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LEGAL INSIGHTS QUARTERLY

December 2023 – February 2024

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Preface to the December 2023 Issue

The December 2023 issue of Legal Insights Quarterly was prepared to provide an extensive look into the upcoming legal issues as well as the foremost contemporary legal agenda in Turkiye.

The Corporate Law section of this issue focuses on a detailed overview of partial demergers in Turkish corporate law. Moreover, the Banking and Finance section places its main emphasis on the regulatory measures implemented by the Central Bank of Turkiye to monitor foreign exchange transactions of companies. Further on, the Capital Markets section discusses the regulations and procedures under the Turkish Capital Markets Law pertaining to handling inside information.

This edition of the Competition Law section presents a lineup of reviews on two mergers and acquisition cases: The first one scrutinizes and sheds light on the treatment of joint venture transactions that do not qualify as concentrations and the second one delves into the dynamic world of aroma chemicals, perfumes, and seasoning markets. This section further offers a compelling insight into the Turkish Competition Board's evolving approach to resale price maintenance conducts, in addition to valuable insights into the Competition Board's assessment of the new interim measures introduced in the online betting market. Lastly, our section features an official statement from the Turkish Competition Authority's President, offering a glimpse into the recent activities of the Authority and an announcement regarding the protocol signed with the Turkish Data Protection Authority.

The Data Protection Law section, on the other hand, focuses on the harmonization of Turkish personal data protection law with the EU legal framework. The Internet Law section assesses the recent amendments to Internet domain names and related decisions rendered by the Information and Communication Technologies Authority.

Moving on, the Litigation section provides a look into the Constitutional Court’s recent decision, which sets out that the loss of value in monetary receivables due to inflation can infringe upon an individual's property rights and illuminates the importance of considering inflation's impact on property rights, potentially leading to quicker settlements in monetary claims cases.

Moreover, the IP Law section includes a recent decision rendered by the High Court of Appeals highlighting that the use of a registered trademark in a trade name can be considered as an infringement, irrespective of whether the phrase is used as a distinct component of the business activities.

This issue of the Legal Insights Quarterly newsletter addresses these and several other legal and practical developments, all of which we hope will provide useful guidance to our readers.

December 2023

Corporate Law

Turkiye: Partial Demerger (Spin-Off)

I. General Overview

Pursuant to Article 159 of the Turkish Commercial Code No. 6102 ("***TCC***") companies are able to demerge (spin off) fully or partially. In terms of continuity of the company in question, full demerger and partial demerger trigger different consequences. While a full demerger basically means dividing all the assets and liabilities of a company into separate parts and transferring these to other companies, a partial demerger is the transfer of only (one or more) part(s) of a company's assets to other company or companies. In a full demerger, the transferor company is dissolved without liquidation and accordingly its legal existence comes to an end; whereas in a partial demerger, the transferor company still retains certain parts of the assets and liabilities, as well as its legal existence. In this article, we will focus on the concept of partial demerger, from the Turkish corporate law point of view.

II. Partial Demerger

Article 159 of the TCC stipulates that (i) shareholders of the partially demerged (transferor) company shall acquire the shares and rights of the transferee company, or (ii) the partially demerged company itself shall acquire the shares and rights in the transferee company, in exchange for the part of the assets transferred, thereby forming a subsidiary company. The transferee company might be an existing company or a new company to be incorporated simultaneously with the partial demerger.

According to Article 163 of the TCC, the transferee company shall increase its share capital by an amount that would protect the rights of the shareholders of the transferor company, unless a new company is being incorporated as a result of the demerger.

In accordance with Article 166 of the TCC, if the assets of a transferor company are transferred to other existing companies, all such companies participating in the demerger must execute a demerger agreement. On the other hand, if the plan is to transfer the assets of the transferor to other companies to be newly established, then a demerger plan must be prepared, instead of the demerger agreement. The companies participating in the demerger may prepare their demerger agreement/plan jointly, rather than each having to draft separate agreements/plans. Per Article 167 of the TCC, a demerger agreement/plan sets out the main components of the envisaged transaction, such as the assets and liabilities to be transferred, inventory thereof (*e.g.* immovables, negotiable instruments and intangible assets, to the extent applicable) and other rights to be granted to certain shareholders, members of the board of directors or managers. It is also important to note that if the period between the date of the demerger agreement/demerger plan and date of the annual balance sheet is longer than six (6) months, or if material changes occur in the assets of the companies participating in the demerger, an interim balance sheet must be prepared.

According to Article 169 of the TCC, each of the companies participating in the demerger must also prepare a demerger report consisting of the following: (i) the purpose and outcome of the demerger, (ii) demerger agreement/plan, (iii) shareholding percentage changes, valuation and the compensation amount to be paid (if any), (iv) additional payment liabilities of the shareholders (if any), (v) effects of the demerger on the employees and creditors from legal and financial points of view. That said, a demerger report is not required in cases where the company is classified as a small or medium-sized enterprise ("***SME***") (as evidenced by a public/sworn accountant report) and there are no objections from the shareholders.

In addition to the above, per Article 171 of the TCC, each of the companies participating in the demerger shall publish an announcement to their shareholders in the Turkish Trade Registry Gazette and on their websites (if the company in question is subject to independent audit), informing them about their rights to review the demerger agreement/demerger plan, demerger report, annual activity reports and financial statements of last three (3) years as well as interim balance sheet (if any). Such announcement shall be made at least two (2) months before the demerger is to be approved by the general assembly. Similar to the above, the announcement process is not a requirement where the company is classified as an SME (to be evidenced by a public/sworn accountant report) and there are no objections from the shareholders.

With respect to other announcements, Article 174 of the TCC provides that each of the companies participating in the demerger shall make three (3) announcements with seven (7) day intervals in the Turkish Trade Registry Gazette, as well as through their websites, to their creditors and notify them of their right to request security for their receivables within three (3) months thereof.

Once the foregoing announcements are duly made and receivables of those creditors who have applied to the company are secured, the demerger process can be finalized upon the approval of the demerger agreement/plan by the general assembly. The approval decision of the general assembly must be registered with the trade registry. Depending upon the structure of the demerger, relevant corporate documents such as share capital increase or new company incorporation must also be submitted to the trade registry. Those assets and liabilities of the transferor determined under the merger agreement/merger plan shall be automatically transferred to the transferee company, as of the date of registration of the demerger by the Trade Registry.

According to Article 178 of TCC, in a partial demerger, the employment agreements shall also be deemed to have transferred to the transferee company with all the rights and obligations, unless the employee objects to such transfer. In terms of the employees who do not consent to the transfer, the employment is deemed terminated at the end of the legal layoff period.

III. Conclusion

From the Turkish corporate law perspective, the preparatory procedures for the demerger and the demerger transactions should be carried out according to the partial demerger method preferred. In order to protect the interests of creditors and shareholders in a demerger process, the TCC requires that a number of specific corporate documents are prepared (*e.g.* merger agreement/plan, merger report) and certain steps are taken (*e.g.* making mandatory announcements). Therefore, the demerger transactions should duly comply with and be structured according to such steps and requirements.

Banking and Finance Law

Monitoring Transactions Affecting the Foreign Exchange Position of Companies

Protecting the value of Turkish Lira against foreign exchange fluctuations and keeping the companies' financial structures strong have become increasingly important goals for Turkiye, in recent years. With this purpose in mind, public authorities employ various methods from time to time and take several measures. As part of such measures, the Central Bank of the Republic of Turkiye ("***Central Bank***") introduced the Regulation on the Procedures and Principles for Monitoring Transactions Affecting Foreign Exchange Position ("***Regulation***"), on February 17, 2018. The Regulation fundamentally aims to monitor the foreign exchange transactions of the companies, and to

regulate the procedure for collecting such information and documents from those companies as determined by the Central Bank. The Central Bank has expanded the scope of the Regulation as of April 12, 2023 by stipulating that the legal entities whose total cash and non-cash financing balance used from the banks in Turkiye exceeds TRY 10 million, shall submit their foreign exchange position reports to the Central Bank. That said, the companies operating in cities affected by the Kahramanmaras earthquakes that took place in February 2023, were excluded from the reporting requirement.

For the purposes of implementation of the Regulation, in order to properly monitor transactions affecting foreign exchange position and increase effectiveness in risk management of foreign exchange rate, the Central Bank has established the Systemic Risk Data Monitoring System ("***System***") which is a comprehensive database and online platform. Users of the System are mainly the companies (and other responsible parties) which are obliged to make these notifications and the Central Bank is acting as the monitoring authority. The System is also integrated with MERSIS (*Online Trade Registry System*). With the Regulation Amending the Regulation on the Procedures and Principles for Monitoring Transactions Affecting Foreign Exchange Position ("***Amendment Regulation***") which was published in the Official Gazette on November 8, 2023 and will be entering into force on January 1, 2024, the option to register with the System via an e-signature creation tool will be no longer available. As of 2024, notifications to System users regarding user identification and data entries will only be made through e-mails to be sent from the System, and text messages will no longer be sent for such notifications.

As for the reporting process, the relevant data prepared in line with the financial reporting principles are notified to the Central Bank by submitting the said information through the System. The Board of Directors and management of the relevant company are responsible for assessing whether they fall under the notification requirement, and duly completing the notification with accurate information. With the Amendment Regulation, these companies will also be notified separately by the credit or financing institution from which the company has its highest cash loan balance, in accordance with the procedures and principles to be determined by the Bank regarding the notification obligation. In cases of a failure to make a complete or accurate notification, the responsible parties may be subject to imprisonment and the judicial fines specified in Article 68 of the Law on the Central Bank of the Republic of Turkiye No.1211.

Article 5 of the Regulation defines which companies are obliged to make notifications. In this regard, companies which have foreign currency cash loans and foreign currency indexed loans obtained domestically and abroad, with a total value of USD 15 million or more as of the last business day of the relevant monthly accounting period, are obliged to notify the Central Bank starting from the subsequent month. However, as of January 1, 2024, the foregoing thresholds will not be applicable and in accordance with the Amendment Regulation, the thresholds for the mandatory notifications to the Central Bank starting from the subsequent month will be amended as (i) companies having a total cash loan balance from domestic and foreign banks with the value of TRY 100 million or more as of the last business day of the relevant monthly accounting period, and (ii) companies having net sales revenue or asset value of TRY 500 million or more in the previous one-year accounting period. The TRY equivalent amount for the foreign currency loans will be determined based on the buying exchange rates published in the Official Gazette on the last business day of the relevant term. In addition, in determining whether a company is subject to notification requirement or not, the financial statements prepared as per the

Turkish Accounting Standards for the last accounting period, if any, or (in case there is no financial statement prepared as per the Turkish Accounting Standards) the balance sheet prepared for submission to the relevant authority in accordance with the tax legislation will be taken into consideration for calculating the total cash loan balance of an entity, and the annual corporate tax return will be used to determine its net sales revenue and asset value.

Under the Regulation, in the event that the total value of foreign currency cash loans and foreign currency indexed loans of a company obtained domestically and abroad falls under USD 15 million, such company would no longer be subject to notification requirement, starting from the following financial year. In accordance with the Amendment Regulation, these limits will change and a company will no longer be required to notify the Central Bank if (i) its total cash loan balance falls under TRY 100 million or (ii) the net sales revenue or asset value of a company falls under TRY 500 million, as of January 1, 2024,

The Amendment Regulation also explicitly regulates that the Central Bank is authorized to change the amount of loan, net sales revenue and asset value thresholds to be taken into account in the determination of the notification requirement, by issuing a practice direction. Therefore, new implementations, announcements and instructions of the Central Bank should be closely followed by the companies.

Capital Markets Law

How Inside Information is Handled under Turkish Capital Markets Law

I. Introduction

Pursuant to Article 106 of the Capital Markets Law No. 6362 ("***CML***"), those who place purchase or sale orders for capital market instruments, change or cancel already placed orders and thus gain a benefit based on inside information (described as non-public information that directly or indirectly concerns capital market instruments or issuers and can affect the prices of related capital market instruments, their values or the decisions of investors) may be faced with a prison sentence of three (3) to five (5) years, or a judicial fine due to insider trading. According to such article, the perpetrator of this crime could potentially be (i) executives and shareholders of issuers, their subsidiaries, or parent entities, (ii) persons who possess this information due to their profession, position, or duties, (iv) persons who obtained such information by committing crimes and (v) persons who know or (if proven) should know that the relevant information they possess would be of the nature described under Article 106. Such persons are not allowed to make any transaction on the capital market instruments based on the inside information they have.

In order to ensure that investors are informed in a timely, complete and accurate manner, and that the capital market operates in a reliable, transparent, efficient, stable, fair and competitive environment, the Capital Markets Board of Turkiye ("***CMB***") has introduced the Communiqué numbered II-15.1 on Material Events ("***Communiqué***"). In accordance with the Communiqué, inside information shall be disclosed to the public to ensure that all market participants have access to the same information, at the same time, and thus prevent inefficiency of prices and markets that may arise as a result of incomplete or inaccurate information. With that purpose, the Communiqué elaborates on the procedures and principles of how inside information should be handled.

II. Inside Information and Public Disclosure Requirement

The Communiqué defines "inside information" as information, events, and developments that may affect the value and price of capital market instruments or the

investment decisions of investors but have not yet been disclosed to the public. From this aspect, inside information is also confidential.

In order to provide case-specific illustrations and clarifications, the CMB has also published the Material Events Guideline ("***Guideline***"). According to the Guideline, (a) external circumstances (*e.g.* cessation of activities, loss/damage of assets due to *force majeure*), (b) changes in executives (*e.g.* replacement of any board member, appointment of new general manager), (c) administrative and judicial proceedings brought against the executives or key persons in connection with their duties, (d) unusual income, profits, expenses and losses, (e) merger/acquisition transactions or share purchase offers (*e.g.* taking any decision or the appointment of a counsel for that purpose), (f) transactions related to tangible assets (*e.g.* disposal, purchase or lease of any tangible fixed asset), (g) change of activities (*e.g.* engaging in new activities, using new technologies), (h) any significant change on financial structure and (i) any change on affiliate entities and financial fixed assets, are listed as particular circumstances that should be interpreted as inside information and disclosed to the public. Although the Guideline provides detailed instances for clarity purposes, the disclosure requirement should be separately evaluated for each circumstance and each case, given that the scope of inside information cannot be determined as *numerus clausus, i.e.*, limited to a specific set of issues.

