ISSN 2147 – 558X

ELİG
GÜRKAYNAK
Attorneys at Law

LEGAL INSIGHTS QUARTERLY

March 2024 – May 2024

LEGAL INSIGHTS QUARTERLY

March 2024 – May 2024

Mart/March 2024, Istanbul

Yayın Türü / Type of Publication
Yerel Süreli / Local Periodical

ELİG Gürkaynak Avukatlık Bürosu adına Yayın Sahibi, Sorumlu Müdür / Owner and Liable Manager on behalf of ELIG Gürkaynak Attorneys-at-Law

Dr. Av. Gönenç Gürkaynak
Çitlenbik Sokak No: 12,
Yıldız Mahallesi
Beşiktaş 34349,
ISTANBUL, TURKIYE

ISSN 2147 – 558X

Preface to the March 2024 Issue

The March 2024 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 the issue explains the types of internal directives that apply to Turkish joint-stock companies and provides insight on the new thresholds applicable for minimum share capital amounts of joint-stock companies and limited liability companies. The Banking and Finance law section focuses on utilization of foreign currency loans by ordinary partnerships. Under the Capital Markets Law section, we present an in-depth look at the role of legal expert reports in public offerings.

The Competition Law section of this edition includes two cases on commitments, one of which concerns a re-evaluation of commitments, as well as two interesting merger control cases in two separate markets.

Moving on, under the Employment section, the Constitutional Court's decision on whether the termination of an employment contract due to an employee's social media post constitutes a violation of the right to privacy and freedom of speech is explained in detail. Moreover, the Litigation section also sheds light to another Constitutional Court ruling on the annual changes to the monetary limit for objections and violation of the principle of foreseeability. The Data Protection Law section and the Telecommunications Law section present new and amended secondary legislation, whereas the Internet Law section provides insight on two new Constitutional Court decisions. Finally, the Intellectual Property Law section elaborates on a decision of the General Assembly of the High Court of Appeals on trademarks registered in bad faith.

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.

March 2024

Corporate Law

Types of Internal Directives Applicable for Turkish Joint-Stock Companies

I. Introduction

From the perspective of corporate law, "internal directive" generally refers to a corporate document that is prepared and accepted by relevant company body, for the purpose of determining and structuring the company's organizational rules and principles. As per the Turkish Commercial Code No. 6102 ("***TCC***"), there are three different types of internal directives applicable to joint-stock companies: (i) internal directive regarding the procedures and principles of general assembly meetings, (ii) internal directive regarding the delegation of management, and (iii) internal directive regarding signature authorities. In this Article, we will examine each type of internal directive in turn and point out the main characteristics and differences.

II. Types of Internal Directives

1. Internal Directive regarding the Procedures and Principles of General Assembly Meetings

In order to systematically regulate procedures and principles of general assembly meetings, which can be held with the attendance of shareholders, beneficial owners of the shares (if any) or those acting as proxies, as per the TCC and its secondary legislation.

According to Article 419 of the TCC, as the managing body of a joint-stock company, the board of directors must prepare an internal directive on the procedures and principles of general assembly meetings, and such internal directive must be approved by the general assembly. The internal directive approved by the general assembly is subject to registration; consequently, it must be submitted to and registered with the relevant trade registry and published in the trade registry gazette to inform the public.

The Regulation on the Procedures and Principles of General Assembly Meetings of Joint-Stock Companies and the Ministry Representatives to Attend These Meetings ("***Regulation***") introduces additional provisions to implement Article 419 of the TCC, and sets out the minimum content the internal directive should address with respect to the assembly convening process, as follows:

i. Entrance to the meeting venue and opening of the meeting,
ii. Constitution of the presiding board,
iii. Duties and powers of the presiding board,
iv. Actions to be taken before the discussion of the agenda,
v. Agenda,
vi. Taking the floor and voting at the meeting,
vii. Preparation of the minutes of meeting,
viii. Actions to be taken at the end of the meeting.

The Regulation also provides a template internal directive, which the adopted internal directives must align with. That being said, the board of directors may customize the internal directive by addressing additional rules, principles and procedures if it deems necessary, provided that the internal directive does not contain any provision limiting or eliminating the inalienable rights of shareholders (or the beneficial owner of the shares), such as attending the general assembly meetings, voting, filing a lawsuit, obtaining information, conducting an inspection and

audit, and the duties and powers of the presiding board.

It is also important to note that even in the case where the company has only one shareholder and its board of directors consists of just one member, an internal directive regarding the procedures and principles of general assembly meetings must be still prepared by the board of directors and approved in the general assembly. The TCC and its secondary legislation do not grant an exception for this circumstance.

On a final note, unless the internal directive regarding the procedures and principles of general assembly meetings is not duly approved and registered following the incorporation of a joint-stock company, the trade registries usually do not accept or process applications for other matters that may need registration and compel the company to satisfy this requirement first. From this point of view, failing to register this internal directive might also technically prevent the daily operations of a joint-stock company. Therefore, the registration process of the internal directive must be completed immediately after the company has been incorporated.

2. Internal Directive regarding the Delegation of Management

In accordance with Article 365 and Article 374 of the TCC, as the managing body, the board of directors is authorized to decide on all matters that are necessary for the joint-stock company to achieve its objectives, save for those that are specifically designated as duties of the general assembly by the mandatory provisions of law and/or articles of association of the company in question.

Nevertheless, Article 367 of the TCC allows board of directors to delegate its management authority powers fully or partially to certain member(s) of the board of directors or to a third party, by way of an internal directive, except those that fall under its non-transferable duties. Non-transferable duties of the board of directors are provided under Article 375 of the TCC and those are: (i) high-level management of company and rendering instructions thereof, (ii) determination of the organizational structure, (iii) establishment of necessary structure for financial planning, (iv) appointment and removal of authorized signatories, (v) supervision of persons who are responsible for the management of the company, (vi) holding the company books, preparation of annual activity reports, issuance of corporate governance disclosures and submitting them to general assembly, preparation of general assembly meetings and execution of the general assembly resolutions and (vii) conducting a notification to court in case of bankruptcy.

To that end, the internal directive regarding the delegation of management must clearly define the relevant duties, description of roles and reporting mechanisms in the corporate organization of a joint-stock company.

For such a delegation, articles of association of the company must explicitly include a provision that enables delegation of management. This provision may be included in the articles of association while the company is being incorporated or added at any time after the incorporation by amending the existing articles of association. Unless duly delegated, the management authority is the joint responsibility of all members of the board of directors.

Article 367 of the TCC does not require this internal directive to be registered with

the trade registry. Instead, said article states that the board of directors must provide information about this internal directive, upon the request of shareholders and those creditors who can conclusively demonstrate their protectable interests, in writing.

Internal directive regarding the delegation of management is crucially important for ascertaining the extent of a board member's liability and accountability. Pursuant to Article 553 of the TCC, in principle, if board members are found to be at fault for failing to fulfil their duties and liabilities arising from the law and the articles of association, such members become liable for damages incurred by the company, shareholders and creditors. Where the management authority has been partially or fully delegated by the board of directors to certain member(s) of the board or to a third party by way of issuing an internal directive in line with Article 367, the board members cannot be held liable for actions and decisions of the authorized persons, unless it is proved that the board of directors had failed to take reasonable care in choosing these individuals.

3. Internal Directive regarding Signature Authorities

In order for joint-stock companies to grant limited signature powers to the board members who do not have any signature authority, or other third parties who have employment relationship with the company, Article 371/7 of the TCC introduces another internal directive which in practice, is called the "internal directive regarding signature authorities".

For issuance of internal directive regarding signature authorities, first a specific provision must be included in the articles of association of the company. This provision could be added to the articles of association during the incorporation phase of the company or at a later stage, after the company is incorporated.

The internal directive regarding signature authorities should only define the scope of limited signature powers in terms of monetary amounts threshold and/or the specific subject matters, without referring to the identity of the particular individuals who will be granted such powers. Although there is no template or draft introduced by any regulation or secondary legislation for this type of internal directive, in practice the general tendency is to assemble the relevant signature powers under certain signature groups, such as Group A, Group B, Banking Authorities, Contracts etc. It is also possible to refer to the job titles in the internal directive to indicate the authorised person, such as the CEO, finance director, or human resources director. The internal directive must be prepared by the board of directors and registered with the trade registry in order to be valid. Once the internal directive is registered with the trade registry, the board of directors may assign relevant individuals to the signature groups and roles defined in the internal directive. Such assignments are also subject to registration with the trade registry.

It is also worth noting that to amend, expand or narrow the scope of an internal directive which has been already registered with the trade registry, the former internal directive must be cancelled, and a new internal directive must be prepared and accepted by the board of directors in its place, each time. The new internal directive must also be registered with the trade registry and accordingly, the signatories should be re-assigned to the relevant signature groups and roles.

In order for joint-stock companies to grant limited signature powers to the board members who do not have any signature authority, or other third parties who have employment relationship with the company, Article 371/7 of the TCC introduces another internal directive which in practice, is called the "internal directive regarding signature authorities".

For issuance of internal directive regarding signature authorities, first a specific provision must be included in the articles of association of the company. This provision could be added to the articles of association during the incorporation phase of the company or at a later stage, after the company is incorporated.

The internal directive regarding signature authorities should only define the scope of limited signature powers in terms of monetary amounts threshold and/or the specific subject matters, without referring to the identity of the individuals who will be granted such powers. Although there is no template or draft introduced by any regulation or secondary legislation for this type of internal directive, in practice the general tendency is to assemble the relevant signature powers under certain signature groups, such as Group A, Group B, Banking Authorities, Contracts *etc.* It is also possible to refer to the job titles in the internal directive to indicate the authorised person, such as the CEO, finance director, or human resources director. The internal directive must be prepared by the board of directors and registered with the trade registry in order to be valid. Once the internal directive is registered with the trade registry, the board of directors may assign relevant individuals to the signature groups and roles defined in the internal directive. Such assignments are also subject to registration with the trade registry.

It is also worth noting that to amend, expand or narrow the scope of an internal directive which has been already registered with the trade registry, the former internal directive must be cancelled, and a new internal directive must be prepared and accepted by the board of directors in its place, each time. The new internal directive must also be registered with the trade registry and accordingly, the signatories should be re-assigned to the relevant signature groups and roles.

III. Conclusion

Under Turkish corporate law, there are three different types of internal directives which apply to joint-stock companies. Among these, while the internal directive regarding the procedures and principles of general assembly meetings is mandatory, the internal directives for delegation of management and signature authorities are optional, depending on the relevant company`s requirements and its corporate structure.

New Thresholds for Minimum Share Capital Amounts of Joint-Stock and Limited Liability Companies

Articles 332 and 580 of the Turkish Commercial Code No. 6102 ("***TCC***") address the minimum share capital requirements of joint-stock companies and limited liability companies and stipulate that higher amounts may be introduced by the President of the Republic of Turkiye. In this regard, with the Presidential Decree No. 7887 ("***Decree***") published in the Official Gazette dated November 25, 2023, and amended on November 26, 2023, the minimum share capital amounts stipulated for joint-stock and limited liability companies have been increased, and the change has come into effect as of January 1, 2024. In this regard,

i. The minimum registered share capital for a joint-stock company has been increased to TRY 250,000 (from TRY 50,000);

ii. The minimum registered share capital for a limited liability company has been increased to TRY 50,000 (from TRY 10,000); and

iii. The minimum initial share capital for joint-stock companies that are subject to the authorized share capital system was raised to TRY 500,000 (from TRY 100,000).

For the purpose of ensuring a smooth transition process both for the trade registry directorates and the companies, the Ministry of Trade has also set out additional rules for implementing this change by a circular addressed to the trade registries. In this regard, unless otherwise instructed by the Ministry, it is expected that the trade registries will also seek the following:

i. For capital increases and transactions involving conversion of company types, the new share capital of the company cannot fall under the new minimum share capital.

ii. For partial demerger transactions, if the share capital of the entity to be split will be also decreased, it cannot fall below the new minimum share capital figures.

iii. If it becomes necessary for a company to take certain measures (*e.g.* share capital increase) due to the loss of its share capital or a technical bankruptcy within the scope of Article 376, the measure should take into account the new minimum share capital figures.

It should be also underlined that, save for the foregoing circumstances, the companies incorporated before January 1, 2024 with share capitals lower than the amounts introduced by the Decree, will be able to continue to operate without increasing their existing share capitals. Neither the Decree nor the Ministry of Trade has introduced any additional action or requirement for these companies.

On a final note, the new minimum share capital amount requirements introduced by the Decree are only applicable for companies whose activities are not subject to any special regulation. If the activities of a company fall under a regulated sector, then provisions set out under the particular sectoral law will prevail in terms of such companies. In such a case, provisions of the TCC and the Decree regarding the new capital requirements will not be applicable.

Banking and Finance Law

Utilization of Foreign Currency Loans by Ordinary Partnerships

I. Introduction

The Circular on Capital Movements ("***Circular***") introduced by the Central Bank of the Republic of Turkiye was issued in accordance with the Decree No. 32 on the Protection of Value of Turkish Currency ("***Decree***") and Article 16 of the Communiqué on Decree No. 32 on the Protection of the Value of the Turkish Currency ("***Communique***"). The Decree, the Circular and other secondary legislation are intended to regulate the local and foreign capital movements, import, export and foreign currency purchase transactions. In this context, Article 53 of the Circular specifically sets

out certain rules and conditions as to the utilization of foreign currency loans ("***FX Loans***") by ordinary partnerships whose shareholders are legal entities. Ordinary partnerships consisting of real person shareholders do not fall under the scope of the relevant provision.

II. Overview of Ordinary Partnerships and Utilization of Foreign Currency Loans

According to Article 620 of the Turkish Code of Obligations ("***TCO***"), ordinary partnership contract is an agreement where two or more persons undertake to combine their resources, such as labor or property, to achieve a common purpose. Shareholders of an ordinary partnership could be real persons or legal entities. As ordinary partnerships do not have a separate legal personality, the debts arising from the partnership's transactions are in fact deemed to be the debts of shareholders themselves. Pursuant to Article 638 of the TCC, unless otherwise decided by shareholders of an ordinary partnership, the shareholders shall be jointly and severally liable for the debts of the ordinary partnership.

In contravention to the TCO, Article 53 of the Circular brings an exception where ordinary partnerships, whose shareholders are legal entities, are also deemed to be legal entities resident in Turkiye. Said article also states that the FX Loans of ordinary partnerships are deemed as having been utilized by the shareholders.

Utilization of the FX Loans is subject to certain conditions which take into consideration the shareholders` foreign currency income and the loan balances. Pursuant to the Communique, loan balance refers to the total unpaid amount of the FX Loan(s) utilized from Turkiye or abroad. In this context, the total amount of each shareholder's foreign currency income is regarded as the ordinary partnership's foreign currency income, and the FX Loan amount utilized by an ordinary partnership is separately deducted from the existing loan balance of each shareholder in proportion to their liabilities in the partnership. In other words, FX Loan of the ordinary partnerships is treated as a loan granted to each shareholder of the partnership and consequently, it reduces the loan balance of each shareholder.

As utilization of FX loan by an ordinary partnership is related to foreign currency income and loan balance of the shareholders, Article 53 of the Circular requires the foreign currency income of each shareholder to be documented. To that end, shareholders are required to (i) fill in and submit the foreign currency income declaration form annexed in the Circular and (ii) submit other reports evidencing the foreign currency income, which are to be prepared and approved by a sworn or certified public accountants based on the unconsolidated financial statements of each shareholder for the last three years. These documents shall be submitted to the relevant bank or financial institution along with a notarized copy of the ordinary partnership agreement.

Article 53 of the Circular also requires the relevant bank or financial institution which will provide the loan directly or act as an intermediary, to check the records of Risk Center of the Banks Association of Turkiye ("***Risk Center***") and determine the loan balance of the shareholders in proportion to their shareholding ratio. Accordingly, if the loan balance is equal to or above USD 15 million, the ordinary partnership may utilize the FX Loan without being subject to further restriction in accordance with paragraph 1/(b) of

Articles 21 and 40 of the Circular. On the other hand, if the loan balance is below USD 15 million, the ordinary partnership may utilize the FX Loan provided that sum of the (i) requested loan amount and (ii) current loan balance shall not exceed its total foreign currency income in the last three fiscal years, in accordance with the Articles 20 and 39 of the Circular.

Once the FX Loan is utilized by the ordinary partnership, such amount is included in the loan balance of each shareholder in proportion to their shareholding percentage and such amount is also notified to the Risk Center.

III. Conclusion

The Circular stipulates certain conditions for utilization of the FX Loans by ordinary partnerships whose shareholders are legal entities. As an ordinary partnership does not have legal personality itself, the Circular seeks relevant criteria at the shareholders' level. Accordingly, an ordinary partnership may utilize an FX Loan to the extent that loan balance of its shareholders is sufficient.

Capital Markets Law

Legal Expert Reports in Public Offerings

I. Introduction

According to Capital Market Law No. 6362 ("***CML***"), a public offering is defined as a general call or offer for the purchase of capital market instruments through various methods and the sale realized following this call. A public offering can also be defined as the offering of the company's capital market instruments to persons other than the company's shareholders, under a certain set of rules.

In addition, public offering is also considered to be a transaction in which companies raise funds for their operations, as a result of long and detailed valuation processes. Within this structure, it is important for the relevant persons and investors to obtain complete and accurate information about the company in question, both from legal and financial aspects. In this context, offering circulars play a vital role in public offering transactions.

Offering circular is defined by the CML as a public disclosure document that includes all information that will enable investors to make a realistic assessment on the financial position and performance of the issuer (and the guarantor, if any) as well as its expectations for the future, its activities, the characteristics of the capital market instruments to be issued or traded on the stock exchange, and the rights and risks associated therewith. Borsa Istanbul A.Ş. Listing Directive ("***Listing Directive***") also regulates the reports to be prepared by independent legal experts, *i.e.*, the legal opinions to be issued as part of the offering circular.

In light of the foregoing, our aim in this article is to explain the concept of independent legal expert report, its scope and function under Turkish capital market law.

II. Independent Legal Expert Reports and its Scope

Pursuant to the Listing Directive, the legal expert report should be prepared by an expert legal counsel who has no direct or indirect relationship with the partnership. As partnerships, issuers and fund founders

whose capital market instruments are listed on Borsa Istanbul A.Ş. or who apply for listing on the stock exchange or for trading without being listed are subject to the provisions of this Listing Directive, independent legal expert reports will be required even if the public offering company is not listed on the stock exchange.

Within the scope of the Listing Directive, the persons drafting the legal report report are liable for the inaccuracies in the legal expert report submitted to Borsa Istanbul A.Ş., such liability to be based on fault and the requirements of the situation. By issuing the report, the legal expert also accepts and undertakes that the said report will be disclosed to the public as part of the offering circular.

Independent legal expert's reports must comprise and assess the following content:

i. information on the partnership (*i.e.,* company details, corporate structure, shareholding, powers of attorney, articles of association of the company),

ii. contracts signed with financial institutions,

iii. material clauses of the agreements executed for conducting the partnership/issuer's operations,

iv. special legislation to which the partnership is subject,

v. description of the assets registered in the partnership/issuer's books and any encumbrances on these assets (guarantees, pledges, mortgages, *etc.*),

vi. permits, authorizations, licenses, etc. that the partnership/issuer must obtain, in order to carry out its activities,

vii. whether the resolutions of the board of directors and general assembly of the partnership/issuer are taken in accordance with the meeting and decision quorums under the Turkish Commercial Code No. 6102,

viii. the list of legal disputes that may affect the activities of the partnership/issuer, and any current and potential impact on the activities of the partnership/issuer, in the event these legal disputes are concluded against the partnership/issuer,

ix. employment related matters.

Accordingly, for the matters and documents required to be reviewed by the independent legal expert pursuant to the Listing Directive, the information and documents submitted by the company will not be sufficient on their own. Other information and documents regarding the legal status of the activities must also be examined and a transparent and independent legal expert report prepared. From this perspective, independent legal expert reports are similar to the legal due diligence reports frequently prepared in M&A deals.

III. Conclusion

Independent legal expert reports have a significant role in public offering transactions, as this is a resource aiming to provide truthful, complete and accurate information about a company during the public offering process. From this point of view, the lawyer who prepared the report may be held liable in case of any missing and/or inaccurate information in the report.

Competition / Antitrust Law

The Board's Approach towards the Re-evaluation of the Commitments and Online Sales Restrictions: A Brief Analysis of the BSH Decision

I. Introduction

The Turkish Competition Board ("***Board***") has recently released its reasoned decision ("***Decision***") concerning the request for the re-evaluation of previously accepted commitments submitted by BSH Ev Aletleri Sanayi ve Ticaret A.Ş ("***BSH***") ("***Commitment Decision***"). This Decision exemplifies the Board's implementation of Article 43(4)(a) of Law No. 4054 on the Protection of Competition ("***Law No. 4054***"), which empowers the Board to review previously approved commitments should there be a significant alteration in any of the factors upon which the initial commitment decision was predicated.

II. Background

The Decision originates from the Board's investigation [1] where the Board had focused on two sets of competition law concerns: (i) concerns stemming from territory/customer restrictions and resale price maintenance allegations, and (ii) concerns stemming from BSH's selective distribution system.