According to Article 5 of the Communiqué, the issuers are obliged to make a public disclosure when new inside information appears, becomes known or changes. That said, in the event that inside information is learned by those who directly or indirectly hold 10% or more of the total voting rights or share capital of the issuers, or by those who hold 10% or more of the privileged shares that give the right to elect or nominate members of the board of directors, without knowledge of the issuer, public disclosure is to be made by such persons. It is also important to note that in the event a person, who has access to the inside information, is obliged to keep such information confidential due to any legal requirement, the articles of association or provisions of a contract, such person could be exempt from the disclosure requirement, as the case may be.

Per the Communiqué and Guideline, list of persons having regular access to inside information is kept by the Central Securities Depository & Trade Repository of Türkiye ("***MKK***"). In this regard, Article 7 of the Communiqué requires the issuers to notify the persons who have regular access to the inside information to the MKK along with their identity information. Upon request, the MKK shares such information with the CMB and Borsa İstanbul A.Ş, the securities exchange of Turkiye. In addition, the issuers shall update the list of persons having regular access to inside information as necessary, in case of any changes.

III. Postponement of Making Public Disclosure

According to Article 6 of the Communiqué, the issuer may, at its own risk, postpone disclosing the inside information publicly in order to prevent damage to its legitimate interests, provided that it will not mislead investors and will be able to ensure that such information is kept confidential. That said the postponement should be an exceptional case and on a temporary basis. This is to say, as soon as the reasons for postponing the public disclosure of inside information disappear, the issuers shall need to disclose such inside information to the public in accordance with the principles set forth in the Communiqué and Guideline along with the postponement decision and the underlying reasons thereof. Nevertheless, if the relevant circumstance that constituted the subject of postponed inside information somehow fails to materialise, it will no longer be necessary to make any public disclosure on that matter.

The CMB is authorized to examine whether the reasons asserted for the postponement are justified or not, if it deems necessary.

IV. Conclusion

The content and nature of inside information might trigger the requirement to make public disclosure, in accordance with the conditions set out in the Communiqué and the Guideline. Given that the public disclosure requirement aims to protect investors, the issuers shall need to take the necessary precautions to duly and timely disclose the inside information to the public, except in special circumstances that may justify a postponement.

Competition / Antitrust Law

Turkish Competition Board's Meta Decision: EU DMA's Data Combination Bans against Gatekeepers are Already Up and Running in Turkiye with a Plot Twist on User Consent

I. Introduction and Summary

On September 11, 2023, the Turkish Competition Board ("***Board***") published its reasoned decision on the investigation against the economic unity consisting of Meta Platforms Inc. (previously, Facebook Inc.), Meta Platforms Ireland Limited (previously, Facebook Ireland Limited), WhatsApp LLC and Madoka Turkey Bilişim Hizmetleri Ltd.Şti. together as ("***Meta***"). The investigation had been launched to determine whether Meta had violated Article 6 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***").[1]

The *ex officio* investigation had started due to WhatsApp's January 2021 update announcement to its Turkish users that they must consent to the sharing of their personal WhatsApp data with other Meta companies, otherwise they would not be able to use WhatsApp as of February 8, 2021. On January 11, 2021, the Board not only launched a fully-fledged investigation but also imposed interim measures against Meta.[2] According to the interim measure decision, (i) WhatsApp's requirement could impede the activities of competitors in online advertising and constitute exploitation of consumers and (ii) waiting until the conclusion of the investigation to impose remedies could cause serious and irreversible harm in the relevant markets.

During the investigation, the Board found that the data sharing practice in question has been continuing since 2016. Therefore, the scope of the investigation was expanded to determine whether Meta abused its dominance via using the user data obtained from a Meta product or service, for any of its other product or services.

In the final infringement decision of October 20, 2022, the Board decided that Meta had abused its dominance through combining the data collected from Facebook, Instagram and WhatsApp services, as it (i) hindered the activities of its competitors in the markets for personal social networking and online display advertising services and (ii) created an entry barrier to these markets. Accordingly, the Board imposed on Meta an administrative monetary fine of more than TRY 346 million and required Meta to "cease the infringement" within one (1) month as of the official service of the reasoned decision.

II. Relevant Markets & Dominance Analysis

The first relevant product market is defined focusing on the demand-side substitutability as "personal social network

[1] The Board's decision dated October 20.10.2022 and numbered 22-48/706-299.

[2] The Board's decision dated 11.01.2021 and numbered 21-02/25-10

services." Professional social network services are clearly kept outside of the scope of the market definition. This is because the Board considered that from the user's point of view, professional social networking services are not substitutable with personal social networking services. Taking into consideration the characteristics of Meta, other alleged rivals in the market were noted to compete with Meta only to a limited extent due to their different features, when compared to Facebook and Instragram.

The second relevant product market is defined as "consumer communication services". Before narrowing down the relevant product market to consumer communication services, the Board evaluated the substitution between (i) social networking services and consumer communication services, (ii) corporate communication services and consumer communication services and (iii) traditional electronic communication services and consumer communication applications. The Board's decision also evaluated the consumer communication services in terms of their functions, the medium they are used, and also by their operating system.

The third relevant product market is "online display advertising services." The Board considered "online display advertising services" a separate relevant product market after considering the substitution between: (i) online advertising and offline advertising (ii) online search-based advertising and online display advertising and (iii) online listing advertising and online display advertising. The Board also examined whether social media advertising should be defined as a separate relevant product market, but concluded that there was no need to narrow the relevant market in this case. However, online advertising activities via social media were also considered when evaluating the impact of the alleged conduct.

The Board defined the relevant geographic market as Turkiye, after noting and considering the global playing field as well as the global nature of Meta's practices and their global impact.

In the dominance analysis for the each of the above markets, the number of daily and monthly active users of the undertakings, their market shares calculated based on these numbers, the frequency of use of the relevant services and consumer preferences, entry barriers and buyer power were considered. In this context; factors such as network effects in the market, economies of scale, data power were considered together with the characteristics of digital platform economies, and as a result of all these evaluations, it was concluded that Meta is dominant in all three of the markets.

III. Theory of Harm

At the beginning of the investigation, while rendering its interim measure decision and starting the investigation against Meta, the Board stated that WhatsApp's "take it or leave it" update requirement could constitute an exploitative abuse. With a similar approach, when the Board expanded the scope of the investigation to include all data combination practices of Meta, the investigation team considered the ways to apply an exploitative harm theory to the case. Indeed, the Board noted in the reasoned decision as well that Meta's data collection and combination practices in favour of its own social network services and display advertising services create a concern that the relevant practice constitutes an exploitative abuse in digital markets. However, the Board's final decision did not delve into the exploitative harm theory due to (i) the difficulty of measuring privacy and (ii) the legal uncertainty[3] of whether a competition

[3] Yet, after the Board's decision dated 20.10.2022 and numbered 22-48/706-299, on July 4, 2023, the Court of Justice of the EU cleared the Bundeskartellamt decision rendering an exploitative abuse conclusion against Meta. It

authority could conduct its investigation based on data protection provisions.

Therefore, the Board focused on and rendered its infringement decision based on the classic exclusionary harm theory, according to which, (i) the data combination practices of Meta makes it difficult for competitors to operate in the social networking services and online display advertising services markets and (ii) Meta restricts competition by discouraging new entries to the market and, in this way, diminishing consumer welfare. Before arriving at this conclusion, the Board followed the below three (3) steps in building its exclusionary harm theory:

As the first step, the Board evaluated in detail the data collection practices of Meta. In its personal social networking services, Meta collects username, password, date of birth, e-mail address, phone number, device information, account used in financial transactions, usage habits, the content of the posts, etc. In its consumer communication services, Meta collects username, password, phone number, profile photo, profile information, location information, device information, account for financial transactions, contacts in the user's contact list, usage habits, etc.

As the second step, the Board found Meta's data combination practices to be abusive. Meta uses the data it obtains from within its core platform services, in its other services, and also combines the information it obtains from different services it offers. The Board considers this to be exclusionary mainly because: (i) The relevant data is of critical importance for both social media services and consumer communication services and (ii) it is not possible for Meta's competitors to create or gain access to an equivalent data set that Meta creates by combining data from its various platforms.

In the third step, the Board detected the anticompetitive "effects" of the alleged abuse. According to the Board, Meta's data combination practices create an entry barrier in both markets of "personal social network services" and "online display advertising services." As opposed to the advertisers' preference for advertising channels in Meta's products due to data merging practices, rival publishers – (including rival social network services) have limited access to advertisers. This way, Meta's advertising revenues increased, and Meta maintained its position in the market. As a result of the actual and potential effect analyses, it was concluded that Meta restricted competition in the social network services and online advertising markets and caused consumer harm by combining the data obtained from its different services.

IV. The Board's Evaluations Specific to the WhatsApp Update Announcement

With regard to the WhatsApp update announcement that led the Board to this investigation, the Board did not delve into a separate and detailed analysis as the it had already found Meta to be in breach of Turkish competition law for its general data combination practices in Facebook, Instagram, and WhatsApp. However, the short assessment followed by a conclusion on this matter is still noteworthy, due to the approach to obtaining user consent for data combination.

After the Board's initial interim measure, WhatsApp included a section to obtain user consent for data combination. The Board did not find the relevant section to be sufficient means to obtain user consent. But the Board noted that even if Meta had obtained clear user consent, this could only eliminate potential "exploitative" abuse concerns, but the "exclusionary" abuse

is now clear in EU competition law that a competition authority can find that EU data protection laws have been infringed, within the context of the examination of an abuse of a dominant position. Similarly, on November 3, 2023, the CMA of the UK also published its press release stating that "*Meta has (…) signed commitments, which will prevent the firm from exploiting its advertising customers' data*".

concerns laid out in the decision would remain the same.

On user consent discussion, the Board's Meta decision appears to have sided with the Ministry of Justice's draft proposal to amend the Law No. 4054 aiming to introduce a digital regulation into the Turkish competition law regime, which was lastly sent to various stakeholders for comments on October 14, 2022 and is not yet enacted by the Turkish Parliament. For sake of completeness, unlike the EU Digital Markets Act ("***DMA***") Article 5(2)(b), the draft proposal does not allow data combination practices *even when user consent exists*.

V. Conclusion

As a result of the investigation, the Board decided that (i) Meta is in a dominant position in the markets for personal social network services, consumer communication services and online display advertising services markets, and (ii) Meta violated Article 6 of Law No. 4054 on the Protection of Competition by combining the data collected from Facebook, Instagram, and WhatsApp services. Therefore, the Board imposed an administrative monetary fine of TRY 346,717,193.40 against Meta and decided that Meta should submit to the Authority the necessary measures it will take to cease the infringement and to ensure the establishment of effective competition in the market within one (1) month from the notification of the reasoned decision.

The decision is especially noteworthy, in two aspects. First, even though Turkiye does not currently have its own digital markets regulation, the Board already considers certain data combinations of dominant undertakings like Meta as a violation of existing Turkish competition laws. Second, the Board does not allow data combination practices even when they are based on users' clear consent, siding with the Ministry of Justice's draft proposal to amend the Law No. 4054 on the Protection of Competition to adopt a Turkish digital markets regulation (not yet enacted) which diverges from the EU DMA Article 5(2)(b) that allows for data combination practices when user gives explicit consent.

The Board Takes a Closer Look into the Aroma Chemicals, Perfume and Seasoning Markets through its Latest Decision Concerning the Merger Between Koninklijke DSM N.V. and Firmenich International SA

I. Introduction

On January 5, 2023, the Turkish Competition Board (***"Board"***) unconditionally approved the transaction concerning the merger of Koninklijke DSM N.V. ("***DSM***") and Firmenich International SA ("***Firmenich***") resulting in a newly merged entity to be called DSM-Firmenich AG ("***DSM-Firmenich***") ("***Transaction***") as per Article 7 of Law No. 4054 on the Protection of Competition ("***Law No. 4054***") and Communiqué No. 2010/4 Concerning the Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***").[4] The recently published reasoned decision of the Board provides detailed analyses on the markets which are horizontally and vertically affected as a result of the Transaction.

II. Information on Parties of the Merger

DSM is a publicly listed limited liability company incorporated in the Netherlands. DSM is globally active in the fields of nutrition, health and bioscience, and focuses on (i) animal feed and health, (ii) health, nutrition & nurture, (iii) food & beverages. In Turkiye, DSM operates through its two subsidiaries, namely DSM Food Specialties Limited Şirketi ("***DFS Turkiye***") and (ii) DSM Besin Maddeleri Ltd. Şti. ("***DNP Turkiye***"). DFS Turkiye's

[4] The Board's decision dated 05.01.2023 and numbered 23-01/7-6.

activities are focused on purchase and sale of food additives such as enzymes, preservatives, yeast, fungal cultures and anti-bacterial testing products, whereas DNP Turkiye is active in the field of import and sale of animal feed additives.

On the other hand, Firmenich is a privately held company based in Switzerland and operating globally through its affiliates and factories. Firmenich's activities focus on the following four main areas: (i) aroma chemicals, (ii) perfumes, (iii) seasoning and (iv) pine resin. In Turkiye, Firmenich operates through its indirect affiliates Firmenich Dış Ticaret Limited Şirketi ("***Firmenich Turkiye***") and Gülçiçek Kimya ve Uçan Yağlar Sanayi ve Ticaret Anonim Şirketi ("***Gülçiçek***"). Firmenich Turkiye sells imported products on behalf of Firmenich, while Gülçiçek is active in the production and sale of perfumes as it supplies perfume compounds and components globally.