With regard to the first set of competition law concerns, the Board concluded that BSH did not violate Article 4 of the Law No. 4054 considering that (i) no information and documents were found that indicated BSH has engaged in resale price maintenance, and (ii) BSH did not impose customer and territorial restrictions to its authorized dealers.[2]

The Board identified the following matters with regard to the second set of competition law concerns: (i) online sales ban for BSH's authorized dealers on e-commerce platforms, (ii) restriction of selective distribution network members' active sales targeting end-users in the physical sales channels, (iii) exclusive supply clauses in the physical sales channels, restricting selective distribution network members' ability to purchase goods from other selective distribution network members, and (iv) clauses that restrict authorized dealers' active and passive sales to certain customers groups in the physical sales channels.

With a view to eliminate the identified competition law concerns, BSH proposed to submit commitments and the Board accepted BSH's commitment proposal, thereby initiating the commitment negotiations with BSH. As a result of the commitment negotiations, BSH submitted its first commitment package to the Authority, which was rejected by the Board.[3] Upon the Board's decision, BSH submitted a second commitment package to the Authority. BSH's second commitment package was accepted and made binding by the Board's Commitment Decision in September 2022, and the relevant reasoned decision was published in April 2023.

Soon after the reasoned Commitment Decision was published on the Turkish Competition Authority's ("***Authority***"), the Board published another reasoned

[1] Investigation launched with the Board's decision dated September 9, 2021 and numbered 21-42/617-M.

[2] The Board's decision dated 15.12.2022 and numbered 22-55/864-358.

[3] The Board rejected the first commitment package of BSH with its decision dated July 25, 2022 and numbered 22-33/524-M.

decision, this time concerning Arçelik Pazarlama A.Ş.'s ("***Arçelik***") conducts which were similar to the ones investigated within the scope of the Commitment Decision ("***Arçelik Decision***").[4]

The investigation concerning Arçelik Decision has also been concluded with the acceptance of certain commitments submitted by Arçelik. According to BSH, some of the commitments accepted by the Board within the scope of the Arçelik Decision had more favorable conditions compared to BSH's commitments. Accordingly, BSH applied to the Board and requested that its commitments be re-evaluated.

III. BSH's Proposed Amendments

In its call for re-evaluation, BSH requested the Board to amend certain commitments previously imposed upon them. Firstly, BSH proposed modifying the approved clause regarding authorized dealers' sales on platforms. The proposed amendment would permit authorized dealers to sell exclusively to end consumers from platform stores and restrict the sale of a maximum of two products from the same group to a single consumer. Secondly, BSH suggested introducing two additional criteria for authorized dealers in their selective distribution system. These obligations included achieving a minimum success level of 80% in store evaluations on relevant online platforms and ensuring that sales from the dealer's store and website accounted for at least 85% of total turnover.

Regarding the first amendment proposed, which concerned prohibiting sales to unauthorized dealers and limiting the number of products sold, BSH explained its intention was to prevent unauthorized resellers from posing as authorized dealers on online platforms. Basing its argument on the principles of selective distribution systems, BSH asserted that such measures were essential to maintain the integrity of its dealer network. The limitation on platform sales was deemed reasonable, mirroring restrictions in physical sales channels, and served to deter unauthorized resale.

Concerning the requirement to achieve a minimum success level of 80%, BSH emphasized the significance of maintaining corporate and brand image within selective distribution systems. Dealers' adherence to service standards on online platforms was crucial for preserving brand reputation. BSH contended that the evaluation criteria for online stores were based on objective metrics, making the minimum success level requirement reasonable and necessary to uphold distribution quality and brand perception. Moreover, BSH assured dealers failing to meet this requirement would be provided with a warning and an opportunity to improve over a three-month period before any termination action was taken.

Regarding the obligation requiring physical sales to constitute at least 85% of total turnover, BSH justified this measure by highlighting its relatively low market share, indicating that it would not unduly hinder online sales. With its market share below 40% in relevant sectors, BSH argued that imposing such a requirement on authorized dealers did not raise competitive concerns. BSH also cited paragraph 25 of the Guidelines on Vertical Agreements ("***Guidelines***") and noted that the proportion of dealers' online marketplace sales in total sales of white goods and small household appliances markets typically did not surpass the 15%

[4] The Board's decision dated 08.09.2022 and numbered 22-41/580-240.

threshold. Furthermore, BSH highlighted that, according to the Guidelines, suppliers are allowed to establish a minimum ratio of physical sales that does not impede online sales, aiming to maintain the efficacy of physical sales channels. Therefore, BSH argued that the 85% ratio did not obstruct online sales and thus complied with the Guidelines. Additionally, BSH emphasized that in the competitive landscape of goods distribution, allowing Arçelik to adopt a more flexible distribution system to safeguard its selective distribution quality would diminish BSH's competitiveness in the market. BSH also affirmed its commitment to providing information on product sales from online marketplaces and the corresponding ratio to total sales, enabling the Authority to monitor whether authorized dealers' online marketplace sales reached the 15% benchmark. This process would then allow the Authority to reassess the requirement, if necessary.

IV. Board's Assessment of BSH's Proposed Amendments

The Board acknowledged that BSH's requests fundamentally stemmed from its aim to safeguard its brand image through the selective distribution system, enhance the efficacy of marketing strategies, improve service quality for end consumers, and align with the criteria imposed on Arçelik's authorized dealers in its selective distribution system, as acknowledged in the Arçelik Decision, given BSH's relatively lower market share in the relevant market.

To assess the viability of BSH's proposed amendments, the Board initially conducted a brief analysis of the selective distribution system criteria outlined in the Arçelik Decision. These criteria include: (i) prohibiting multiple sales by authorized dealers (defined as the sale of more than two products in the same product group), (ii) requiring authorized dealers to rank within the top 20% of stores on online platforms, and (iii) mandating that a minimum of 85% of an authorized dealer's sales must occur through physical channels. Considering these criteria, the Board evaluated the Commitment Decision had been based on market conditions before the date of the Arçelik Decision, recognizing that the market landscape significantly shifted with the implementation of the criteria outlined in the Arçelik Decision.

In light of these considerations, the Board opted to approve BSH's proposed amendments pursuant to Article 43(4)(a) of Law No. 4054, given the substantial alteration in market conditions.

However, the Board emphasized the need to monitor the minimum sales requirement (*i.e.,* the obligation for 85% of sales to occur through authorized dealer's store and its own website), as well as the details of terminated agreements with authorized dealers, to observe any further changes in market conditions. Nevertheless, the Board deemed this condition would be acceptable as a short-term solution.

V. Conclusion

The Decision rendered by the Board underscores the Board's power to reassess the previously accepted commitments in light of evolving market conditions according to Article 43(4)(a) of the Law No. 4054. This decision, emanating from BSH's request for amendments to previously accepted commitments, not only reflects the Board's dedication to preserving competition integrity but also offers valuable insights into its approach to selective distribution systems.

Through a meticulous evaluation of BSH's proposed amendments and a comparative analysis with criteria established in the Arçelik Decision, the Board demonstrated a nuanced understanding of the shifting dynamics within the market landscape. By approving BSH's amendments while emphasizing the need for ongoing monitoring, the Board strikes a balance between fostering competitive markets and safeguarding the interests of all stakeholders involved.

Furthermore, the Decision serves as a testament to the Board's adherence to procedural fairness and transparency, as it navigates complex competition law concerns and seeks to uphold the principles of competition and consumer welfare.

In essence, the Commitment Decision serves as a pivotal milestone in the Turkish competition landscape, showcasing the Board's adaptability and dedication to ensuring a level playing field for all market participants. As the decisional landscape continues to evolve, this Decision sets a precedent for future cases and underscores the importance of continuous evaluation and refinement in fostering competitive markets.

Turkish Competition Board Approves Farmasi's Commitment Package on Online Sales Restrictions in the Cosmetics Industry

I. Introduction

The Turkish Competition Board ("***Board***") has published its reasoned decision ("***Reasoned Decision***") [5] wherein it assessed the commitment package proposed by Farmasi Enternasyonal Ticaret AŞ ("***Farmasi***"), an undertaking operating in cosmetics and personal care products market. The Board's assessment follows Farmasi's application to the Turkish Competition Authority ("***Authority***") to initiate the commitment process in terms of the allegations within the scope of the full-fledged investigation launched by the Authority,[6] and aimed at determining whether Article 4 of Law No. 4054 on the Protection of Competition ("***Law No. 4054***") had been violated. Below, we provide background information on the Reasoned Decision, further details on the Board's substantial assessment of Farmasi's practices, and the commitment procedure within scope of the Reasoned Decision.

II. Background Information

On June 23, 2022, the Board initiated a preliminary investigation against several undertakings in the cosmetics market, including Farmasi. The preliminary investigation aimed to determine whether these undertakings violated Article 4 of Law No. 4054 by restricting their resellers' online sales and/or interfering in their resale prices. Subsequently, on October 20, 2022, the Board decided to initiate a full-fledged investigation against Farmasi to further evaluate the alleged violations. The allegations raised against Farmasi pertained to the restriction of online sales under its agreements with authorized resellers. Additionally, it was anticipated by the Authority that these agreements might contain provisions restricting the territories and customers of Farmasi's resellers.

During the investigation period, Farmasi initiated a settlement request on November 24, 2022, before the legal deadline for

[5] The Board's decision dated 02.03.2023 and numbered 23-12/187-63.

[6] The Board's decision dated 20.10.2022 and numbered 22-48/696-M(2).

submitting the undertaking's first written defence had expired. Furthermore, during the ongoing investigation process, Farmasi made a commitment application to the Authority on January 13, 2023, and following the commitment application, the Board decided to commence the commitment process[7] within the meaning of Communiqué No. 2021/2 on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition, and Abuse of Dominant Position ("***Communiqué No. 2021/2***").

In the Reasoned Decision, the Board scrutinized the commitment package in order to ascertain whether the proposed commitments are sufficient to address the competitive concerns under investigation. Following its evaluation, the Board accepted Farmasi's commitments, deeming them adequate to eliminate competitive concerns and, consequently, concluded the investigation against Farmasi with respect to its practices regarding the restriction of online sales.

III. The Board's Substantial Assessment and the Commitment Procedure

The Board's Reasoned Decision briefly provides information on Farmasi and its activities, indicating that it engages in the import, export, retail and/or wholesale purchase and sale as well as direct or door-to-door marketing of all types of personal care and cosmetic products in Turkiye. Moreover, it is noted that Farmasi markets its products with a direct sales business model, along with other brands it owns. Based on this and considering the Board's precedents, in the Reasoned Decision the Board defines the relevant product market as "cosmetics and personal care products" and the relevant geographic market as "Turkiye" and makes an assessment based on this consideration, which are explained in further detail below.

1. The Board's assessment of restriction of online sales

In the Reasoned Decision, the Board evaluates that the agreements concluded by Farmasi with its authorized resellers include provisions requiring the resellers to obtain approval from Farmasi to conduct sales through online channels and potentially restricting the resellers' territories and customers. Accordingly, the Board notes that certain provisions give rise to concerns in terms of restriction of online sales.

Within this scope, in the Reasoned Decision, the Board indicates that the online sales are considered as passive sales as per paragraph 25 of the Guidelines on Vertical Agreements ("***Vertical Guidelines***") providing that "the restriction, by a supplier, of distributors/dealers/buyers from making sales on their own websites is a type of passive sales restriction." Based on this, the Board's Reasoned Decision considers that limitations imposed by a supplier in terms of the regions or customers to whom the buyer may sell goods or services, constitute a restriction that cannot benefit from the block exemption under Article 4 of Communiqué No. 2002/2 on Block Exemption for Vertical Agreements ("***Communiqué No. 2002/2***").

On the other hand, referring to paragraph 28 of the Vertical Guidelines, the Board highlights that the suppliers could establish specific quality standards and/or conditions

[7] The Board's decision dated 23.02.2023 and numbered 23-10/176-M(1).

for product sales through online channels, aiming to ensure the provision of specific services to consumers. The Board emphasizes that, despite the possibility of introducing additional conditions, the primary objective should not be to impede online sales directly or indirectly. Rather, these conditions must be objectively concrete and reasonable, with the overarching goal of safeguarding distribution quality, enhancing brand image, and/or potential effectiveness. Moreover, referring to Article 4(c) of Communiqué No. 2002/2, the Board indicates that members of the selective distribution system could engage in active or passive sales to the customers in any region, including online channels.

2. Farmasi's commitments and the Board's assessment

Based on the Board's considerations on agreements signed with Farmasi's resellers, in an attempt to eliminate the concerns, Farmasi submitted a commitment package which constituted the following:

i. Farmasi proposed to change the provision in the agreements which obliged resellers to obtain Farmasi's approval before engaging in online sales or online marketing. This provision was proposed to be replaced with the following provision which allowed the resellers to sell the products on any platform, including online platforms: "*Entrepreneurs can sell products in any platform they wish, including online retail e-commerce sites and marketplaces.*"

ii. Farmasi also proposed to exclude the provisions that (i) limited the resellers' activities to only promotional marketing, and banned sales of Farmasi products in promotional stands of shopping malls, hairdressers/barbers/beauty salons, sports/slimming centers, and (ii) prevented resellers from engaging in direct sales, gift and raffle campaigns or written posts on the resellers' websites, in the new agreements that will be executed with all current and future resellers.

iii. Farmasi also proposed to submit a commitment confirmation petition, regarding the new agreements signed with its resellers incorporating the above changes, within 60 days of the date the Board's short-form decision regarding the proposed commitments is officially served on them.

In light of the foregoing, the Board accepted Farmasi's proposed commitments as (i) the commitment package submitted by Farmasi related to sales restrictions imposed on resellers, especially online sales bans, therefore the restrictions in question did not amount to a clear and hard-core violation, and (ii) the commitment application was submitted within the period of three months from the official receipt of the investigation notice, as stipulated under Communiqué No. 2021/2.

The Board also concluded that the commitment package submitted by Farmasi would eliminate the competition concerns raised within scope of the investigation and, therefore, unanimously decided to terminate the investigation with respect to the conduct relating to the restriction of online sales.

IV. Conclusion

The Board's Reasoned Decision, which signals that restrictions on online sales in

the cosmetics and personal care products market are subject to the Board's scrutiny, provides another example for the increasing trend of investigations concluded through the commitment mechanism. Through its detailed assessment, the Reasoned Decision also offers valuable insights into how the Board analyses and addresses contractual provisions that impose limitations on online sales and seeks to show the Authority's dedication to enhancing access for all consumers of cosmetic products, to online sales channels.

The Competition Board Approves Coca-Cola's Acquisition of Anadolu Etap İçecek, Addressing Vertical Overlaps in Fruit Juice Market

I. Introduction

On April 6, 2023, the Turkish Competition Board ("***Board***") unconditionally approved the transaction concerning the acquisition of certain percentage of shares and sole control of Anadolu Etap Penkon Gıda ve İçecek Ürünleri Sanayi ve Ticaret A.Ş. ("***Anadolu Etap İçecek***") by Coca Cola İçecek A.Ş. ("***CCI***") ("***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 Calling for the Authorization of the Competition Board ("***Communiqué No. 2010/4***").[8]

The Decision is noteworthy in the sense that it provides detailed analyses on whether the vertical overlaps between the "fruit juice concentrates and purees market" and "fruit juice market" would give rise to input and customer foreclosure.

[8] The Board's decision dated 06.04.2023 and numbered 23-17/318-106.

II. The Board's Assessment on the Transaction

1. Relevant Product and Geographic Market Analysis

It was noted that the Target, Anadolu Etap İçecek, operates in the field of production and sales of fruit juice concentrates and purees, which are used as intermediary products in the production of fruit juice or similar beverages. In terms of CCI's activities, the Board noted that CCI is active in the production and sales of fruit juice.

In its relevant product market assessment, the Board noted that in the production of fruit juice concentrates and fruit purees, certain fruits are more suitable for the production of fruit juice concentrate, while others are suited for production of fruit puree. Additionally, the Board remarked that the firms producing fruit juice, whose demands comprise a significant portion of the total demand for fruit juice concentrates and purees, diversify their product portfolio by using several types of fruits, and do not rely only on certain types. To that end, it was remarked that while the relevant product market could be sub-segmented based on each fruit type depending on which fruit juice concentrate or fruit puree is used in a given fruit juice, such sub-segmentation is unwarranted given that fruit juice concentrate and fruit puree producers have been producing all the intermediary product types; and in parallel, producers of fruit juice and similar beverages demand all types of intermediary products and use them as an input for their own products. Accordingly, the Board remarked that the relevant product market may be defined as "*fruit juice concentrate and fruit puree market*". The Board has left open the exact relevant market definition by relying on paragraph

20 of the Guidelines on the Definition of Relevant Market, whereas the transaction in question does not give rise to competition law concerns regardless of the market definition.

That being said, considering that Anadolu Etap İçecek's activities of fruit juice concentrate and fruit puree production and sales vertically overlaps with CCI's activities of fruit juice production and sales, the Board identified the affected markets as "fruit juice concentrate and fruit puree market" and "fruit juice market". The Board remarked that there would be no horizontally affected market arising from the Transaction.

In terms of relevant geographical market, the Board determined relevant geographical market as Turkiye, considering that the products supplied by the parties in the relevant product market can be sold throughout Turkiye.

2. Assessment Concerning Vertically Affected Markets

In terms of its assessment within the scope of Article 7 of the Law No. 4054, the Board first delved into the vertically affected markets, namely, the "fruit juice concentrate and fruit puree market", which is the upstream market where Anadolu Etap İçecek operates in, and then the "fruit juice market", which is the downstream market where CCI operates in. Within this scope, the Board primarily assessed whether the vertical overlaps between CCI and Anadolu Etap İçecek would give rise to input or customer foreclosures.

a. The Board's Assessment of Input Foreclosure

Within the scope of its input foreclosure assessment, the Board first reviewed the market shares Anadolu Etap İçecek had in the fruit juice concentrate and fruit puree markets during the 2020 – 2022 period. The Board determined that the based on its 2022 market share, Anadolu Etap İçecek is a strong player in the relevant market. In that context, the Board remarked that in case Anadolu Etap İçecek supplies all of its production to CCI, other actual or potential customers in the downstream market may theoretically face the risk of not accessing a sufficient supply sources.

That being said, the Board noted that a total of 57 undertakings operate in the downstream fruit juice market and five of the ten largest undertakings in terms of their market shares are vertically integrated in this market. Accordingly, the Board remarked that vertical integration is a typical operational structure in the fruit juice industry.

Furthermore, the Board remarked that the customers of fruit juice concentrate and fruit puree could easily switch suppliers, considering that these products are homogenous, seasonal, and periodical factors affect the product quality and cost structure of agricultural products. The Board further noted that within the last three years prior to the Transaction, Anadolu Etap İçecek has supplied various customers in the market in varying amounts, the customers could easily switch suppliers in the market and most of Anadolu Etap İçecek's domestic sales have been made to CCI. Additionally, the Board remarked that three of the vertically integrated undertakings in the market have also supplied their inputs from Anadolu Etap İçecek.

The Board then focused on the alternative suppliers and their total shares in the market and indicated that Anadolu Etap İçecek's customers other than CCI could easily find themselves new suppliers and

the competitive conditions in the market would not change. The Board remarked that this assessment is supported by the fact that entry barriers to the relevant market are low and operating in the sector does not require know-how. Furthermore, the Board noted that fruit juice concentrate and fruit puree markets are price sensitive and due to the fact that the product in question is agricultural and affected by seasonal factors, the price of the product could change significantly throughout the year. Accordingly, the Board remarked that it is not possible for Anadolu Etap İçecek to process all the cheapest fruits in the market, considering the variety of fruits that are being processed. Additionally, the Board noted that not all types of fruit juice concentrates and fruit purees would be demanded by CCI, and CCI might not provide the best price offer for the products offered by Anadolu Etap İçecek. To that end, the Board concluded that it would not be commercially reasonable for Anadolu Etap İçecek to direct all production to CCI.

Lastly, the Board noted that the competitive environment in the market would not change to a substantial degree even in the worst-case scenario, where Anadolu Etap İçecek directs all of its production to CCI, considering that most of Anadolu Etap İçecek's total production is sold at export markets and most of its domestic sales are made to CCI.

III. The Board's Assessment of Customer Foreclosure

The Board remarked that CCI is a strong player in the fruit juice market considering its 2022 market share, which also makes CCI a strong buyer of fruit juice concentrate and fruit puree. In that context, the Board noted that if the Transaction is realized and CCI meets its entire supply needs in this market from Anadolu Etap İçecek, there is a possibility that existing and potential competitors in the upstream market may face the risk of customer foreclosure.

In terms of customer foreclosure, the Board examined (i) whether the combined entity has the ability to foreclose the access to downstream market by way of reducing its purchases from the competitors in the upstream market, (ii) whether the combined entity has the incentive to reduce its purchases from the competitors in the upstream market, and (iii) whether such a market foreclosure would have negative effects on consumers in the downstream market, in accordance with the Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions.

In terms of its assessment on whether the combined entity has the ability to foreclose access to the downstream market, the Board first examined the capacity utilization rates of Anadolu Etap İçecek. In that context, the Board remarked that actual capacity utilization rates differ on a monthly, seasonal or annual basis, depending on climatic (rain, frost, high temperatures, *etc*.) or agricultural (fruit quality, quantity of harvest, *etc*.) factors and this would prevent Anadolu Etap İçecek from supplying CCI's total demand for fruit juice concentrate and fruit puree, even if Anadolu Etap İçecek installed additional equipment. The Board also examined CCI's capacity utilization rates and found that CCI would supply its demand from alternative suppliers other than Anadolu Etap İçecek, even if its capacity utilization rates were to increase.