III. The Board's Assessment of the Transaction

1. Assessment on the Relevant Product and Geographic Markets

By reviewing the parties' global and Turkiye-related activities, the Board determined that the transaction gives rise to two horizontally affected markets, considering that both of the merger parties are active in the markets for (i) aroma chemicals and (ii) seasonings. The Board also determined that there are three markets that give rise to a vertical relationship between the parties' activities in Turkiye. The Board identified the vertically affected markets as follows:

- DSM operates in the aroma chemicals market and Firmenich operates in the perfume market. The outputs of the aroma chemicals market are used as input in the perfume market, rendering the aroma chemicals market the upstream and the perfume market the downstream in this vertical relationship.
- DSM operates in the aroma chemicals market whereas Firmenich operates in the seasoning market. Similar to the vertical relationship above, the outputs of the aroma chemicals market are used as input in the seasoning market, rendering the aroma chemicals market an upstream market and the seasoning market a downstream market.

Finally, DSM operates in the flavour additives market whereas Firmenich operates in the seasoning market. The outputs of the flavour additives market are used as input in the seasoning market, meaning that the flavour additives market is the upstream while the seasoning market is the downstream market.

Consequently, the Board concluded that parties' activities horizontally overlap in the aroma chemicals and the seasoning markets; while a vertical overlap occurs with respect to the aroma chemicals, seasoning, perfume and flavour additives markets.

In terms of the relevant geographic market, the Board determined that the relevant geographic market is Turkiye, as the distribution of the relevant products takes place throughout within the Turkish borders.

2. Assessment on the Horizontally Affected Markets

Within the scope of the case at hand, the Board presented its assessments for the aroma chemicals and seasoning markets, separately.

Upon analysing the parties' activities in the aroma chemicals market, the Board determined that DSM's activities in this market comprised of synthetic and natural (including biotechnology) flavour additives that can be utilised as input in high-quality and ambient fragrances for home and body; whereas Firmenich mostly operates in the fields of (i) aroma chemicals supplied as raw materials for the

production of seasoning and perfume compositions, along with (ii) natural and synthetic ingredients, including resins used in the pharmaceutical industry and industrial applications.

In terms of the seasoning market, the Board indicated that DSM was active in the seasoning market through a US-based company called First Choice Ingredients that it acquired in 2021, which mainly operates in the field of milk-based seasonings used in savoury and dairy products; whereas Firmenich is active in the seasoning market through the production of both natural and synthetic seasonings used for confectionery, dairy products, beverages and dietary supplement products. The Board further highlighted that neither Firmenich nor DSM manufactured seasonings in Turkiye and that the horizontal overlap between the parties' activities was only due to the sale of the imported seasoning products in Turkiye.

Upon reviewing the market shares of the competitors, as well as the limited increment in the market share within the aroma chemicals and seasoning markets, the Board determined that the Transaction would not result in a significant impediment to the competition in the horizontally affected markets in Turkiye.

3. Assessment on the Vertically Affected Markets

a. Assessment Concerning the Aroma Chemicals Market and the Seasoning Market

Following its analyses concerning the aroma chemicals market (upstream market) and the seasoning market (downstream market), the Board determined that the vertical relationship between the parties' activities will not result in competitive concerns, given the market share level of the merged undertaking, as well as the presence of strong players in the market which may indicate the existence of competitive pressure in the market.

b. Assessment Concerning the Aroma Chemicals Market and the Perfume Market

The Board highlighted that although both parties are active in the aroma chemicals market, only Firmenich is active in the perfume market. Although the Board determined that there was a significant increase in Firmenich's market share following 2019, the Board determined that this increase was due to Firmenich's acquisition of Gülçiçek. The Board further determined that it should be examined whether the merged entity would have the ability to restrict the market through input foreclosure and/or customer foreclosure as the merged entity's market share exceeded the 25% threshold provided within the Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions ("***Vertical Guidelines"***).

In terms of input foreclosure, the Board determined that the merged entity would not have an incentive to restrict inputs in the market, considering (i) the limited market share of the merged entity in the relevant market post-transaction, (ii) the position of the merged entity in the market, as well as (iii) the significant competitors operating in the market in Turkiye.

With respect to customer foreclosure, the Board examined whether the players operating in the upstream aroma chemicals market would be able to find alternative customers to sell their products in the downstream perfume market; and addressed Firmenich's purchases of the aroma chemicals used in the production of perfumes during its review. The Board concluded that Firmenich's ability and incentive to restrict the customers of local producers is limited, as Firmenich is not a significant local buyer of aroma chemicals. Additionally, the Board found out that a significant amount of the aroma chemicals purchased by Firmenich for the production of perfumes in Turkiye is supplied through other various global suppliers. As a result, the Board concluded that since Firmenich purchases aroma chemicals from various

undertakings, the fragmented structure of its purchases will significantly reduce its ability to restrict the customers of its competitors operating in the upstream market.

Accordingly, the Board determined that there is a low possibility that the merged entity will foreclose the market through input or customer foreclosure in terms of the vertical overlap between the aroma and the perfume markets and therefore, the Transaction would not significantly impede effective competition in these markets.

c. The Assessment Concerning Flavour Additives Market and Seasoning Market

The reasoned decision indicated that DSM sells flavour additives (especially yeast extract and yeast-extract based seasonings) which are used as input in the production of specific seasonings including the relatively small amount of sales to Firmenich; whereas Firmenich does not operate in the flavour additives market at all. As such, the Board determined that the vertical relationship between the parties' activities on this front would not result in significant impediment of effective competition, taking into account the likely market share of the merged entity as well as the market shares of other competitors active in the market in Turkiye.

IV. Conclusion

In conclusion, the Board determined that the Transaction will not significantly impede the effective competition both in terms of the horizontally and the vertically affected markets, in the geographic market as a whole or in specific parts of Turkiye, in particular by way of creating a dominant position or strengthening an existing dominant position and therefore cleared the transaction.

Turkish Competition Board's Recent Approach to Resale Price Maintenance Conducts in Light of its BSH and Anavarza Decisions

I. Introduction

On July 20, 2023, the Turkish Competition Authority ("***Authority***") published the Turkish Competition Board's (the "***Board***") reasoned decision ("***BSH Decision***")[5] where the Board assessed whether BSH Ev Aletleri Sanayi ve Ticaret A.Ş. ("***BSH***"), which operates in the production, import, export, distribution, marketing and after-sales services of white goods, violated Article 4 of Law No. 4054 on the Protection of Competition, by way of territory/customer restrictions on its authorized dealers and/or resale price maintenance ("***RPM***"). The Board concluded that BSH did not violate Article 4 of Law No. 4054 on the grounds that (i) no information or documents indicating that BSH has engaged in RPM could be found and (ii) BSH did not impose customer and territorial restrictions to its authorized dealers.

On July 20, 2023, the Authority also published the Board's decision ("***Anavarza Decision***")[6] pertaining to the allegation that Sezen Gıda Mad. Tarım ve Hayvancılık Ürün. Tic. ve San. Ltd. Şti. ("***Anavarza***"), which operates in the production of honey products, violated Article 4 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***") through resale price maintenance conducts. The Board unanimously decided not to initiate a fully-fledged investigation against the undertaking since there was no evidence to show that Anavarza intervened in shelf prices.

These two decisions show the Board's recent approach on (i) whether RPM

[5] The Board's decision dated 15.12.2022 and numbered 22-55/864-358.
[6] The Board's decision dated 09.03.2023 and numbered 23-13/209-67.

violations can be categorized as "by object" restrictions, (ii) the requirement of mutual agreement and (iii) standard of proof within the scope of RPM cases.

II. The Board's Assessment on RPM in BSH and Anavarza decisions

While the Board's recent trend was to categorize all RPM violations as "by object" without the need to prove a mutual agreement,[7] its most recent Anavarza and BSH decisions differ from this strict approach on RPM violations. As explained in detail below, these two decisions take a different route and evaluate that the collected documents do not show a mutual agreement between parties and that certain internal correspondences do not demonstrate an agreement which could lead to an RPM type of violation.

In the BSH Decision, there is an e-mail correspondence between a BSH employee and an employee of Asya Halı San. ve Tic. A.Ş. ("***Asya***") which is a BHS dealer (Finding 1). The Board remarked that the relevant correspondence raises the suspicion that Asya was prevented from selling based on discounted prices in its brick-and-mortar stores, hence Asya's resale prices were interfered with. The Board concluded that this finding, in and of itself, is not sufficient to prove that BSH has engaged in resale price maintenance and no other evidence could be obtained within the scope of the investigation which proves such a violation.

With regard to Finding 2, there is a draft WhatsApp correspondence between BSH's regional distributor, Seren Day. Tük. Mam. Tic. ve Paz. Ltd. Şti. ("***Seren***") and a retailer Teknofish Elekt. Hizm. San. ve Tic. A.Ş. ("***Teknofish***"). This correspondence includes two (2) draft texts prepared by a Teknofish employee, which were intended to be communicated with BSH. The Teknofish employee has sent these texts to a Seren employee and requested their confirmation on the contents. However, these messages were not sent to BSH.

The first draft text notes that Teknofish has complied with BSH's request in relation to the increase in retail prices of Bosch branded products sold on Teknofish's website, however Teknofish notices that other retailers' online prices remained as they were. Additionally, this draft text notes that despite the fact that Teknofish has notified the matter to BSH, BSH did not take any action regarding these retailers but kept interfering with Teknofish's retail prices. The second text draft includes the following remarks: "*(…) we would like to convey that we will not be able to meet the total value (…) TRY that we committed to purchase at the beginning of this year, due to the stores being open only within certain time periods in 2021, the ban on online sales as well as interferences to prices*."

Against the foregoing, the Board indicated that the text within Finding 2 was not sent to BSH and remained as a draft. Considering that no other evidence could be obtained in support of the allegation and the draft text comprised of unilateral remarks, the Board concluded that Finding 2 is not capable of proving that BSH had interfered with Teknofish's resale prices beyond any doubt and does not meet the requisite standard of proof.

As for Finding 3, which is a correspondence between a BSH employee and an employee of a distributor of BSH, ALC Dayanıklı Tük. Mall. San. Tic. Ltd. Şti ("***ALC***"), the ALC employee expresses his/her frustration in relation to the online price of a Siemens branded iron that he/she came across on the internet to the BSH employee. In response to ALC, the BSH employee notes the following: "*these prices will be corrected*". The Board noted that although BSH's response could be construed as BSH would interfere with the online resale prices, it is not clear whether BSH actually interfered with such prices.

[7] The Board's decisions dated 30.06.2022 and numbered 22-29/483-192, dated 17.02.2022 and numbered 22-09/130-50.

Considering that the relevant correspondence as well as other documents and information obtained during the investigation do not show that the alleged violation has actually taken place, the Board noted that no violation allegation could be brought against BSH based on this document.

In the Anavarza Decision, there is an internal correspondence which was obtained from Anavarza where an employee stated that he/she will contact Özdilek (Anavarza's reseller) and subsequently stated that the price is updated. Concerning this document, the Board analyzed that although the statements raise concerns that Anavarza interferes in Özdilek's retail prices, the correspondence is an internal correspondence, thus, it is far from demonstrating an agreement between Anavarza and Özdilek regarding applicable shelf prices.

The Board concluded in its Anavarza Decision that statements such as "*Özdilek makes purchases but the shelf price is still the same, if we can contact today and make it change, at least there will not be a problem in other places*" and "*Our Özdilek price is revised as TRY 139.90*" did not amount to any agreement or show any pressure or incentive on Anavarza's side, simply based on the fact that it is an internal correspondence.

In light of the above, the BSH Decision provides insight as to the extent of evidence that would satisfy the standard of proof, especially in terms of establishing resale price maintenance type of violations. As per the BSH Decision, the Board seeks further evidence for establishing a violation in cases where the documents at hand raises a suspicion that resale prices have been interfered with but do not prove the existence of a violation beyond doubt. This approach was also followed by the Anavarza Decision which indicated that internal communications are not sufficient to prove beyond reasonable doubt that an Article 4 violation through RPM had taken place.

III. Conclusion

It is now seen that the Board may indeed be taking a step back from its strict view to see RPM as a by-object violation where even a single correspondence could be used to determine the existence of an RPM violation. The Board's recent approach in RPM cases in BSH and Anavarza decisions now shows that unilateral actions or internal correspondence, which are not able to demonstrate a concurrence of wills, cannot establish an RPM violation. This could lead to the discussions whether the Board will move onto evaluating the effects of RPM cases in the future before labelling each RPM case as a violation by object without diving deeper.

The Turkish Competition Board Reinforces Its Approach on the Treatment of Transactions That Do Not Qualify as Concentrations Due to Shifting Alliances

I. Introduction

The Turkish Competition Board (the "***Board***") determined that the transaction concerning the acquisition of Çelik Halat ve Tel Sanayii AŞ's ("***Çelik Halat***" or the "***Target***") shares by Artaş İnşaat San. ve Tic. AŞ ("***Artaş***") and Betatrans Lojistik İnşaat Sanayi ve Ticaret AŞ ("***Betatrans***") does not constitute a concentration under Turkish merger control regime, and it qualifies as a cooperation agreement between the relevant parties. As a result of its assessment under Article 4 of Law No. 4054 on the Protection of Competition, which prohibits anticompetitive agreements, the Board granted negative clearance to the transaction on the grounds that it does not have the object or effect of restricting competition (the "***Decision***").[8] The Decision is notable for the Board's

[8] The Board's decision dated 23.11.2022 and numbered 22-52/795-325.

analysis of the control structure of the Target post-transaction (in particular, the assessment of a shifting alliances structure).

II. Legal Background Regarding the Concept of Control and the Shifting Alliances under Turkish Merger Control Regime

Pursuant to Article 5(1) of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***"), which is akin to Article 3(1) of the EU Merger Regulation ("***EUMR***"), a transaction is deemed to be a merger or an acquisition (*i.e.* a concentration) provided that it brings about a change in control on a lasting basis. Under Turkish merger control regime, control is defined as the possibility to exercise decisive influence over an undertaking. If an acquired undertaking will not be controlled by any of its shareholders after the transaction, such transaction would not result in a change in control over the acquired undertaking on a lasting basis and it would not constitute a notifiable concentration within the meaning of Article 5 of Communiqué No. 2010/4.

According to paragraphs 50-66 of the Turkish Competition Authority's (the "***Authority***") Guidelines on Cases Considered as a Merger or Acquisition and the Concept of Control ("***Control Guidelines***"), which are closely modelled on paragraphs 64-80 of the European Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 ("***CJN***"), joint control can be typically established through (i) equality in voting rights or appointment to decision-making bodies, (ii) veto rights, and (iii) joint exercise of voting rights. According to paragraph 48 of the Control Guidelines, joint control over an undertaking exists where two or more undertakings or persons have the possibility of exercising decisive influence over another undertaking. Decisive influence in this sense means the power to block actions which determine the strategic commercial behaviour of an undertaking. Accordingly, joint control is the possibility of a deadlock situation resulting from the power of two or more parent companies to reject proposed strategic decisions. In this respect, the veto rights allowing to exercise decisive influence must be related to strategic decisions on the business policy of the target and must go beyond the veto rights normally granted to minority shareholders that are given in order to protect financial interests of investors.

In terms of the analysis of control structure, the level of shareholdings and representations in certain corporate bodies would not play a decisive role on their own, if they are not accompanied with specific voting rights and/or meeting/decision quorum mechanisms that would allow the relevant parties to exercise decisive influence over an undertaking *(i.e.* the power to block/reject the actions which determine the strategic commercial behaviour of the undertaking). Accordingly, the analysis for the control structure under Turkish merger control regime will boil down to whether the parties have the ability to reject the strategic commercial decisions (*e.g.* the business plan, budget or the appointment/dismissal of senior management) via their voting rights, veto mechanisms or creating a deadlock merely by refusing to attend meetings.

The matters which confer joint control typically include decisions on material issues, such as the appointment of senior management, the budget, the business plan and certain major investments. Apart from these typical veto rights, there may be other veto rights that might come into play in terms of control analysis in the context of the market where the joint venture is active (*e.g.* if technological investments are crucial for the joint venture's activities, a veto right on technology investment decisions could be considered with this respect). As set forth in paragraph 54 of Control Guidelines, which is akin to paragraph 68 of the CJN, and also

acknowledged by the Board with its precedent on this front, it will be sufficient to have a veto right on only one of the strategic business decisions for there to be joint control. By way of example, the Board consistently resolved that veto rights regarding the appointment and dismissal of high level/senior management (such as the general manager, CEO, CFO etc.) are considered as strategic veto rights and that such rights alone are adequate to conclude that the undertakings in question will be jointly controlled by the relevant transaction parties.[9]

Similar to the EUMR, under the Turkish merger control regime, paragraphs 66 and 75 of the Control Guidelines indicate that the possibility of changing coalitions/shifting alliances between minority shareholders will exclude the assumption of joint control since in such a case, there is no stable majority in the decision-making procedure and the majority can on each occasion be any of the various combinations possible among the shareholders. In particular, paragraph 66 of the Control Guidelines indicates that in the case of an undertaking where three (3) shareholders each own one-third (1/3) of the share capital and each elect one-third (1/3) of the members of the board of directors, the shareholders do not have joint control since decisions are required to be taken on the basis of a simple majority. The decisional practice of the Board also indicates that if a transaction would result in shifting alliances (*i.e.* none of the parties will acquire control after the envisaged transaction), such transaction would not constitute a concentration under Turkish merger control regime and it would norequire a mandatory merger control filing before the Authority.[10]

III. The Board's Treatment of Transactions That Result in a Shifting Alliances Structure Post-Transaction

Paragraphs 69 and 70 of the Control Guidelines - which are closely modelled on and akin to paragraph 83 of the CJN - provide that Communiqué No. 2010/4 covers operations resulting in the acquisition of sole or joint control, including operations leading to changes in the nature of the control: mere changes in the level of shareholdings of the same controlling shareholders, without changes to the powers they hold in a company and of the composition of the control structure of the company, do not constitute a change in the nature of control and therefore are not a notifiable concentration; and similarly, there is no change in the nature of control if a change from negative to positive sole control occurs.

In this respect, the transactions which result in a shifting alliances/changing coalitions structure post-transaction (*i.e.* where the acquired entity will not be controlled by any of its shareholders after the transaction) do not qualify as notifiable concentrations within the meaning of Communiqué No. 2010/4. In such cases, the Board typically considers these joint venture transactions as cooperation agreements and analyses these cooperation agreements under Article 4 of Law No. 4054. Indeed, there are various decisions where the Board determined that the joint venture in question will not be solely or jointly controlled by any of its shareholders; there will be a shifting alliances structure as a result of the transaction; therefore, such transaction

[9] For example, the Board's AMG/Shell-JV decision dated 09.01.2020 and numbered 20-03/20-10; Alcan decision dated 11.12.2014 and numbered 14-50/885 403; Yargıcı decision dated 26.05.2011 and numbered 11-32/660-205; THY Teknik decision dated 5.6.2008 and numbered 08-37/503-183; Caradon Radiators decision dated 24.7.2008 and numbered 08-47/656-252

[10] For example, the Board's Kayı decision dated 08.12.2016 and numbered 16-43/701-315; Orica Limited decision dated 29.3.2007 and numbered 07-29/268-98; Bain Capital Investors decision dated 9.10.2007 and numbered 07-78/965-366; Silver Lake Partners decision dated 18.11.2009 and numbered 09-56/1337-340.

should be deemed a cooperation agreement rather than a concentration; and the transaction/agreement should be evaluated under Article 4 of Law No. 4054 in order to determine whether it has the object or effect of restricting competition.[11] Within the scope of these decisions, the Board regarded these transactions as agreements between the parties that fall within the scope of Law No. 4054; conducted a substantive analysis under Article 4 to see whether they lead to any competition law concerns; and typically granted individual exemption or negative clearance on the grounds that the transactions/agreements would not lead to coordination between the parties' activities.[12]

For instance, in its *Turkcell/Anadolu Grubu/Zorlu/Kök Ulaşım/BMC/TOBB* decision,[13] the Board examined the corporate charter of the joint venture to be established by the parties as well as the shareholders agreement signed between the parties. The Board determined that none of the parents or a fixed combination thereof constituted the majority in the board of directors; the required majority to adopt resolutions at the general assembly and the board of directors is established through different coalitions; the joint venture will not be jointly controlled by its shareholders due to the shifting alliances structure; and the transaction cannot be regarded as a concentration. Accordingly, the Board deemed the relevant joint venture to be a joint production agreement between the parent undertakings; evaluated this agreement under Article 4 of Law No. 4054; and granted negative clearance since the agreement did not have the object or effect of restricting competition.

IV. The Board's Analysis of the Transaction in the Decision

The Board indicated that as a result of the transaction, Artaş and Betatrans will acquire the shares of Çelik Halat that are being held by Doğan Şirketler Grubu Holding AŞ ("***Doğan Holding***"). In this respect, the Board evaluated the control structure of Çelik Halat post-transaction by way of reviewing/examining the provisions of the articles of association of Çelik Halat and the share purchase agreement between Doğan Holding, Artaş and Betatrans. The Board found out that Çelik Halat's articles of association provides that the meeting quorum for the board of directors is a simple majority of the directors, and the decision quorum is again simple majority of the directors that attended the meeting. To that end, the Board underlined that (i) neither Artaş nor Betatrans will be able to reach the quorum of meeting for the board of directors, by themselves, (ii) none of the members of the board of directors have privilege in terms of meeting and/or decision quorums, and (iii) neither Artaş nor Betatrans alone will be able to convene the board of directors and they will have to establish alliance/coalition with each other or other members of the board of directors. The Board also evaluated whether there is a legally binding agreement by which Artaş and Betatrans committed to act together or whether there is a holding company which is jointly controlled by Artaş and Betatrans and to which they transferred their voting rights. However, it was indicated that there are no written and/or verbal agreements by which any of

[11] For example, the Board's Turkland decision dated 27.08.2018 and numbered 18-29/491-242; Turkland decision dated 27.08.2018 and numbered 18-29/492 243; Turkcell/ Anadolu Grubu/Zorlu/Kök Ulaşım/BMC/TOBB decision dated 26.09.2018 and numbered 18-34/566-279; CMLKK Liman decision dated 31.05.2018 and numbered 18-17/303-152; CMLKK Bilişim decision dated 05.07.2018 and numbered 18-22/376-184; IGA Akaryakıt decision dated 02.08.2018 and numbered 18-24/421-199; CMLKK Otopark/CMLKK Döviz/CMLKK Akaryakıt decision dated 02.08.2018 and numbered 18-24/426-200; IGA decision dated 16.10.2014 and numbered 14-40/737-329.

[12] For the sake of completeness, the Board follows the same path when assessing transactions which involve joint ventures that do not meet the full-functionality requirement. In such cases, the Board deems these transactions as cooperation agreements between the parties rather than notifiable concentrations and evaluates their impact in the market under Article 4 of Law No. 4054. For instance, please see the Board's Voith/MOOG-JV decision dated 09.04.2020 and numbered 20-19/259-125; ITOCHU/Press Metal decision dated 10.01.2019 and numbered 19-03/20-9; DSM/Evonik decision dated 26.10.2017 and numbered 17-35/573-248; POAŞ/Shell-MDH decision dated 05.06.2014 and numbered 14-20/382-166.

[13] The Board's decision dated 26.09.2018 and numbered 18-34/566-279.

the members of the board of directors of Çelik Halat committed to act together in terms of convening board meetings or adopting board resolutions. As a result, the Board concluded that the shareholders will not acquire control over Çelik Halat after the consummation of the transaction and therefore the transaction would not be deemed as a concentration within the meaning of Communiqué No. 2010/4.

In accordance with the Board's decisional practice, the Board regarded the joint venture in question as a cooperation agreement between the parties and analysed whether it would fall within the scope of Article 4 of Law No. 4054. In this respect, the Board determined that the activities of Artaş and Betatrans horizontally overlapped in the market for "construction and sale of residential housing". The Board assessed that the parties' combined market share would not be high, and the cooperation agreement will not give rise to any anticompetitive impact which would violate Article 4 of Law No. 4054, including price fixing, territory or customer sharing, restriction of supply and exchange of competitively sensitive information. The Board also determined that there is a vertical relationship between the upstream markets for "manufacture and sale of steel rope" and "manufacture and sale of concrete strands" where Çelik Halat is active and downstream market for "construction and sale of residential housing" where Artaş and Betatrans are active. To that end, the Board assessed that (i) Çelik Halat is not the market leader in the markets for steel rope or concrete strands, (ii) the buyers have alternative sources of supply regarding these products, (iii) Çelik Halat will adopt its purchase and sales decisions independently from Artaş and Betatrans, and (iv) therefore Çelik Halat will continue its commercial relationships with third parties/commence new relationships. Accordingly, the Board concluded that the cooperation agreement will not result in the exclusion of competitors in terms of vertical effects. Against the foregoing, the Board granted negative clearance to the transaction on the grounds that the transaction does not have the object or effect of restricting competition within the meaning of Article 4 of Law No. 4054, and it does not violate Articles 6 and 7 of Law No. 4054.

V. Conclusion

The Decision reinforces the Board's approach towards the assessment of control structure in joint venture transactions post-transaction and the elements to be taken into consideration when evaluating a shifting alliances structure. The Decision is particularly important since it sheds light on the treatment of joint venture transactions that are not deemed as a concentration, and how to examine such transactions under Article 4 of Law No. 4054 as cooperation agreements.

New Interim Measures on the Online Betting Market: Turkish Competition Board Imposes Interim Measures on Maçkolik following the Interim Measures on Nesine.

I. Introduction

The Turkish Competition Board (the "***Board***") has recently published its reasoned decision[14] regarding the interim measures imposed on Maçkolik İnternet Hizmetleri A.Ş. ("***Maçkolik***") during the on-going investigation[15] against Maçkolik ("***Decision***"). The Decision is related to the ongoing investigation that was initiated to determine whether Maçkolik had violated Articles 4 and 6 of Law No. 4054 on the Protection of Competition ("***Law No. 4054***") by causing a *de facto* exclusivity with D Elektronik Şans Oyunları ve Yayıncılık A.Ş. ("***Nesine***") following a separate investigation and

[14] The Board's Maçkolik Interim Measure decision dated 07.09.2023 and numbered 23-41/797-281.
[15] The Board's ongoing Maçkolik investigation initiated through Turkish Competition Board's decision dated 10.08.2023 and numbered 23-37/714-M.

commitment procedure which involved Nesine prior to the Decision.

II. Background on the Nesine and Maçkolik Investigations and Interim Measures

The Board had first initiated an investigation[16] against Nesine, a company operating in the online betting market, regarding its exclusive Advertisement Sales Services Agreement ("***Agreement***") with Maçkolik, a platform providing live scores of sports events and statistical information through its broad database, to determine whether the Agreement would result in abuse of Nesine's dominant position in the context of Article 6 of the Law No. 4054 and thus fall into the category of vertical agreements prohibited by Article 4 of Law No. 4054.

The Board initially evaluated the allegation that the Agreement related to the renting of ad spaces on Maçkolik's website and mobile app, actually prevents Maçkolik from renting its ad spaces to the Nesine's competitors. In addition to this exclusivity requirement, the Agreement also imposes ad click quotas on Maçkolik, failure of which is subject to penalties. Against such concerns, Nesine submitted two rounds of commitments to the Board. The commitments were not deemed sufficient to resolve the competitive concerns and as a result the Board imposed interim measures against Nesine.[17] In the Nesine interim measure decision the Board also noted that both Nesine and Maçkolik are the leading undertakings in the markets that they are operating in: In the online betting services market, Nesine is the leading undertaking in terms of clicks, doubling the clicks of its closest competitor, and Maçkolik is also the most popular digital platform in the sports category in Turkiye in terms of internet traffic.