Furthermore, by stressing the importance of climatic and agricultural effects on the actual capacity utilization rates and the fact that not all types of fruit juice concentrate

and fruit puree derived from a variety of fruits, including apricot, cherry, peach, orange carrot, apple, pomegranate, black carrot and citrus may be available to be sourced at all times, from all the suppliers, after the completion of the Transaction CCI would continue to procure the types of fruit juice concentrate and fruit puree that it could not supply from Anadolu Etap İçecek, from alternative suppliers. In that context, the Board pointed out that the majority of CCI's demand of fruit juice concentrate and fruit puree has already been supplied from Anadolu Etap İçecek, however, there are certain alternative suppliers that CCI has been making purchases from, which have been producing the fruit juice concentrate and fruit puree types that Anadolu Etap İçecek has not been producing. Accordingly, the Board concluded that the key criteria of actual or potential customers for preferring a supplier are product variety and prices, and CCI would not have an incentive for customer foreclosure.

IV. Conclusion

The Board concluded that the Transaction would not give rise to competitive concerns due to the following elements:

i. Considering that Anadolu Grubu Holding A.Ş., which holds joint control over Anadolu Etap İçecek and CCI prior to the completion of the Transaction, would continue to ultimately exercise joint control over Anadolu Etap İçecek after the completion of the Transaction, activities of Anadolu Etap İçecek will continue under the Anadolu Grubu Holding A.Ş. after the completion of the Transaction,

ii. Before the completion of the Transaction, most of Anadolu Etap İçecek's domestic sales has been made to CCI and relatedly most of CCI's purchases of fruit juice concentrate and fruit puree has been sourced from Anadolu Etap İçecek,

iii. Anadolu Etap İçecek is a relatively large producer of fruit juice concentrate and fruit puree, but more than half of its sales have been made to export markets,

iv. The relevant market is suitable for exportation,

v. Five out of the ten largest players in fruit juice market have vertically integrated structures,

vi. There is no brand loyalty in the fruit juice concentrate and fruit puree market, given that such market does not target end-users,

vii. There are many undertakings operating in the fruit juice concentrate and fruit puree market,

viii. There are many undertakings operating in the fruit juice market, including the private label production by retailers,

ix. While the fruit juice market has been growing since 2020, CCI could not make use of this growth to increase its market share,

x. There are no high entry barriers in the affected markets, and the entry to the markets does not require know-how,

xi. Seasonal changes in agricultural markets significantly affect product quality and cost structure.

In conclusion, within the scope of its evaluation presented above, the Board determined that the Transaction will not

significantly impede the effective competition in terms of the vertically affected markets in Turkiye and cleared the Transaction.

Turkish Competition Board Clears the Way for AXA's acquisition of Groupama's Turkish Business Unit based on Low Concentration Levels

I. Introduction

The Turkish Competition Board (the "***Board***") has unconditionally approved Axa S.A.'s ("***Axa***" or the "***Acquirer"***) acquisition of sole control over Groupama Investment Bosphorus Holding Anonim Şirketi ("***Groupama***" or the "***Target***"), clearing the way for the deal to be finalized (the "***Decision***")[9]. Despite the horizontal overlaps and the vertical links between the parties' activities, the Board approved the transaction based on the parties` low market shares in the relevant markets in Turkiye.

In line with its established case law, the Board has segmented the insurance sector into several sub-markets in assessing the transaction.

II. The Board's Assessment of the Transaction

Before delving into its competitive assessment of the transaction, the Board noted that Groupama is active in Turkiye in terms of life insurance and non-life insurance services. Axa, on the other hand, offers life insurance, non-life insurances, pension funds, and reinsurance and risk management consultancy services. The Board, then, indicated that life insurances protect the beneficiary against the insurance policy holder's death or serious illness, whereas non-life insurances cover all types of risks including personal risks and companies' commercial risks. The Board went on to define reinsurance services as: wholly or partially re-insuring the risk that was insured by insurance companies, to avoid mitigate potential difficulties that may arise in payment of the coinciding corresponding significant damages claims under the policy.

The Board noted that its established case law divides the insurance sector into life insurances market, non-life insurances market, and reinsurance market segments, as well as their sub-markets in accordance with the risk types in a given case. Adopting the same approach here, the Board identified horizontal overlaps in the markets for life insurance services, as well as non-life insurance services and certain insurance sub-markets, namely for land vehicles, water vehicles, land vehicles liability, transportation, fire and natural disaster, general damages, surety, legal protection, financial losses, general liability, illness/health, construction, and personal accident. The Board also defined that there is a vertical link between the Acquirer's reinsurance services and the Target's activities.

In terms of the horizontal overlap in the life insurances market, the Board concluded that the combined entity's market share would be less than 1% and there are major competitors holding significant market shares that would exert competitive constraints on the combined entity. Moreover, the presence of 19 other competitors in the same market would mitigate competitive concerns regarding life insurance services.

With regards to the horizontal overlaps in the non-life insurance services market and its aforementioned sub-markets, the Board

[9] The Board's decision dated 23.03.2023 and numbered 23-15/258-88.

found forty-two competitors active in the different segments of the non-life insurance services market in Turkiye. Considering that there were three competitors each holding a market share above 10% in the non-life insurance services market, the Board acknowledged that the combined entity would not present a significant threat to competition in the market. It further noted that the combined entity's market share across the sub-markets would not exceed 12% . On that point, the Board also referred to paragraph 18 of Guidelines on the Assessment of Horizontal Mergers and Acquisition, which provides that in case the sum of the merging parties' shares in the relevant market is lower than 20%, it can be presumed that the merger's negative effects on competition are not so significant as to require an in-depth investigation and prohibition of the merger. Hence, the Board concluded that the market share increment as a result of the transaction would be negligible.

As for the vertical link, the Board remarked that the transaction would not lead to any input or customer foreclosure either, since Groupama has low market shares in the upstream life and non-life insurance services markets, and Axa's market share in the reinsurance services market is also insignificant. The Board also emphasized that there are powerful competitors in the reinsurance market. Examining the case from a global perspective, the Board also concluded that Axa's global activities would not give rise to any competition law concerns.

All in all, given the low market shares of the parties in the affected markets, the presence of powerful competitors and the competitive structure of those markets, the Board held that the transaction would not have an appreciable effect on competition or be likely to significantly impede effective competition in any insurance market in Turkiye, within the meaning of Article 7 of Law No. 4054.

III. Conclusion

The Decision reaffirmed the Board's well-established decisional practice with respect to the insurance sector and the market segmentation. It also shed light on the importance of premium-based market share assessment in the insurance sector and the structure of the relevant product markets in Turkiye.

Employment Law

The Constitutional Court Rules that Termination of Employment Contract Due to Employee's Social Media Posts Constitutes a Violation of the Right to Privacy and Freedom of Speech

I. Introduction

The Constitutional Court ("***Court***"), through its recent Decision dated June 14, 2023, and numbered 2019/10975 ("***Decision***") ruled that termination of an employee's employment contract due to his posts within his social media posts constitutes a violation of privacy and freedom of speech. The Decision stemmed from the reinstatement application of 6 employees.

II. The Background of the Decision

The employees working in a subsidiary that had been incorporated by an administrative authority, shared some posts on their social media accounts, which caused the administrative authority to initiate an investigation before the disciplinary board. As per the

investigations carried out separately for each employee by the disciplinary board, the posts of the employees were found to constitute immoral, dishonourable or malicious conduct and accordingly, the disciplinary board decided to terminate their employment contracts, as per Article 25 of the Labor Law numbered 4857. The employees alleged that the termination of their employment was unlawful and each of them filed a lawsuit for reinstatement. The Court of First Instance determined that the termination of the employment contracts had been lawful, and the employer had exercised its right of termination for just cause. After the appeal of the employees, the Regional Court of Appeal assessed the case, but ruled that employment contracts were terminated with valid reason (not "just cause") as per Article 18 of the Labor Law numbered 4857, and the termination decision of the disciplinary board was lawful. The employees appealed their cases once again, and the cases were sent to the High Court of Appeal. However, the High Court of Appeal also dismissed the appeal requests of the employees and decided to ratify the decision of the Regional Court. Accordingly, employees filed a lawsuit before the Constitutional Court, alleging that their right to privacy and freedom of speech was violated with the decision of the disciplinary board as to termination of the employment contracts.

III. Decision and Reasoning of the Court

The Court elaborated that the employer has the right to limit restrict certain acts and behaviours of the employees for justifiable and legitimate reasons, such as the efficient conduct of business, occupational health and safety, and the protection of the employer in criminal and legal matters. However, the exercise of such right cannot go beyond the framework of the fundamental rights and freedoms in a democratic society. Accordingly, the Court decided that terminating an employee's employment contract due to an employee's posts and likes on his/her personal social media accounts that are not related to his/her job, workplace, or employer is a breach of their fundamental rights and freedoms.

IV. Conclusion

In accordance with the Decision, the employers are entitled to request the employees to behave or act in a certain manner, within the scope of the work that is being carried out as per the employment contracts. However, employers do not have the power to direct their employees` actions which are not in the scope of the employment contract. Accordingly, employers should rely on a valid reason stemming from an issue related to the employee's job and/or conduct within the workplace when terminating the employment contract, and termination based on the actions of the employees` behaviour merely within the scope of their private lives would be regarded as unlawful termination.

Litigation

The Constitutional Court Ruled That the Annual Monetary Limits for Objection Violates the Principle of Foreseeability

I. Introduction

On October 10, 2023, upon the applications of the 2nd Tax Chamber of Samsun Regional Administrative Court and Istanbul 13th Administrative Court

("***Applicants***"), the Constitutional Court decided in its Decision numbered 2023/81 E. and 2023/184 K. ("***Decision***") that the annual revisions made to the monetary limit for filing objections against court decisions rendered in tax-related cases, full remedy actions and annulment actions, violates the principle of foreseeability and annulled the relevant provisions.

II. Grounds for the Request for Annulment

The monetary limits for objections, which are annually adjusted according to the revaluation rate, may be changed while a case is ongoing evaluation before the first-instance court. Consequently, the opportunity to object to a decision may vanish by time the objection deadline comes around and thereby potentially infringe the applicant's right to access the courts and legal remedies.

This naturally raises concerns regarding legal certainty and predictability. It remains unclear whether the date of filing the lawsuit, or the date of the (first instance) court's decision must be considered in determining whether the decision is open to objection. A lengthy litigation might mean that the individuals pursuing that litigation may lose their right to object, while others may still have their right to object if the litigation is concluded swiftly. This discrepancy therefore violates the principle of equality.

In light of the above summary, the Applicants contend that these rules breach Articles 2, 10, 13, 36, 37, and 40 of the Constitution.