Following the interim measures decision, Nesine submitted a letter to the Authority stating that the Agreement between Nesine and Maçkolik was amended, and the provisions of exclusivity were removed ("***Amendment Protocol***"). Following the evaluations on the Amendment Protocol, the Board decided to launch an investigation on August 10, 2023, to determine whether Maçkolik had violated Articles 4 and/or 6 of Law No. 4054 by causing a *de facto* exclusivity with Nesine.

III. The Relationship Between Maçkolik and Nesine

Although the reasoned decision is yet to be published on the Nesine investigation, the Board found that Maçkolik is a crucial player in the market, being the most popular website among sports and football fans. It has a widespread following as demonstrated by the number of instant users actively betting. Therefore, the website gets a remarkably high number of visits. The Board also examined Maçkolik's website and mobile application advertisement spaces, which include banners and pop-up advertisements. Because of the exclusivity clauses in the Agreement, none of the other players in the market was able to advertise in those ad spaces and work with Maçkolik. The Board assessed that the business development projects between Nesine and Maçkolik would also eventually end up increasing the number of advertising spaces saved for Nesine, creating competitive concerns. Therefore, the Board decided to impose interim measures to remove the exclusivity provision from the Agreement, on the basis of the risk of potentially irreparable damage.

Following the interim measures introduced to Nesine, Maçkolik i) started reaching out to other online betting platforms and as a result, signed a "Advertising Sales and

[16] The Board's Nesine investigation dated 07.07.2022 and numbered 22-32/500.
[17] The Board's Nesine interim measure decision dated 15.06.2023 and numbered 23-27/520-176.

Marketing Agreement" on August 15, 2023 with Oley, ii) re-directed betting clicks to Oley's platform in the mobile applications and website, iii) set Oley's place in the segment for match betting at second-place under Nesine, and iv) created a new website in which Nesine has a rather less influence on the advertisement spaces, but which also includes a direct link to the old website. The old website, when examined, still displayed the pop-ups and banners of Nesine.

IV. The Board's Concurrent Assessment Regarding Interim Measures

In circumstances where time is of the essence due to the possibility of substantial and irreparable harm, the Board may adopt interim steps to preserve the status quo prior to the infringement. The Board's actions demonstrate that it uses interim measures in extraordinary cases with unique dynamics that may result in irreparable damage. In the Decision, the Board follows the same approach as the Nesine interim measure decision in taking interim measures. Accordingly, within the Decision, Maçkolik is noted as the most preferred live score tracking application in Turkiye, being ahead of its competitors with a higher traffic rate, and it was defined as the biggest online sports platform in Turkiye considering both its website and its mobile application. Hence, the Board deemed Maçkolik to be much more important than the other platforms, for those betting companies that wished to advertise.

Accordingly, the Board decided that although Nesine and Maçkolik entered into the Amendment Protocol as a result of Nesine's interim measure decision, it was analyzed that Maçkolik did not cooperate with any other betting company, in a way similar to how it cooperated with Nesine. The Board further analyzed that the fact that Nesine's advertisements still constitute the overwhelming majority of ads displayed on Maçkolik's platform, with the only other advertised betting undertaking there being Oley, and the fact that Oley's advertisements are shown in a limited area in the platform, created the impression that activities of Nesine's competitors who also wish to be on Maçkolik platform may have been restricted. Oley as the only undertaking other than Nesine that has an advertisement agreement with Maçkolik, also has limited visibility when compared to Nesine. The Board also concluded that certain content provided by Nesine on Maçkolik's platform (such as Nesine TV, Nesine editor comments and videos) shows that Maçkolik and Nesine are working in integration with each other. Such integration creates the impression that certain advertisement spaces that are important for betting companies are specially allocated to Nesine. Hence, the Board decided that this restriction and exclusionary effect may continue until a final decision is rendered.

In light of the above competitive concerns, the Board decided to impose interim measures on Maçkolik until the investigation is concluded, due to the possibility of undertakings operating in the online betting services market facing serious and irreparable damages, including the following: (i) limiting the privilege of visibility of Nesine's advertising space on Maçkolik's platform, (ii) developing an algorithm that allows rotation in advertisement spaces (banners, pop-ups) which would not allow Nesine to be in an advantageous position against its competitors, reviewing of procedures for banners and pop-ups, ensuring a transparent advertisement policy that would not allow discrimination between online betting undertakings, (iii) ensuring that Nesine and Maçkolik's projects are offered transparently to other companies, (iv) ensuring that directing users/visitors to other betting platforms through clicking on bet ratios on Maçkolik's website and mobile app are conducted in the same manner for all betting companies, (v) ensuring that Maçkolik will not engage in practices that will lead to a *de facto* exclusivity, etc.

V. Conclusion

The Board's recent decision to impose interim measures on Maçkolik reflects the Board's commitment to ensuring fair competition in the online betting market. The Board's decision also acknowledges Maçkolik's significant role in the market, being a highly frequented, popular platform among other alternatives. The Board concluded that with Maçkolik being a major player in the market, the exclusivity clauses in the Agreement with Nesine, despite being amended, had created a restrictive environment, hindering other competitors from advertising on Maçkolik's platform. The Board's decision to impose interim measures, including the removal of exclusivity provisions, ensuring transparency in advertising policies, and equal opportunities for all betting companies, underscores their determination to prevent any potential irreparable harm to the competitive landscape. This case serves as a reminder of the Board's proactive role in preserving competition and protecting the interests of consumers and businesses alike.

Official Statement from the Turkish Competition Authority's President on the Authority's Recent Activities

On October 11, 2023, the Turkish Competition Authority ("***Authority***") released an official statement by the President of the Authority, Mr. Birol Küle, to the public, regarding the Authority's recent activities. The public statement includes references to developments in the digital market and a brief look into to the work that the Authority carried out in the past year. We provide below a (convenience) translation of the official statements made by Mr. Birol Küle, the President of the Competition Authority, into English, as these provide valuable insight into the President's, and in general, the Authority's view on its activities. We trust that you will find the below both informative and enlightening.

"Dear Public,

The digital economy is becoming the centre of our lives at an increasing pace and this deeply affects competition policies and practices. As the Turkish Competition Authority, we are closely following the dynamics brought about by the digital transformation. We are also implementing the necessary regulations and initiatives to strengthen Turkiye's position in this area.

The Turkish competition legislation aims to secure the rights of undertakings and consumers, and to support innovation by protecting and encouraging competition. I would like to emphasize once more that competition is indispensable for sustainable growth and development in all sectors, including the digital economy.

While digital markets develop fast and provide countless benefits to consumers, they also become the means for major platforms to restrict competition and exclude rivals. In this context, the integration of competition law with the digital economy and the establishment of a fair competition environment is of great importance, both at the national and international levels. Sometimes market definitions move beyond national borders, increasing the importance of cooperation among competition authorities.

As the Turkish Competition Authority, in 2020 we have accelerated our work [in this field] by determining our strategy towards the digital economy. In this regard, we transformed our 1st Supervision and Enforcement Division into a specialized division and re-defined their area of responsibility solely as "digital economy". Besides conducting many preliminary assessments, pre-investigations, and investigations, we have finalized our work on E-Marketplace Platforms Sector Inquiry and Online Advertising Sector Inquiry. We are currently working on the Mobile Ecosystems Sector Inquiry Report.

Another important item to note is that we have completed our report for the law on digital platforms that the Turkish Grand National Assembly will enact on Law No. 4054, which is also included in the Medium-Term Plan. For almost two years, 21 of our experts have worked day and night, to (i) review almost all the relevant literature and studies around the world, (ii) conduct public opinion surveys and (iii) prepare our 2500-page report on the Reflections of Competition Law in Digital Transformation. The study we published on our website constitutes a very short summary of this work.

Dear Public,

I would like to briefly summarize the foremost topics in the Authority's activities in recent years.

The Impact Assessment Report, which was prepared according to the OECD methodology to assess the impact of the Competition Board's decisions on the economy, shows that consumers benefited by USD 13.1 billion during the period between 2021-2022. This once again shows the importance of the steps and measures taken by the Authority in the economy.

The commitment and settlement mechanism, as one of our novel methods, has also accelerated the process for our intervention in competition violations and increased efficiency. This way, undertakings that admit to the violation can produce structural and permanent solutions with commitments designed at the early stages of the investigation and get a reduction in their fines. Twelve (12) of the investigations launched after the legislative amendment were concluded with effective commitments. On the settlement side, 92 undertakings that accepted the violation paid a total administrative fine of approximately TRY 836 million, and the investigations against them were concluded. All these amendments have contributed to making our legislation more fair and transparent for the business world and consumers.

As the Authority, our mission to preserve and encourage the competitive environment also brings about the responsibility to uncover the competition violations and impose necessary sanctions.

I would like to point out that fines are an important mechanism in eliminating distortions in competition, even though they are not always a sufficient deterrent, as they are reactive rather than proactive in preventing and changing behaviours that distort competition. Although the high level of fines is frequently brought to the public agenda, penalties are inevitable for the healthy functioning of competition and to prevent competition violations that have serious consequences on social welfare.

Our successful investigation processes, which have increased thanks to our investments in both human resources and information technologies in recent years, have also led to an increase in fines. When we analyze the data from the last decade, 87% of the fines imposed by the Board were issued in the last 4 years. In these 4 years, the Board imposed a total of TRY 10.4 billion of administrative monetary fines.

In this framework, we have increased our assessment capacity on digital data with our investments in information technologies.

Our IT professionals have the capability to examine mobile and embedded devices, software codes, databases, server systems, and algorithms. We conducted examinations on the algorithms of platforms such as Trendyol and Hepsiburada. The Board found that Trendyol interfered with the algorithms, and imposed serious remedy requirements on Trendyol as well as an administrative monetary fine of TRY 62 million.

This increase in capacity has naturally led to an increase in the number of on-site inspections along with the number of investigations. During the pandemic, we conducted vital investigations aimed to protect public health and economic stability, such as the investigations against hospitals and chain stores.

Dear Public,

The earthquake disaster at the beginning of this year had a deep impact on all of us and once again reminded us of the importance of social solidarity and quick action. We were in the region from the very first day of the disaster and took immediate action to heal the wounds and support the regional economy. We participated in relief efforts for those affected and began to take the necessary steps to revitalize the region's economy. We came together with representatives of chambers of commerce, stock exchanges, and NGOs in 8 different cities and evaluated the regional economic structure and competition conditions. The inquiries and investigations we have initiated specifically for the region continue to contribute to the economic recovery of the region and to protect fair competition conditions. This incident has shown us that competition law has the capacity not only to promote economic development but also to provide quick and effective solutions to social and economic challenges.

Our work in competition law is not limited to theoretical principles and general practices. Many of our decisions that stand out in practice demonstrate how the Authority shapes competition in the economy and how our activities have positive effects on consumers, businesses, and markets.

In this regard, I would like to highlight some of our prominent decisions and practices.

- *With our* Google *investigation, we paved the way for comparison shopping sites and local search sites.*
- *By removing the turnover thresholds for the technology companies, we prevented killer acquisitions. In this regard, Twitter should have notified the Authority of the acquisition but it did not. As a result, the Board imposed an administrative monetary fine on Twitter.*
- *We ensured that the second-hand booksellers could easily change platforms.*
- *We put a stop to Facebook's impositions on WhatsApp users. Now, they will not be able to use your data as they wish.*
- *We prevented Trendyol from self-preferencing through its algorithms. We put an end to discrimination.*
- *The florists and the restaurants will be able to work on any platform and under any conditions they want. They will also be able to implement the promotional campaigns they wish in their stores.*
- *We conducted sector inquiries such as e-marketplaces, online advertising, medicine, and fuel oil. We delved deep into the sectors and shed light on problems.*
- *We paved the way for real estate agents and car dealers who advertise on Sahibinden, to move their data to other competitors whenever they wish. It they want, they will also be able to move their data from competitors to Sahibinden.*
- *We prevented the hub and spoke cartel in chain markets. We imposed a record fine of TRY 2.7 billion . We also prevented producers and suppliers from intervening in shelf prices.*
- *We ensured that 25% of Coca-Cola's refrigerators in small markets and grocery stores were made available*

to competitors. We concluded the investigation with commitments to prevent the undertaking from abusing its dominant position.

- *In the same vein, we made available 30% of Algida's refrigerators to the competitors and put an end to the exclusivity practices.*

- *We penalized and put an end to competition violations on food staples such as flour, yeast, and eggs.*

- *By preventing the pharmaceutical giants from making agreements among themselves and imposing expensive drugs on patients, we saved the public budget from further economic burden.*

- *We penalized the giant player in the eyeglass and spectacle lens market with a fine of TRY 492 million for not complying with its commitments.*

- *We identified and penalized each and every undertaking that set shelf prices in the cosmetics sector.*

- *We conducted and are conducting inquiries into the cement, ready-mixed concrete, glass, and ceramic sectors.*

- *We went after whoever was blocking online sales, found them, and liberalized the market.*

- *We ensured the sales of bus tickets on different platforms.*

- *We penalized violations of resale price maintenance by four (4) major undertakings operating in the fuel sector.*

- *We received a commitment for a 50% discount on bonded temporary storage service fees at Ankara's Esenboğa Airport.*

- *We put a stop to excessive pricing practices at the Antalya port. We improved competition conditions in [container] filling services.*

- *We have identified and fined gentlemen's agreements which impede the free movement of labour. We have ensured that employees can freely change their jobs and increase their welfare.*

As can be seen, we have intervened in violations in many sectors including the digital sector. We have taken targeted measures against these violations. In this context, we influence the way undertakings do business by fulfilling our quasi-judicial duties and competition advocacy with great devotion, and we raise social awareness. Through all our activities, reports, and decisions, we aim to promote innovation-based competition and stand against anti-competitive interventions and barriers to entry in the markets.

With my deepest respect to the public

Birol Küle"

The Turkish Competition Authority's Announcement on the Protocol Signed with the Turkish Data Protection Authority

The Turkish Competition Authority ("***Authority***") announced on October 26, 2023 that it signed a cooperation and information exchange protocol with the Turkish Data Protection Authority.

The Authority noted that while there are numerous and varying products/services which are developed based on data-driven technologies and which support the digital economy, the increasing processing of data through big data technologies may give rise to both competition law concerns and protection of personal data. Accordingly, the Authority remarked that the intersection of competition law with data privacy laws rendered a cooperation with the Turkish Data Protection Authority inevitable and hence, the Turkish Data Protection Authority and the Turkish

Competition Authority have entered into a Cooperation and Information Exchange Protocol ("***Protocol***") with a view to ensuring an active and effective regulatory environment.

In the announcement, the Authority noted that, within the scope of the Protocol, the parties agreed to substantially engage in active cooperation initiatives, such as the following:

- Conducting joint studies in developing areas which fall under both authorities' remit and have the potential to cause irreparable damage if not intervened swiftly and effectively,
- Raising user awareness in terms of personal data protection and protection of competition, particularly in digital markets, and issuing reports to convey a joint message to undertakings on practices concerning both fields of law, with the cooperation of both authorities,
- Organizing joint presentations and discussion programs within the scope of the long-established "Wednesday Seminars" of the Turkish Data Protection Authority and/or "Thursday Conferences" of the Turkish Competition Authority,
- Organizing trainings where the relevant authority shares its expertise and experiences related to its remit,
- Consulting on the mutual subjects in national and/or international events organized and/or attended by the relevant authority and supporting such events in terms of matters falling under the relevant authority's remit.

The Authority noted that the Protocol aims to establish effective competition in the sector and strengthen the consumers' control over their own personal data.

New Regulation to Address Foreign Subsidies Distorting the EU's Internal Market

I. Introduction

In the pursuit of fostering fair competition and safeguarding the integrity of the European Union's ("***EU***") internal market, Foreign Subsidy Regulation[18] ("***FSR***") entered into force on January 12, 2023, accompanied by Implementing Regulation 2023/1441[19] ("***Implementing Regulation***") on July 10, 2023.

Since 12 October 2023, the notification obligation for concentrations and public procurements above certain thresholds applies.

Below is an overview of the FCR including its objective, scope, potential outcomes as well as implications for Turkiye.

II. Objective of the Regulations

The core objective of the FSR is to counteract distortions within the EU internal market arising from foreign subsidies. The term "subsidies" is broadly defined, encompassing diverse forms of financial support. These regulations are specifically designed to target public procurement procedures and merger and acquisition transactions, introducing notification obligations and scrutiny thresholds to prevent potential market distortions proactively.

The FSR authorizes the European Commission ("***Commission***") to scrutinize subsidies provided by non-EU countries to companies operating in the EU and

[18]The Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market

[19]The Commission Implementing Regulation (EU) 2023/1441 of 10 July 2023 on detailed arrangements for the conduct of proceedings by the Commission pursuant to Regulation (EU) 2022/2560 of the European Parliament and of the Council on foreign subsidies distorting the internal market

mitigate any potential adverse effects on the EU single market. It establishes comprehensive rules and procedures, equipping the Commission to assess foreign subsidies from non-EU countries.

Implementing Regulation offers comprehensive insights into the procedural facets governing the functioning of the FSR regime. It delves into the *ex-ante* notification and approval procedures, covering elements like time constraints, notification process, accessibility to the Commission's records, and handling of confidential information. The Implementing Regulation also includes two annexes that include standardized forms on the applications regarding concentrations and public procurements outlining the information companies are required to furnish.

III. Scope of the Regulations

The ambit of the FSR and its Implementing Regulation is discerned through a comprehensive definition that encapsulates a broad spectrum of economic activities within the internal market. The FSR's applicability extends to undertakings, including public undertakings directly or indirectly controlled by the State, engaging in economic activities within the internal market. This encompasses scenarios where an undertaking acquires control of or merges with a Union-established entity or participates in a public procurement process within the Union. Notably, as defined in FSR the term "*undertaking*" is equated with the broader legal concept of an "*economic operator"*.

The FSR adopts a sweeping definition of financial contribution, encompassing various forms of support that can distort the internal market. The FSR confirms that "*a financial contribution should confer a benefit on an undertaking engaging in an economic activity in the internal market"*. This includes the transfer of funds or liabilities, such as capital injections, grants, and loans. Additionally, the foregoing of revenue that would otherwise be due, such as tax exemptions, falls within the purview of a financial contribution. The provision or purchase of goods or services and the granting of special or exclusive rights without adequate remuneration are also considered financial contributions within the scope of the FSR.

It is noteworthy that the FSR's scope extends to actions of third countries, encapsulating not only the central government and public authorities but also entities at all levels whose actions can be attributed to the third country. Private entities, acting in a manner attributable to the third country, are also included within this ambit.

In essence, the FSR's scope is intricately designed to encompass a wide array of economic activities, providing a framework for scrutinizing foreign subsidies that have the potential to distort the internal market. The broad definition of financial contribution, coupled with the extraterritorial reach of the regulations, underlines the European Union's commitment to ensuring transparency, fair competition, and the preservation of the integrity of its internal market.

The FSR, in principle, applies to subsidies granted in the five years prior to 12 July 2023 (*i.e.,* the date of FSR's entry into force).

IV. Thresholds within the Regulations

The Implementing Regulation outlines the thresholds for concentrations and public procurements. In terms of concentrations, the FSR introduces a new mandatory review process for mergers, acquisitions, and the establishment of full-function joint ventures. This involves a stand-still obligation, preventing closure until the Commission completes its review. Article 20 of the FSR specifies the following thresholds which trigger a filing obligation:

- One of the involved companies (merging undertakings, acquired undertaking, or joint venture) is EU-based, generating a minimum aggregate turnover of EUR 500 million in the EU.

- The concerned undertakings received combined financial contributions exceeding EUR 50 million from third countries in the preceding three financial years.

Importantly, the absence of a global turnover threshold implies that transactions which do not actually trigger a filing obligation under the EU Merger Regulation may still require notification for foreign subsidies review. The second threshold, based on the amount of financial contribution, introduces new filing obligations for any EU or non-EU undertaking engaged in M&A transactions with EU targets, regardless of whether the financing is classified as a foreign subsidy. The Commission retains the authority to request prior notification of non-notifiable transactions suspected of benefiting from foreign subsidies in the previous three years.

In terms of Public Procurements, Article 28 of FSR sets forth the following thresholds which trigger a filing obligation:

- The estimated value of the public procurement or framework agreement, net of VAT, equals or exceeds EUR 250 million; and

- The economic entity, along with its subsidiary entities lacking commercial autonomy, parent companies, and, if relevant, primary subcontractors and suppliers engaged in the identical tender within the public procurement procedure, obtained total financial contributions amounting to EUR 4 million or more per third country during the three years preceding notification or, if applicable, the updated notification.

Similar to concentrations, the second threshold, based on the amount of financial contribution, imposes new filing obligations for EU or non-EU undertakings participating in EU public procurement, irrespective of whether the financing qualifies as a foreign subsidy. The Commission can request notification of foreign financial contributions in non-notifiable public procurement procedures if there is any concern on that front.

It is worth mentioning that the Commission holds the power to initiate ex officio reviews: The Commission can conduct a preliminary review, and if deemed necessary, launch an in-depth investigation, even in cases where the notification thresholds are not met.

V. Potential Outcomes and Sanctions

Upon conducting an in-depth investigation, the Commission can render one of the following decisions: (i) a no-objection decision; (ii) a decision involving commitments or structural/behavioral redressive measures; or (iii) a decision prohibiting a concentration or the award of a public contract.

Non-compliance with the FSR may lead to significant fines. If a notified concentration is completed or an investigated bidder is awarded the public procurement contract while under investigation by the Commission, the Commission can impose fines, which may reach up to 10% of the company's annual aggregated turnover. Furthermore, provision of inaccurate, incomplete, or misleading information may lead to fines of up to 1% of global turnover.

VI. Implications for Turkiye

The FSR does not target any specific country. The FSR applies to subsidies granted by all non-EU countries that distort the EU’s internal market. Given extraterritorial nature of the regulations, both non-EU and EU businesses receiving

subsidies from foreign countries, including Turkiye should make an assessment of their activities within the framework of these regulations. In particular, Turkish companies operating in the EU which (i) have received any financial contribution from a non-EU country and (ii) engage in public procurement procedures or M&A transactions in the EU should conduct notifiability analysis for each relevant case, and comply with the standstill obligations in the FSR in case the relevant concentration or public procurement is subject a mandatory filing under the FSR. This also applies to non-Turkish companies having activities in the EU, provided that they have been subsidized by Turkiye or any other non-EU country.

The Investment Office of the Presidency of the Republic of Turkiye has reported that, in 2022 alone, Turkiye issued over 13,600 incentive certificates, translating into a cumulative investment of TRY 578 billion[20]. This significant amount indicates that some Turkish companies might be subject to the filing obligations in the FSR in case they engage in M&A transactions or public procurement processes in the EU.

In the regular course of their operations, national governments may extend substantial incentives to attract foreign investors, ranging from subsidies and tax breaks to more intricate forms of state aid associated with significant investment ventures. Despite the considerable volume of state aid provided, a significant portion may remain undisclosed, and certain state aid programs have yet to align with established state aid regulations. Whether reported to national state aid authorities or not, all such contributions fall within the purview of the FSR review by the Commission. As the information sought by the Commission in filings within the scope of the FSR is highly extensive and complicated, it might be beneficial for the companies operating in the EU to review their information tracking and retention policies, taking into account the FSR.

[20]invest-in-turkiye-roadshow-booklet.pdf, p. 26 (Last Acces: 13.11.2023)

Employment Law

The High Court of Appeal Has Rejected the Request of a Subcontractor Employee Regarding Wage Change after their Transfer to Permanent Staff Position

I. Introduction

The decision[21] of the 9th Civil Chamber of High Court of Appeals ("***Decision***") sheds light on how the wage policy must be interpreted for an employee who got transferred from subcontractor to permanent staff position.

II. Decision

The case involves the plaintiff who was previously a subcontractor employee but transferred to a permanent staff position under the Statutory Decree no. 656 ("***Decree***"), and who claimed that his salary should be calculated in the same manner as his previous employment contract (*i.e.*, 30% higher than the minimum wage) even after his transfer to a permanent position, along with other claims. The first instance court accepted this claim.

However, the 9th Civil Chamber ruled that, it is important to correctly evaluate the wage provisions of the employment contracts signed between the employer and the employees who were transferred into and employed as permanent staff, under the Decree.

According to the decision of the 9th Civil Chamber, if the wage in the employment contract to be concluded between the parties is determined as:

[21] The decision of 9th Civil Chamber of High Court of Appeals dated 12.06.2023 and numbered 2023/10609 E. 2023/8901 K.

- a certain percentage higher than the minimum wage (for example, 30% higher than the minimum wage), or

- the wage stipulated in the service procurement contract before the transfer of the employee to a permanent staff position, or

- multiples of this wage (for example, two (2) times of the wage stipulated under the service procurement agreement),

it must be accepted that the wage defined as such would constitute the first (basic) wage of the employee for the initial period of permanent employment. So, 9th Civil Chamber rules that such determination of the wage regarding the employment after the transition to a permanent staff as per the Decree does not oblige the employer to use this calculation, in terms of the salary increases in the following salary payment periods. In other words, for instance, even if the salary is determined as explained above, the employer is not obliged to keep the salary of the employee at a certain percentage higher than the minimum wage during the following stages of his employment and the employer is free to determine the level of the salary increase, later on.

The 9th Civil Chamber indicated in the Decision that the employer would be under an obligation to maintain the salary of the employee during the later stages of the employment at the level stipulated for the initial salary (for instance, 30% higher than the minimum wage), if this were to be specifically indicated in the employment agreement.

In light of the foregoing, when the contract signed between the parties is examined, it was explicitly stated that in determining the wage, the relevant article of the Statutory Decree no. 375 was applied and there was no stipulation that the employee would be paid a wage at a certain rate of the applicable minimum wage in the subsequent periods.

Accordingly, the 9th Civil Chamber reversed the decision of the first instance court on the grounds that the above-mentioned employment contract concluded at the time of the employee's transfer did not expressly stipulate that he/she would still be paid a salary at a certain rate/multiple of the minimum wage in due course.

III. Conclusion

The decision pertains to the determination of the salary during the following stages of employment after a contractor employee was transferred to a permanent staff position. The Decision concludes that if it is not specifically determined in the latter employment agreement that the salary will be calculated in the same way as set out in the first employment agreement under which the employee had worked as a subcontractor (for instance, 30% higher than the minimum wage), then the calculation of his first permanent position salary does not create an obligation for the employer to apply the same calculation for any subsequent increases.