III. Evaluations of the Constitutional Court

The Constitutional Court emphasized the paramount importance of the freedom to seek justice, noting that it stands as one of the most robust safeguards ensuring the proper enjoyment and protection of other fundamental rights and freedoms. However, the Constitutional Court also clarified that limitations on fundamental rights and freedoms, as outlined in Article 13 of the Constitution, would not breach the law as long as they were designed in accordance with the proportionality principle.

Furthermore, the Court highlighted that imposing a monetary limit on the right to object/appeal would not, in and of itself, constitute a violation, but also addressed the necessity for a clear and foreseeable regulation as to application of changes made to such monetary limits. In this context, the Constitutional Court concluded that the existing rules do not meet the criterion of legality, as they lack clear and unambiguous guidelines concerning the date on which the revised monetary limit for objections/appeals would take effect. Ultimately, the Constitutional Court ruled that the pertinent regulations must be annulled due to their breach of the Constitution.

Consequently, the decision was made to annul the second sentence of paragraph (1) of Article 45, along with the second sentence of paragraph (1) and Additional Article 1 of the Administrative Procedure Law No. 2577.

IV. Conclusions

The principle of foreseeability stands as a cornerstone of law, ensuring that individuals are aware of the legal rules that

they must abide by, and they are subject to. It enables all persons to navigate their daily lives within the framework of their country's legislation, anticipating its foreseeable outcomes.

In alignment with this principle, the Constitutional Court nullified provisions restricting the right of objection/appeal based on the monetary value of claim, due to recurrent changes in the applicable thresholds which undermined the foreseeability and predictability as to whether a claimant would still have the right to object/appeal at the end of the litigation. As a result, the Court deemed it necessary to annul these provisions.

Data Protection Law

Turkish Data Protection Authority Introduces New Guideline on Mobile Apps

The Turkish Data Protection Authority ("***DPA***") has recently issued the Guideline on Recommendations for Protecting Privacy in Mobile Apps [10] ("***Guideline***") which was published on the DPA's website on December 22, 2023.

The Guideline aims to address the existing and potential risks regarding the protection of privacy in mobile applications and to provide general recommendations for data subjects and data controllers in terms of personal data processing activities carried out through via the mobile applications used on smartphones and tablets.

In the first part, it is stated that various personal data can be processed in mobile applications for purposes such as enriching the users' experience, providing functionality, improving the service offered, and creating marketing strategies; giving various examples such as online identifiers, user interactions, especially search history and text data collected from messaging platforms. The DPA underlines once again the need for stricter protection of special categories of personal data, such as health data and voiceprint biometrics used in voice recognition applications.

In the second part of the Guideline, the data controller and data processor relationships and responsibilities of the actors in the mobile application sector are explained with various examples. For instance, in cases where a mobile application integrates a third-party service into its application, it is noted that more than one data controller may exist.

Third section lists the issues that individuals should pay attention to before installing and during the use of the mobile application. While the issues to be considered before installing the mobile application include checking the source of the application, which data it requests access to, and the privacy policy, the issues to be considered during the use of the application include various warnings, such as checking the permissions requested during the use of the application and avoiding the use of social media accounts while logging into applications.

In the fourth and final section, the Guideline gives recommendations for the parties processing the personal data. For example, it is underlined that the status of different stakeholders – whether they are data controllers or data processors –should be determined before the personal data processing activity is started in developing or launching the apps, or the data subjects' use of these mobile applications. In

[10] https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/8ba209bb-fa93-4479-84f0-dd55aac97a0f.pdf (Last accessed on January 25, 2024)

addition, it was reminded and explained with examples that personal data should be processed in compliance with the general principles regulated in Article 4, titled "General Principles" of Law No. 6698 on the Protection of Personal Data, ensuring transparency, and setting out the conditions determined for processing the said personal data.

In this section, under the heading of processing children's personal data in mobile applications, the DPA referred to the "Protection of Children's Personal Data - Things to be Considered by Developers of Products and Services" [11] another document published previously by the DPA, and recommended that systems are established to verify the age of users, and that processing activities for children are carried out by following a separate policy and procedure.

Finally, the Guideline provides certain recommendations regarding data security. Various data security measures such as designing applications in compliance with the principles of privacy by design and privacy by default, operating an appropriate password security policy, performing regular patch management and software update processes, and limiting the number of unsuccessful entries in users' account logins to mobile applications were explained in detail.

[11] https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/db0b3f30-c636-4fcb-930a-bf8f2e524de8.pdf (Last accessed on January 25, 2024)

Internet Law

A New Decision from the Turkish Constitutional Court Hints at Potential Changes Regarding Article 8/A of Law No. 5651

The Turkish Constitutional Court ("***Court***") frequently receives a multitude of individual applications in which applicants assert that their right to freedom of expression has been violated due to access ban and/or removal of content decisions regarding online contents. In this regard, the Court granted a recent decision [12] in which it addressed 62 individual applications and consolidated them under a single individual application, due to their legal links in terms of subject matter. Among the applicants, there were news agencies, and online platforms, as well as individuals. Further, all claims made by the applicants related to the violation of their rights to freedom of expression due to access ban and/or content removal decisions concerning their websites, based on Article 8/A of the Law No. 5651 on the Regulation of Broadcasts via Internet and the Prevention of Crimes Committed Throught Such Broadcasts ("***Law No. 5651***"), which empowers judgeships and the President of the Information and Communication Technologies Authority ("***ICTA***") to render access ban decisions in the interest of protecting national security and public order, preventing crime, and protecting public health.

The applicants separately asserted in their applications that no substantial justification had been given regarding the purpose for which the measure in question had been

[12] "*Ahmet Alphan Sabanci and Others*" Constitutional Court application number 2015/13667, dated November 21, 2023.

taken, and that none of their substantive claims submitted to the objection authority (*i.e.,* judgeship) had been properly evaluated, and that the contents subject to the access ban/removal of content decisions were not unlawful. As part of its assessment, the Court first examined the admissibility of the individual applications and concluded that the applicants' claims regarding the violation of their right to freedom of expression were admissible. Underlining that the Internet has become an indispensable tool in the exercise of the freedom of expression due to its structure open to mutual interaction and the wide opportunities it offers for receiving and transmitting opinions, the Court stated that any restrictions imposed in the form of an access ban with respect to websites, or news and content on websites interferes with the freedom to receive and impart information, thus constituting an interference in terms of the right to freedom of expression.

Subsequently, the Court undertook an examination of the legality principle within the scope of Article 13 of the Turkish Constitution, which puts forth the legal framework for the limitation of basic rights and freedoms. In this context, the Court determined that the legal basis for interference in the present case was Article 8/A of the Law No. 5651, however, the Court also noted that, while the existence of a duly legislated law constitutes the first criterion for legality, it is also necessary to have substantive content, therefore the characteristics of the relevant law should also be examined. The Court referred to its Arti Media Gmbh decision [13] wherein it examined the legality of Article 8/A of Law No. 5651. The findings of the relevant decision were that (i) Article 8/A of Law No. 5651, in its current form, does not provide the basic safeguards that could prevent arbitrary behavior by narrowing the discretionary power of public authorities and guaranteeing a fair balance between freedom of expression and the legitimate right of a democratic society to protect itself against the activities of terrorist organizations, (ii) the violation of the right to freedom of expression and press is directly derived from the law, and (iii) the procedure stipulated under Article 8/A of Law No. 5651 has all the consequences of a formal final judgement and has an indefinite effect, and thus fails to provide the basic safeguards for the protection of the freedoms of expression and the press. Based on these considerations, the Court concluded that the interference grounded in Article 8/A of Law No. 5651 could not be deemed to satisfy the requisite standard of legality and that the applicants' rights to freedom of expression had been violated due to access ban and/or removal of content decisions based on Article 8/A of Law No. 5651.

Furthermore, the Court's evaluation in the decision regarding the relief that the applicants are entitled to, is quite noteworthy, as it outlines the re-trial procedure that will be conducted by the judgeships as first instance courts, and signals that there might be certain changes to the use and applicability of Article 8/A of Law No. 5651.

In detail, the Court states that the Turkish Constitution assigns to the judge the duty of examining whether the provision to be applied in a given case complies with the Turkish Constitution and provides the judge with the opportunity and discretion to refer the matter to the Court for review, if the judge concludes that there is a

[13] "*Arti Media Gmbh decision*" Constitutional Court application number 2019/40078, dated September 14, 2023

serious claim of unconstitutionality. The Court also underlines that, although the judgeships did not submit an objection regarding the alleged unconstitutionality of Article 8/A prior to the individual applications, it is possible to submit an objection during the re-trial proceedings regarding the alleged unconstitutionality of the provision, namely Article 8/A of Law No. 5651.

Consequently, the Court urges the relevant judgeships to initiate re-trial proceedings and to render new decisions addressing the violations identified by the Court. Most importantly, the Court emphasizes that since a decision cannot be rendered based on a provision that has been deemed unconstitutional by the Court, the judgeships should file an objection before the Court regarding the alleged unconstitutionality during re-trial proceedings as per Article 152 of the Turkish Constitution. In other words, the Court suggested that the relevant first instance courts should submit an application to the Court for the annulment of Article 8/A of Law No. 5651.

This decision may turn out to be of particular significance, as it could pave the way for the constitutional review of Article 8/A of Law No. 5651, and we may expect to see some changes in the continued existence and application of Article 8/A of Law No. 5651 soon.

Constitutional Court's Decision Amending or Cancelling Certain Provisions of the Turkish Internet Law

I. Introduction

The Turkish Constitutional Court ("***Court***") furnished a significant decision ("***Decision***") on January 10, 2024, regarding certain provisions of the Turkish Internet Law. This decision may lead to essential changes in the relevant legislation, as it cancelled Article 8/4, Article 8/11, and Article 9 of Law No. 5651 on the Regulation of Broadcasts via Internet and the Prevention of Crimes Committed through such Broadcasts ("***Law No. 5651***").

In the Decision, the Constitutional Court cancelled several provisions of Law No. 5651. Considering the wide usage and fundamental role of the Internet in the modern world, it might be said that the Decision has the potential to sharply change Turkiye's position in terms of the right to freedom of expression and freedom of the press. As Article 9 of Law No. 5651 has been annulled in its entirety, requesting access bans based on the alleged violation of personal rights will no longer be possible due to this Decision. Therefore, the most significant part of this decision appears to be the cancellation of Article 9 of Law No. 5651 titled "Removal of Content from Broadcast and Access Ban".

II. The Facts and the Application

134 deputies of the Turkish Grand National Assembly applied to the Constitutional Court seeking the annulment of certain provisions of Law No. 5651. The applicants requested the annulment of the articles below:

i. Articles 8/4, 9/5, and 9/9 related to changes in language regarding the removal of content and/or blocking access, emphasizing the removal of content over access blocking;

ii. Article 8/11 related to the concept of "content provider, hosting provider" with respect to the imposition of administrative sanctions;

iii. Articles 9/1 and 9/3 related to requests regarding the removal of content or access bans;

iv. Article 9/8 related to compliance with access ban decisions;

v. Article 9/10 related to the prohibition against associating the applicant's name with the websites subject to the decision;

vi. Article 9/11 related to the concept of "responsible persons of content providers, hosting providers and access providers" regarding the imposition of judicial sanctions;

vii. Article 2/1-s related to the definition of "social network provider";

viii. Article 3/5 related to the notification of the administrative fine decisions;

ix. Article 5/6 related to the amount of administrative monetary fines imposed on hosting providers for failing to make hosting provider notifications; and

x. Supplemental Article 4 related to the obligations of the social network providers.

III. The Evaluation of the Court

Upon finding the applications admissible, the Constitutional Court examined the requests and decided to reject some of them, namely those regarding Articles 2(s), 3/5, 5/6 and Supplemental Article 4 of Law No. 5651.

The Court then, in accordance with the arguments presented by the applicants citing violations of various articles of the Turkish Constitution, proceeded to revise or annul the other provisions, as detailed below:

(i) Article 8/4 of Law No. 5651: The Court decided to remove the wording "removal of content and/or" from this paragraph.

(ii) Article 8/11 of Law No. 5651: The Court decided to remove the wording "Content provider, hosting provider and" from this paragraph.

(iii) Article 9 of Law No. 5651: The Court assessed that the legal basis of the decisions regarding content removal and access blocking were unclear, and that the relevant provisions raised concerns about the lack of clarity in the rules, the absence of specific regulations on notification procedures, and the potential for arbitrary interference. Therefore, the Court annulled Article 9 in its entirety since it determined that it was no longer possible to implement the remaining parts of the article in practice.

The Court concluded that the challenged provisions of Law No. 5651 violated Articles 13, 26, and 28 of the Turkish Constitution. The lack of clear limitations, the absence of safeguards ensuring proportional decision-making, and the potential for arbitrary use of the authority granted under Law No. 5651 were cited as the underlying reasons for the Court's findings as to the unconstitutionality of these provisions.

1. Evaluations related to Article 8 of Law No. 5651

Article 8/4 of Law No. 5651 sets forth that the president of the ICTA shall *ex officio* decide for the removal and/or access blocking for content that is found to violate Article 8/1. In its decision, the Court ruled that the phrase "removal of content and/or" should be stricken from Article 8/4.

Article 8/11 of Law No. 5651 sets forth that, if the relevant content provider,

hosting provider or access provider fails to comply with the decision requiring the removal of content and/or access blocking as an administrative precaution, then an administrative fine shall be imposed on such providers. The Constitutional Court decided to remove the phrase "relevant content, hosting and", and thus made this administrative fine applicable only to access providers.

The Court evaluated that the measure envisaged in the articles above is separate from criminal proceedings and should be considered as a final measure that would be implemented by the President of the ICTA, subject to the finding of a criminal offence. The Court also observed that any administrative measures implemented by the President of the ICTA, cannot be examined during the criminal investigation process initiated with respect to the offence that constitutes the justification for such a measure. The Court further noted that such administrative measures continue to be implemented even if the related criminal trial does not result in a conviction. In this case, the Court concluded that the assurance that a person is presumed innocent and cannot be treated as a criminal until he is found guilty by a final court decision, becomes meaningless. As a result, the Court evaluated that deciding on the "removal of content" which constitutes, by its very nature, a final measure subject to the determination by an administrative authority that a crime has been committed, before any such determination regarding criminality has been rendered by a final court decision, and the imposition of an administrative fine if the removal of content decision is not implemented, violates the principle of the "presumption of innocence."

2. Evaluations related to Article 9 of Law No. 5651

Articles 9/5 and 9/9 of Law No. 5651 refer to court decisions on the removal of content and/or access ban. The Court decided to strike off the phrase "removal of content and/or".

Article 9/8 of Law No. 5651 concerns compliance with court decisions. The Court annulled the entire paragraph.

Article 9/10 of Law No. 5651 sets forth that, in case of a request by parties whose personal rights have been violated due to the content broadcasted on the internet, a judge may order that the applicant's name should not be associated with the websites subject to the decision. The Court annulled this paragraph entirely.

Article 9/11 of Law No. 5651 refers to the "responsible persons of content providers, hosting providers and access providers". The Court ordered the removal of the phrase "of content providers, hosting providers and access providers."

Articles 9/1 and 9/3 of Law No. 5651, generally sets forth that any real person or legal entity or authority or institution, who claims that his/her personal rights have been violated due to content broadcast on the Internet, may apply to the content provider, or to the hosting provider (if the content provider cannot be reached), and that the court may rule for the removal of the relevant content and/or blocking access in accordance with the requests of such persons.

The Court determined that the rules in question limit the right to freedom of expression by enabling the removal of content and/or access bans to the broadcasting of such material, and limit the freedom of the press, considering that the

broadcast in question might also fall within the scope of journalistic activities. The Court further evaluated that, in accordance with Article 13 of the Constitution, such restrictions must be made by law and must comply with the reasons for such restrictions as stipulated in the Constitution, as well as the requirements of the democratic social order and the principle of proportionality.

In its decision, the Court also referred to its pilot decision in the case of *Keskin Kalem Yayıncılık ve Ticaret A.Ş. and others* ([GK], B. No: 2018/14884), wherein it stated that court decisions based on Article 9 of Law No. 5651 that fail to follow the principles set forth by the Court's precedents, signal the existence of a systematic problem. The Constitutional Court evaluated that, in the context of the implementation of Article 9, it was understood that the criminal judgeships of peace reached their decisions without conducting an adversarial trial, demonstrating the need to reach a decision quickly and without delay, and that an approach to ensuring a reasonable balance between conflicting rights could not be identified. In addition, the Court explained that the reasoned decisions included general expressions that were independent of and unrelated to the facts and circumstances of the concrete events, and that the Court could not discern how it was determined that the relevant content clearly violates the applicants' personal rights. In this context, the Court concluded that the ill-defined scope and limits of Article 9 create a wide margin of latitude for the judicial authorities, and further observed that, when the facts of the case regarding the applications made to the Court are examined, it is apparent that it is difficult to obtain results by objecting to the decisions made within the scope of Article 9.

Furthermore, the Court assessed that the rules in question did not provide a gradual intervention method to restrict Internet content and that the restriction within the scope of the rules resulted in access being blocked to certain content on the Internet within the borders of a certain country, indefinitely, starting from the date of the decision. According to the Court, these rules constitute a serious curtailment of the right to freedoms of expression and the freedom of the press. The decision noted that the blocking procedure is a method that should not be used as long as the offending content on the Internet can be eliminated through other methods. In this context, the Court evaluated that the existing rules do not provide procedural assurances for preventing arbitrary practices by narrowing the discretionary powers of public authorities. In addition, the Court concluded that the rules in question do not contain assurances that will ensure proportionate decisions by public authorities that will be in accordance with the requirements of the democratic social order.

In light of the foregoing considerations, the Court decided that the relevant rule was unconstitutional and annulled it.

Furthermore, the Court also annulled Article 9 of Law No. 5651, titled "Removal of Content from Broadcast and Access Ban" in its entirety, since it determined that it is no longer possible to implement the remaining part of the provision, as per Article 43 of Law No. 6216 on the Establishment and Trial Procedures of the Constitutional Court. In other words, since the cancellation of Articles 9/1 and 9/3 affects the validity of the remaining paragraphs, the

Constitutional Court decided to void Article 9 entirely.[14]

IV. Conclusion

The Court invalidated Articles 8/4, 8/11, and Article 9 of Law No. 5651. According to the decision, these annulments will enter into force nine months after the publication of the decision in the Official Gazette, (which will be October 10, 2024) to consider the potential legal gaps that might harm the public interest.

Although the entirety of Article 9 of the Law No. 5651 has been quashed, it is highly likely that a new mechanism through a new (yet similar) provision will be introduced and enacted within this 9-month transition period, as there will otherwise be a gap in the legislation regarding individual requests based on personal rights.

Telecommunications Law

Regulation and Communiqué Amendments on the Registration of Devices with Electronic Identity Information

On October 12, 2023, the Regulation Amending the Regulation on the Registration of Devices Having Electronic Identity Information ("***Amendment Regulation***") [15] and the Communiqué Amending the Communiqué on the Registration of Devices Having Electronic Identity Information ("***Amendment Communiqué***") [16] has been published on the Information Technologies and Communications Authority ("***ICTA***")`s website. As of January 1, 2024, both the Amendment Regulation and Amendment Communiqué have come into effect.

Entities engaged in the provision of mobile electronic communication services or the provision of mobile electronic communication networks, and in operating their infrastructure within the framework of authorization in accordance with the Regulation on the Registration of Devices with Electronic Identity Information ("***Regulation***") are mandated to offer electronic communication services to the devices whose IMEI numbers are included in the whitelist or in the paired whitelist. The blacklist, on the other hand, consists of the IMEI numbers of the devices that have been smuggled, lost, or stolen, or whose electronic identity information has been changed or copied to other devices, or those that have been reported to the Authority as disposed of or exported, and the devices that are used within Turkish borders even though they had received international permanent data roaming services, or those that have not been included in the ICTA's records, and the devices that have been removed from the

[14] Article 43 of Law No. 6216 reads as follows: If the application is made only against the specific articles or provisions of the law, presidential decree or the Bylaws of the Grand National Assembly of Turkiye and the annulment of the same results in the impossibility of application in terms of other provisions or the entirety of the law, presidential decree or the Bylaws of the Grand National Assembly of Turkiye, the Constitutional Court may decide to annul the other provisions or the entirety of the law, presidential decree or the Bylaws of the Grand National Assembly of Turkiye, which can no longer be applicable, provided that this is indicated in the rationale of the decision.

[15] https://www.btk.gov.tr/uploads/boarddecisions/elektronik-kimlik-bilgisini-haiz-cihazlarin-kayit-altina-alinmasina-dair-yonetmelik-ve-tebligde-degisiklik-yapilmasina-iliskin-taslakla/272-2023-web.pdf (last accessed on January 25, 2024).

[16] https://www.btk.gov.tr/uploads/boarddecisions/elektronik-kimlik-bilgisini-haiz-cihazlarin-kayit-altina-alinmasina-dair-yonetmelik-ve-tebligde-degisiklik-yapilmasina-iliskin-taslakla/272-2023-web.pdf (last accessed on January 25, 2024).

whitelist due to a failure to receive service from electronic communication networks for one uninterrupted year from the last signal reception.