Data Protection Law

Efforts Regarding the Harmonization of Personal Data Protection Law with the EU acquis, in Particular with the EU General Data Protection Regulation

I. Introduction

The Medium-Term Program ("***Program***") is a very significant document for fiscal planning in Turkiye that initiates the budget process, and it is a policy document that covers macro policies, principles, Government's macroeconomic targets, revenue and expenditure forecasts for the next three (3) years, budget balance and debt levels.[22]

[22] *See*, The Medium Term Program dated 30 September 2023,https://www.sbb.gov.tr/wp-

On September 6, 2023, the latest program for 2024-2026 has been published in the Official Gazette with the Presidential Decree No. 7597.[23]

Even at the first glance, it is apparent that this most recent program has set goals for a variety of fields. Under Section 10 on Business and Investment Climate of the program, a very crucial objective can be seen that concerns Turkish Data Protection Law (***"DPL***"). Accordingly, the target for completing the harmonization of the Personal Data Protection Law and the EU General Data Protection Regulation, as well as the EU economic regulations affecting the export of goods and services is set for the 4th quarter of 2024. On page 36, Item 8 of the policy and measures planned under this section, clearly illustrates that "*Efforts to harmonize Personal Data Protection Law with the EU acquis, in particular the EU General Data Protection Regulation (GDPR), will be completed*." Followingly, Item 9 further indicates that *"Taking into account international standards, national standards will be determined based on the principles of interoperability, security, data protection, inclusiveness, sustainability and international cooperation in the digital transformation of the business and investment environment."*

The GDPR is applicable as of 2018 for all EU member states to establish a harmonization of data privacy on a legal surface. While similar in essence, the DPL is quite different from the GDPR. Both legislations aim to ensure the most legal, equitable and transparent processing of personal data as well as certifying the security of the digital privacy of persons.

II. Certain Differences Between Two Legislations

Although the DPL is basically in line with the GDPR's provisions, the DPL does not include some significant matters which are regulated under the GDPR. For instance, a topic introduced by the GDPR but not DPL is protection of children's personal data, regulated in article 8 of the GDPR which renders the processing of such data subject to certain special conditions.

Another example is data protection impact assessment. Although data protection impact assessment is stipulated as an obligation for the controllers in GDPR in the form of a long and detailed article, DPL brings no such obligation whatsoever for controllers or any other persons.

Further significant difference between the DPL and the GDPR is the amount of penalties prescribed to the breaches. The amount of the penalties might seem of secondary importance at first glance, though it certainly is not since the importance of the protected right is underlined under both legislations.

Another issue is determination of the countries where there is an adequate level of protection.

Article 9 of the DPL which regulates transfer of personal data abroad entered into force in 2016. According to this article, Turkish Data Protection Board ("***Board***") shall determine the countries where there is an adequate level of protection by evaluating (i) the international agreements which Turkiye is a party to, (ii) the reciprocity related to data transfer between Turkiye and the country demanding personal data, (iii) the category of the personal data as well as the purpose and period of processing for each specific data transfer, (iv) the relevant legislation and practice in the foreign country which the data will be transferred to, and (v) the measures that the controller in the foreign country, which the data will

content/uploads/2023/09/Orta-Vadeli-Program_2024-2026.pdf, (Last accessed on November 12, 2023).

[23] *See*, Official Gazette dated September 6, 2023, https://www.resmigazete.gov.tr/eskiler/2023/09/20230906M1-1.pdf, (Last accessed on October 18, 2023).

be transferred to, commits to provide, and announces them.

On June 11, 2019, the Board announced the criteria to be considered when determining such countries and provided a table including the same (*i.e.*, reciprocity, the recipient country's legislation and implementation, existence of an independent data protection authority, being a party to international agreements and institutions, the membership status to the global and regional associations to which Turkiye is a party and common trading volume).

Despite these developments, the Board has not announced the list of the countries providing an adequate level of protection and has not provided a timeline yet.

III. Conclusion

The harmonization of the GDPR with the DPL will bear significant impacts on the development of the business and investment environment. With the rapid increase in globalization and digitalization in the 21st century, the inclusion of Turkiye in this economic market becomes ever more crucial. The way to enable this process is through the revision of the DPL in terms of bringing it closer to the principles specified in the GDPR. According to the Medium-Term Program, it is expected that the DPL will be amended by taking into account certain provisions of the GDPR.

Internet Law

Significant Changes in ".tr" Domain Name Management

After the changes published in the Official Gazette dated June 10, 2023, with the communiqué amending the Internet Domain Names Communiqué ("***Communiqué***"), Information and Communication Technologies Authority ("***ICTA***") published a decision regarding the "Procedures and Principles for the Allocation of Domain Names in the a.tr Structure" and "Principles and Fees for Domain Names in a.tr Structure" ("***Decision***").

The latest significant changes in the Communiqué comprised of, (i) enabling free-of-charge allocation for domain names with the "gov.tr", "edu.tr", "tsk.tr", "bel.tr", "pol.tr", "k12.tr" extensions, (ii) applying the "first come, first served" principle, and (iii) restricting the Domain Registrars ("***DR***") so that they are no longer permitted to apply for or allocate Internet Domain Name ("***IDN***") on behalf of themselves or any of their employees to store IDNs for the sale, assignment, or other similar purposes, regardless of whether or not they use the automated means of electronic connection to TRABIS. In addition to foregoing, the Decision now allows for the allocation of various domain names similar to "a.tr" under specific criteria, by outlining the allocation procedures for domain names within the "a.tr" structure, along with the associated rules and procedures governing this process.

First and foremost, the Decision describes TRABIS as the system that enables the operation of the ".tr" domain name extension, the management of its central database, the creation and updating of the directory, the provision of directory services, and the real-time processing of IDN application procedures in a secure manner that ensures business continuity is sustained. The Decision further outlines a prioritization for the distribution of "tr" domain names as (i) initial allocation procedures, and (ii) priority for domain name ownership based on extension. According to the Decision, the initial allocation procedures give priority to domain names already allocated to public institutions and organizations and entities whose majority shares of their capital are publicly owned as of the effective date. Additionally, it touches on the free allocation of certain domain names (*i.e.*, a.bel.tr, a.k12.tr) for one (1) year and grants free renewal to others as long as they are not cancelled.

The Decision further prioritizes those professional organizations with public status, public benefit organizations with "org.tr" domain names, public benefit charitable associations and trusts, and workers' and employers' professional organizations. It states that individuals or entities who are already allocated ".org.tr" domain names as of the publication date of these rules should provide electronic proof of eligibility when applying through a chosen registry using application codes. This is essentially a requirement for those who wish to maintain their ownership. The prioritization of "org.tr" domain names will be completed once the first allocation processes are terminated, a one (1) month window will open for applications for "a.org.tr" domain names after being published on ICTA's website.

Moreover, the Decision prioritizes the ownership of domain names based on extensions such as "kep.tr", "av.tr", "dr.tr", "com.tr", "org.tr", "net.tr", "gen.tr", "web.tr", "name.tr", "info.tr", "tv.tr", "bbs.tr", and "tel.tr".

After the completion of the allocation of domain names mentioned above, the Decision emphasizes that a "first come, first served" principle will be applied to the available IDNs.

The Decision indicates that entities will have three (3) months to apply starting from the date of ICTA's announcement (regarding the prioritization of domain name ownership based on extension) is published on its website. It is important to keep in mind that the TRABIS system became operational on September 14, 2022 and these relevant principles are effective as of September 14, 2023.

Constitutional Court's Decision on Access Ban Procedure under Article 8/A of Law No. 5651

I. Introduction

The Turkish Constitutional Court handed down a decision ("***Decision***") on September 14, 2023 regarding the access ban of the news contents broadcast on the Internet, based on Article 8/A of Law No. 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through such Broadcasts ("Law No. 5651") upon an individual application with number 2019/40078.[24]

The Decision was published on the Official Gazette on November 8, 2023. The Constitutional Court decided that the Applicant Artı Media Gmbh's freedom of expression and press, which are guaranteed under Articles 26 and 28 of the Turkish Constitution, had been violated due to the access ban decisions issued under Article 8/A of Law No. 5651.

II. Facts and Claims of the Applicant

The Applicant is the owner of an Internet news website. The Ministry of Interior's Security General Directorate had requested an access ban regarding the news broadcast on the relevant news website, on the grounds that the relevant news content is used to disseminate the "black propaganda" against the Republic of Turkiye, especially by terrorist organizations and their supporters, in order to damage the country's reputation as well as to present its political and military decisions and practices as unfair. Upon this request, the Information and Communication Technologies Authority ("***ICTA***") has implemented an access ban decision as a protection measure based on Article 8/A of the Law No. 5651 and the

[24] Artı Media Gmbh [GK], B. No: 2019/40078, 14/9/2023, Accessible at https://www.resmigazete.gov.tr/eskiler/2023/11/20231108-11.pdf Accessed on November 10, 2023).

decision was presented to the approval of the criminal judgeship of peace. The criminal judgeship of peace approved the ICTA's relevant access ban decision. Although the Applicant filed an objection against the criminal judgeship of peace's decision, the higher criminal judgeship of peace rejected the objection of the Applicant, and the decision became final and binding.

Upon this development, the Applicant lodged an individual application before the Constitutional Court, claiming that the blocking of access to the relevant news is a violation of its freedoms under the scope of Article 26 of the Constitution entitled "Freedom of Expression and Dissemination of Thought" and Article 28 of the Constitution entitled "Freedom of Press".

III. The Evaluation of the Constitutional Court

In terms of admissibility

The Constitutional Court decided that the allegation regarding the violation of freedom of expression and press was admissible on the grounds that it was not manifestly ill-founded and there was no other reason to declare it inadmissible.

In terms of merits

The Constitutional Court, while making its assessments, mainly referred to its pilot-judgment rule which is considered under the *Keskin Kalem Yayıncılık ve Ticaret A.Ş. and others* decision,[25] wherein it had evaluated that the first instance courts' similar decisions within the scope of Article 9 of Law No. 5651 pointed to the existence of a systemic problem, that directly originated from the provision of law and there is a clear need to reevaluate the present system in order to prevent similar new violations.

The Constitutional Court also referred to its *Birgün İletişim ve Yayıncılık Ticaret A.Ş.* decision[26] wherein it is considered that access ban decision to the contents that threaten the democratic social order on the Internet, such as broadcasts that exalt violence, incite and encourage people to adopt the methods of a terrorist organization, to use violence, fostering hatred, retaliation or armed resistance, based on Article 8/A of the Law No. 5651 should only be granted in urgent cases and where "*prima facie* violation," exists *i.e.*, where the violation is apparent without the need of a detailed examination.

The Constitutional Court evaluated that, similar to the procedure stipulated under Article 9 of Law No. 5651, Article 8/A of Law No. 5651 was designed as a method separate from the judicial proceedings set out under current procedural law. The Constitutional Court also evaluated that the criminal judgeship of peace grants access ban decision under Article 8/A of Law No. 5651 without a contentious trial and that the decisions include generic statements irrelevant to the facts, therefore, it is not understood

[25] Keskin Kalem Yayıncılık ve Ticaret A.Ş. ve diğerleri ([GK], B. No: 2018/14884, 27/10/2021), Accessible at https://www.resmigazete.gov.tr/eskiler/2022/01/20220107-17.pdf (Accessed on November 10, 2023).

[26] Birgün İletişim ve Yayıncılık Ticaret A.Ş. ([GK], B. No: 2015/18936, 22/5/2019), Accessible at https://www.resmigazete.gov.tr/eskiler/2019/07/20190712-15.pdf (Accessed on November 10, 2023).

how the courts determined that the relevant broadcasts had clearly and *prima facie* violated personal rights.

Accordingly, the Constitutional Court found that this violation directly results from the law itself, as Article 8/A of the Law No. 5651 does not provide the procedural assurances of judicial law for the protection of freedom of expression and press.

In its decision, the Constitutional Court assessed that Article 8/A of Law No. 5651 lacks basic assurances on the following grounds:

- **Article 8/A of Law No. 5651 lacks the legal security of due procedures under judicial proceedings:** The Constitutional Court assessed that the decisions were granted within 24 hours without trial and the applicants were not notified or otherwise included in the access ban procedure. Therefore, the applicants did not have the opportunity to be informed of the evidence and arguments submitted by the complainants and to provide their own arguments against the same in response.

- **Article 8/A of Law No. 5651 does not provide a firm and effective protection mechanism:** The Constitutional Court determined that the authority reviewing the objection does not examine the evidence and claims of the parties, does not conduct an *ex officio* investigation to determine the facts, which fails to provide fundamental assurance to the counterparty or balance the conflicting rights of the parties.

- **Article 8/A of the Law No. 5651 does not provide assurances for ensuring the decisions are proportionate, as necessitated under a democratic society:** The Constitutional Court assessed that Article 8/A of the Law No. 5651 does not describe how the criminal judgeships of peace are to use their authority or provide the tools to assist them in granting proportionate decisions in accordance with the requirements of a democratic society. Article 8/A of Law No. 5651 should contain the necessary procedural guarantees so that it does not lead to arbitrary practices and does not disproportionately eliminate or restrict the use of individual freedoms. The Constitutional Court further evaluated that a provision should be brought, to ensure a reasonable balance between the tools to be used and the legitimate aim to be achieved, and alternative tools other than the access ban method should be introduced.

IV. Conclusion

In conclusion, the Constitutional Court decided that the interference by access banning the said news content in the news website based on Article 8/A of Law No. 5651 violates the freedoms of expression and press guaranteed under Articles 26 and 28 of the Constitution and this violation directly stems from the law, as it does not consider the fundamental guarantees for the protection of freedom of expression and press. The Constitutional Court also decided to inform Grand National Assembly of Turkiye, as it is determined that the issue at hand arises out of the relevant law.

Telecommunications Law

ICTA's New Principles and Procedures: Confirmation Obligation for Internet/TV and Fixed Phone Services

The Board of the Information and Communication Technologies Authority ("***ICTA***") has decided that the Principles and Procedures on Confirmation Processes Prior to the Establishment of the Individual New Subscription for Internet/TV and Fixed Telephone Services ***("Principles and Procedures***") to be published in the Official Gazette with its decision dated September 5, 2023.[27]

The Principles and Procedures sets forth the obligations of the operators for obtaining confirmation from consumers prior to the establishment of a new individual subscription agreement regarding the internet/TV and, if any, the fixed telephone services to be provided within the scope of the relevant authorization. The scope is limited to the internet/TV and fixed phone services (i) provided with the authorizations for the provision of internet, satellite or cable TV services, cable broadcasting services and satellite platform services, and (ii) that do not involve a change of operator. Moreover, the Principles and Procedures do not cover the new individual subscriptions provided exclusively for fixed phone services.

As per Article 5 of the Principles and Procedures, operators are obliged to call the consumer for confirmation through their customer services via the contact number provided, before the establishment of the new individual subscription agreement. During the call, the operator shall obtain the consumer's confirmation on whether the consumer has received a phone call or SMS regarding the relevant internet or TV service for the marketing or promotion. In case where (i) the consumer was not contacted previously for marketing and promotion purposes, or (ii) the consumer was contacted previously from the operator's authorized channels (as evidenced by the operator) then the consumer's new subscription agreement request will be processed, upon the said confirmation. Furthermore, during the confirmation call, the informative content stipulated in the Principles and Procedures shall be conveyed to the consumer in a clear, comprehensible and accurate manner. The confirmation on initiating a new subscription agreement process shall be obtained from the consumer by verbal consent or by pressing the relevant digits on their devices.

Pursuant to Article 6 of the Principles and Procedures, in case (i) a confirmation call is not made, (ii) a confirmation call is not responded to, (iii) information is not provided in the content stipulated in the confirmation call, or (iv) a consumer does not give consent, then the new subscription agreement process will not be initiated.

The burden of proof regarding compliance with all the processes within this scope shall be on the operator. The Regulation on Administrative Sanctions shall be applied and accordingly, if an operator fails to comply with its obligations set out under the Principles and Procedures, then it might be face an administrative fine up to 3% of its net sales in the previous calendar year. The Principles and Procedures shall enter into force six (6) months after its publication date on Official Gazette. The president of ICTA will execute the provisions of the Principle and Procedures.

[27] https://www.btk.gov.tr/uploads/boarddecisions/internet-tv-ve-sabit-telefon-hizmetlerine-iliskin-bireysel-yeni-abonelik-tesisi-oncesinde-teyit-islemleri-yapilmasi-hakkinda-usul-ve-esaslar/263-2023-web.pdf (Last accessed on October 24, 2023).

White Collar Irregularities

Tackling Data Protection Issues that may Arise when Conducting Electronic Document Reviews

In the context of white-collar irregularities, electronic document review is a particular stage of an internal investigation that involves the process of locating, gathering, and examining electronically stored information, in order to investigate the facts on alleged violations of national or international laws and/or internal company policies.

Depending on the investigation's scope and the size of the company, the extent of this electronic review can vary from only a few hundred to millions of documents. E-mail correspondences, documents, databases, audio and video files, chat logs are just a few examples of what may be reviewed as part of the electronic review process.

As such, electronic review may be considered a particularly meticulous stage of the internal investigation process as a whole, since it is a juncture where fundamental rights of individuals and a company's legitimate interests converge. Therefore, in order to eliminate any risk of fines, penalties or lawsuits against the company, international companies (in particular) have the responsibility to ensure that the electronic review process complies with all local laws, especially in terms of the collection and use of employee data, which may include certain personal information as well.

In the course of electronic review, compliance with provisions of Law No. 6698 on Protection of Personal Data ("***DPL***") which regulate special categories of personal data; cross-border transfer of personal data; and obligations of the data controller with respect to third-party personal data are especially crucial for companies.

Special Categories of Personal Data

Certain categories of personal data may be subject to additional protections as per DPL. For instance, data concerning racial or ethnic origin, political opinions, philosophical beliefs, religion, sect or other beliefs, appearance and clothing, membership to associations, foundations or trade-unions, health or sex life, and criminal conviction and security measures regarding a person, along with their biometric and genetic information are considered as special categories of personal data. As a general rule, special categories of personal data cannot be processed unless data subjects provide their explicit consent. (Article 6 of DPL). Nevertheless, the DPL has brought certain exceptions to the explicit consent requirement. For instance, special categories of personal data other than those related to health and sexual health may be processed without the explicit consent of the data subjects, if the processing is a legal requirement to comply with relevant statutes. Having said that, health and sexual health data may only be processed without explicit consent of data subjects, for the purpose of protection of public health, preventative medicine, medical diagnosis and continuation of treatment plans, by individuals and legal entities who are under a duty of confidentiality.

The most common example for employers' processing of special categories of personal data without explicit consent may be while performing employers' routine compliance obligations in accordance with Tax Law, Labor Law, or Social Security Law.

In the context of an electronic review, the employer may be accessing, reviewing, and transferring to domestic and/or international third-parties, special categories of personal data. In the absence of explicit consent, and lack of other legal basis, the employers may need to base this processing on an existing contractual ground and/or company policy.

Cross Border Transfer

Personal data may have to be transferred abroad during the electronic review process.

As a general rule, personal data can only be transferred abroad if conditions set forth under Article 9 of Law No. 6698 on Protection of Personal Data are met. This means that personal data can be transferred abroad if (i) explicit consent of the data subject is obtained, (ii) another legal basis for processing of personal data exists (*i.e.* contractual relations, legitimate interest) and the country the data will be transferred to is deemed to provide an adequate level of protection by the Turkish Data Protection Board, or (iii) through the process of submitting a written undertaking to the Data Protection Board ("***Board***") to obtain its approval. However, since the Board has yet to issue the list of countries with adequate level of protection, currently, personal data may only be transferred abroad by (i) obtaining explicit consent of data subjects, or (ii) the undertaking letter process.

Third Parties' Personal Data

An additional consideration is when personal data of third parties (*i.e.* individuals other than the custodians) may be caught up in the scope of electronically reviewed documents. If the employer is aware that personal data of third parties may be involved in the scope of electronic review, then employer may need to take additional steps in terms of informing and obtaining explicit consent from third parties, unless processing can be based on an another legal ground.

Depending on the extent and nature of third party personal data at issue, electronic review may be conducted by application of the "legitimate interest" exception to the explicit consent requirement, if the employer can establish that it has a legitimate interest in conducting the internal review and the review does not harm the essence of the third parties' fundamental rights, as the review will be conducted in a proportionate matter by taking reasonable measures to avoid an excessive invasion of third parties' privacy; and the review is necessary to identify legal risks and to ensure compliance with the law or fulfil its legal obligations.

(ii) Solutions

Non-Disclosure Agreements

When personal data is processed on behalf of a data controller by another real person or a legal entity, data controller is held jointly responsible with such third parties for taking necessary administrative and technical measures for protection of personal data.

In order to clearly delineate the lines of responsibility, employers, as data controllers, may enter into a "non-disclosure agreement" with third parties and obtain assurances that third parties to whom their employees' personal data are transferred are also subject to the same obligations under DPL.

Deed of Consent and Privacy Notice

As a separate obligation, the employees should also be clearly informed of the fact that and made aware that their personal data could be accessed, monitored and reviewed by the employer within the scope of electronic review. Privacy notices and consent forms are used for this purpose. These documents should be drafted in compliance with DPL and any relevant secondary legislation and records thereof should be kept by employers.

If the employer is aware that personal data of third parties may be involved in the scope of electronic review, then the employer may need to take additional steps, in terms of informing and obtaining explicit consent from third parties, unless processing can be based on another legal ground.

Redactions and Domestic Transfer

Employers may also consider extracting the personal data that is subject to additional protections, from the scope of review (*i.e.* by applying redactions.) Similarly, employers for whom conditions for cross-border transfer are difficult to fulfil may consider conducting the review domestically.

Litigation

The Constitutional Court rules that Depreciation of Receivables Awarded by a Court Violates the Right to Property

I. Introduction

On March 16, 2023, upon an individual complaint of the Applicant Volkan Kahırlı ("***Applicant***"), the Constitutional Court decided through its Decision ("***Decision***") numbered 2019/22730 that the delayed payment of the receivable without taking inflation into account constitutes a violation of the individual's right to property.

II. Dispute Subject to the Decision

The Applicant is a team member of the Turkish Deaf Football team. The national Turkish Deaf Football team ranked second in World Deaflympics Football Championship held in Patras, Greece in July 2008. According to Article 6 of the (Repealed) Regulation on the Rewarding of Outstanding Achievers in Sports Services and Activities ("***Repealed Regulation***"), the team that won the second prize would be entitled to receive 400 Cumhuriyet gold coins from the state for each team member.

On January 26, 2009, the General Directorate of Youth and Sports ("***Administration***" or "***Defendant***") paid an award in Turkish liras to the Applicant that was equivalent to 75 Cumhuriyet gold coins, based on the exchange value of Cumhuriyet gold on July 12, 2008 (*i.e.,* the date the championship ended). The Applicant made an application to the Administration claiming the unpaid balance of the prize, *i.e.*, 325 Cumhuriyet gold coins. The Administration did not respond to this application within the requisite period and accordingly it was deemed as implicit rejection. Afterward, the Applicant filed a lawsuit for dismissal of the implicit rejection on May 11, 2009, before Ankara 7th Administrative Court. Ankara 7th Administrative Court ruled that the Administration must pay the TRY equivalent of the remaining 325 Cumhuriyet gold coins, based on the exchange value on July 12, 2008, with its legal interest.

On May 10, 2010, the Administration paid TRY 14.462,19, which was the equivalent of 58 Cumhuriyet gold, and appealed the case; yet the appeal was rejected by the Council of State. Upon the decision of the Council of State, on November 30, 2018, the Administration paid TRY 66,750 as the equivalent of the remaining 267 Cumhuriyet gold coins, based on its value on July 13, 2008. However, the Administration did not make any payment for legal interest.

The Applicant brought a full remedial action against the Administration for the depreciation of the value of this receivable, between the date on which the payment should have been made and the date on which the payment was actually made. The lawsuit of the Applicant was rejected.

III. Evaluations of the Court

The Applicant filed a full remedy lawsuit before Ankara 4th Administrative Court, for the amount arising from the diminishment of value of the prize, between the date when the payment should have been made and the date the payment was actually made. The Applicant complained that the Administration had not even paid interest and argued that the TRY 66,750 paid for the remaining 267 gold coins should have been calculated based on the increase in the value of gold.

Ankara 4th Administrative Court dismissed the case and ruled that the calculation method of the administration is in compliance with the legislation.

IV. Evaluations of the Constitutional Court

The Constitutional Court evaluated that the claim is related to the right to property, which is regulated under Article 35 of the Turkish Constitution. According to the Constitutional Court, in case the delay in payment of receivables and compensations results in severe depreciation due to inflation, this constitutes a violation the right to property.

Based on the foregoing, considering that the receivable is paid after 10 years, the Constitutional Court determined that the receivable had depreciated, *i.e.*, diminished in value. Further to this determination, it is ruled that this creates an extreme burden on the Applicant; therefore it upsets the balance between public interest and Applicant's right to property, to the detriment of the Applicant.

V. Evaluations on and the Effects of the Decision

The most significant aspect of the Decision is that it determines that preserving the real value of monetary receivables falls within the protection framework of the property right and that the loss of value due to inflation constitutes a violation of a property right. Indeed, it is a practical reality for litigations in Turkiye that they do take quite some time before a decision is rendered and then finalized. Considering that Turkiye has an inflationist economy, the receivable or compensation awarded by a court may drastically lose its value while one waits for its actual payment date. So much so that this can even be a strong motivation for parties of a dispute with monetary claims to settle instead of going to court, to protect the value of the compensation without any further delay.

Based on the ratio of the Decision and the effects of the Turkish economy over the monetary claims, the Decision is expected to have a positive effect, ensuring justice to prevail and also increase the sense of justice and trust in the rule of law in the public perception.

VI. Conclusions

Article 35 of the Turkish Constitution protects the right to property and ensures individuals' free enjoyment of their properties. In line with this constitutional and global right, the Constitutional Court made an accurate and realistic evaluation for protection of the benefit to be enjoyed through compensation and monetary claims. The Constitutional Court indicated that inflation must be taken into account, as the loss of value caused by inflation is a violation of the right to property.

Intellectual Property Law

The High Court of Appeals General Assembly of Civil Chambers Ruled that the Use of a Registered Trademark within a Trade Name Constitutes Infringement Even Though the Phrase Subject to Trademark Is Not Used as a Component of the Business Being Carried Out

I. Introduction

Article 7 of the Industrial Property Law, with reference to Article 29/1-a thereof, regulates the grounds for infringement of trademark rights. Based on this article, the High Court of Appeals General Assembly of Civil Chambers ruled through its decision dated February 2, 2023, and numbered 2021/446 E. 2023/61 K. that the use of an element of a registered trademark in a trade name constitutes infringement of the trademark rights, even though the phrase subject to the trademark is not used within the course of business activities as a trademark or component element of such business.

II. Evaluation of the Decision

In a civil action initiated before the Civil Court of Intellectual and Industrial Rights, the plaintiff argued that the use of the phrase "MESA" (which was a registered trademark of the plaintiff) within the defendant's trade name constitutes an infringement of trademark rights.
In its defense, the defendant argued that the phrase "MESA" subject to the dispute is only present in the trade name of the company, and it is not used as a trademark within the course of any business activities of the company.
The Regional Court of Appeals, on the basis of Articles 29/1-a and 7/3-e of the Industrial Property Law, ruled that even the mere use of the trademark in a company's registered name would constitute an infringement of the trademark rights, regardless of whether the phrase subject to trademark is used as a distinct component of the business carried out, and therefore approved the decision of court of first instance. However, the High Court of Appeals quashed the Regional Court of Appeals decision on the grounds that usage of the phrase subject to trademark within the course of business is essential element of the breach.

Within its decision, to resolve the disagreement between the High Court of Appeals and the Regional Court of Appeals decision, the High Court of Appeals General Assembly of Civil Chambers decided that the mere use of the trademark in a company`s name would indeed constitute an infringement, even though the phrase is not used as a trademark within the course of any business activities of the defendant.

III. Conclusion

With the decision of the High Court of Appeals General Assembly of Civil Chambers, it is concluded that even the mere use of the trademark in a company's name would constitute an infringement of the trademark rights. Accordingly, even if the phrase subject to protection under the registered trademark is only being used within the company's trade name, this would constitute breach.

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