In accordance with the provisions outlined in the Amendment Regulation, the operators that own the infrastructure for the unit where the communication connection is established and managed among networks providing mobile electronic communication services for voice or data are obliged to disconnect the electronic communication of these devices within a stipulated timeframe of 24 hours from the moment the relevant IMEI number is recorded on the blacklist. While devices that are made available by pairing the IMEI number with the registered subscriber number are exempted, the electronic communication of devices which fail to receive service from the electronic communication networks for one uninterrupted year since the last signal they received, while registered in the ICTA's Central Mobile Device Identity Database System (MCKS), will be disconnected.

ICTA will include in its blacklist the electronic identity information of devices registered in the MCKS that have not received any electronic communication services for an uninterrupted year, starting from the last signal received. It is important to emphasize that devices utilizing electronic identification information for the 112 in-vehicle emergency call system ("e-Call") are exempt from this categorization, if they can be identified subject to the limitations of the technical capabilities of the e-Call system.

In the event that a blacklisted device is used again with a subscriber number, the responsible operator is required to notify ICTA. Subsequently, the operator is obligated to transmit a message informing the "blacklisted" status of the device to the subscriber number. Following the notification, ICTA will conduct a thorough examination to ascertain whether the device is in use with the subscriber number of an end user. If the examination reveals that the device is indeed associated with the subscriber number of an end user, the IMEI number will then be whitelisted. Conversely, if a disparity is identified between the subscriber number and the end user of the device, ICTA mandates the re-registration of the IMEI number through MCKS, a process that will be facilitated by the device's importer or manufacturer. After the successful completion of the application and the requisite verifications conducted by ICTA, the IMEI number will be officially whitelisted.

On the other hand, the Amendment Communiqué addresses matters pertaining to the allocation of user accounts and the re-registration of devices that have been deactivated from service due to not receiving an electronic communication service for an uninterrupted period, by submitting an application to ICTA.

As per the stipulations outlined in the Amendment Communiqué, the registration of electronic identification information for imported or manufactured devices is conducted through the user account allocated to the respective importer or manufacturer. The creation of this user account is subject to the discretion of ICTA, and subsequently, the importer or manufacturer assumes responsibility for all transactions carried out through the designated user account.

In cases where the end user of a device, whose IMEI number has been blacklisted due to a prolonged absence of service

within specified periods, does not match ICTA's records, and where the importer or manufacturer of the device is undergoing liquidation or has been abandoned, the device's user may apply to ICTA for the re-registration of the device. The application must be accompanied by the information and documents specified in the Amendment Communiqué. Upon successful completion of the requisite verifications conducted by ICTA, the pertinent IMEI number is re-registered and reinstated on the whitelist.

White Collar Irregularities

Reporting Suspicious Transactions in Financial Crimes

I. Introduction

In the context of anti-money laundering legislation, the obligation to report suspicious transactions is one of best-known measures in place that has been stipulated in detail under Law No. 5549 on the Prevention of the Laundering of the Proceeds of Crime ("***Law No. 5549***") and the Regulation on Measures Regarding the Prevention of the Laundering of the Proceeds of Crime and the Financing of Terrorism ("***Regulation***").

Accordingly, a suspicious transaction is defined as any transaction about which information, suspicion or reasonable grounds exist to suspect that the asset, in relation to which transactions are carried out, or attempted to be carried out, through obligated parties, has been acquired through illegal methods or used for illegal purposes, and as such, used for terrorist activities or by terrorist organizations, terrorists or those who finance terrorism (Article 27(1) of the Regulation).

II. Obligated Parties

Obligated parties are defined as certain real persons, organizations, and/or legal entities, who are under the legal duty to report suspicious transactions to MASAK. In other words, if such obligated parties are determined to have failed to carry out their reporting duties, they may be individually and/or jointly subject to administrative or criminal sanctions.

The obligated parties set forth exhaustively under Article 4 of the Regulation are as follows: (i) banks; (ii) institutions other than banks that have the authority to issue bank cards or credit cards; (iii) authorized foreign exchange offices; (iv) financing and factoring companies; (v) brokerage institutions in capital markets and portfolio management companies; (vi) payment service providers and electronic money institutions; (vii) investment partnerships; (viii) insurance, reinsurance and pension companies, and insurance and reinsurance brokers; (ix) financial leasing companies; (x) institutions providing swap and custody services within the framework of capital markets legislation; (xi) Borsa Istanbul Anonim Şirketi (Istanbul Stock Exchange,) pertaining only to its custodial service with respect to the Precious Metals and Precious Stones Market; (xii) Postal and Telegraph Agency, Inc. (*i.e.,* PTT Anonim Şirketi); (xiii) asset management companies; (xiv) those who engage in the purchase and sale of precious metals, stones and jewelry and those who act as intermediaries for such transactions, (xiv) the Directorate General of the Turkish State Mint, pertaining only to its activities of minting gold coins; (xv) precious metals brokers; (xvi) those who buy and sell immovable property for trading purposes and the intermediaries of such transactions; (xvii) those who deal with the purchase and sale of any kind of sea, air, or land vehicles, including

construction machinery and those who act as intermediaries for these transactions, (xviii) dealers and auctioneers of historical artifacts, antiques and works of art; (xix) those who operate in the field of lotteries and betting activities, including the Turkish National Lottery Administration, the Turkish Jockey Club and the Football Pools Organization Directorate; (xx) sports clubs; (xxi) public notaries; (xxii) lawyers in private practice, pertaining only to their role in conducting financial transactions related to the purchase and sale of immovable properties, establishing and revoking limited property rights, establishing, merging, managing, transferring and liquidating a company, foundation or association, and to managing bank accounts, securities accounts and any type of accounts or assets in such accounts, provided that it is not contrary to the provisions of other laws in terms of the right of defense, and excluding the information obtained through professional work performed under the scope of Article 35(1) of Law No. 1136 on Advocacy, and alternative dispute resolution; (xxiii) certified general accountants, certified public accountants and sworn-in certified public accountants in private practice; (xxiv) independent audit institutions authorized to conduct audits in financial markets; (xxv) crypto-asset service providers, (xxvi) savings financing companies. (Article 4 of Law No. 5549).

Branches, agencies, representatives and commercial agents of obligated parties whose principal place of business is located in a foreign country are also deemed to be subject to the duties of obligated parties per Law No. 5549. However, foreign branches, agencies, representatives and commercial agents of obligated parties whose principal place of business is located in Turkiye are only subject to the duties of the obligated parties to the extent that the legislation and authority in their place of operation allow. In cases where the laws of the country in question does not permit the implementation of suspicious reporting measures, this shall also be reported to MASAK.

Suspicious transactions may be reported by the real-person obligated party themselves, or by the legal representatives of a legal entity, in case of unincorporated entities without a separate legal personality by directors or other individuals who have been authorized by such directors, and by compliance officers in the case of obligated parties for whom such compliance officers have been appointed.

III. Reporting Thresholds

In the Turkish AML legislation, there is no specific monetary threshold for obligatory suspicious transaction reporting. Suspicious activities must be reported to MASAK by obligated parties regardless of the amount in question, as per Turkish laws.

When obligated parties have grounds to believe that they are dealing with a suspicious transaction, they must conduct a full investigation (to the extent allowed by their authority and capabilities) by considering multiple pieces of information and findings, and then report the suspicious transaction to the Presidency by filling out the Suspicious Transaction Notification Form.

As per the Regulation, suspicious transactions must be reported to MASAK within ten (10) business days from the date on which suspicion has first arisen. Subsequent to reporting, if new information and findings surface regarding the reported transaction, the Suspicious

Transaction Notification Form may be amended.

The Ministry of Treasury and Finance ("***Ministry***") is authorized to determine, on a case-by-case basis for obligated parties, the procedures and principles regarding the preparation of the Suspicious Transaction Notification Forms, the obligation to make any notifications using electronic means and information communication tools, and the use of electronic signatures in suspicious transaction reports.

Guidelines for such notifications may be issued by MASAK. Indeed, MASAK has issued sectoral guidelines for banks; brokerage institutions for capital markets; insurance and pension companies; factoring, financing, and financial leasing companies; authorized agencies; payment institutions and electronic payment institutions; cargo companies; precious metals and those who purchase and sell precious stones and jewelry; intermediaries for the purchase/ and sale of immovable properties; crypto asset service providers; as well as other obligated parties. According to the recent Guidelines, suspicious activity notification forms may be delivered to MASAK in person, or electronically through the online portal of MASAK (*i.e.,* EMIS).

MASAK Guidelines include a number of suspicious activity types, such as tax fraud, smuggling of immigrants, human trafficking, and cybercrime. It is important to note that suspicious activity types are for guidance only and that they are published for the purpose of helping obligated parties in assessing whether any suspicions, or reasonable grounds for suspicion exist with respect to a given transaction/activity. Suspicious activity types are not listed on a *numerus clausus* basis (*i.e.*, limited in number). Therefore, obligated parties must report a suspicious activity to MASAK regardless of whether it is specifically listed or mentioned as a particular suspicious activity type in the MASAK Guidelines.

IV. Sanctions for Failure to Report

As per Article 13 (1) of Law No. 5549, if an obligated party fails to report a suspicious activity, an administrative fine in the amount of TRY 303,630 (approximately USD 10,000) (for the year 2024) could be imposed. If the obligated party is a bank, financial institution, factoring company, lender, financial leasing company, insurance and reinsurance company, pension company, capital markets institution, authorized institution, payments and electronic money institution, or any other financial institutions set forth by regulation, the administrative fine shall be doubled and, will not be less than 5% (five percent) of the amount of the suspicious transaction.

Furthermore, judicial monetary fines and imprisonment are also foreseen as sanctions under Law No. 5549. As such, failure to report a suspicious transaction may be punished with imprisonment from 1 (one) year to 3 (three) years and with a judicial fine up to five thousand days (which would be between approximately TRY 100,000 (USD 3,300) and TRY 500,000 (USD 16, 51200), when calculated over the maximum daily rate of TRY 100 (USD 3.30) and the minimum daily amount of TRY 20 (USD 0.66). The courts will decide the applicable rate by taking into account the financial status of the relevant party.

Intellectual Property Law

The General Assembly of the High Court of Appeals Ruled That Use of a Trademark Registered in Bad Faith cannot benefit from Trademark Protection and Use of Such Trademark Constitutes Unfair Competition as well as Trademark Infringement

I. Introduction

Before the Law No. 6769 on Intellectual Property came into force, the main legislation for trademarks had been Decree-Law No. 556; where it was permissible to use a registered trademark that infringed on another trademark and that should never have been registered in the first place. Essentially, the annulment of a trademark which was found to bear a confusing similarity to an older trademark, lacked retrospective effect in terms of its use, and thereby did not create infringement or unfair competition.

The General Assembly of the High Court of Appeals, in its decision dated February 1, 2023, and numbered 2023/11-83 E., 2023/7 K. ("***Decision***"), determined that if the trademark in question was registered in bad faith, the use of such a trademark constitutes both trademark infringement and unfair competition under Decree-Law No. 556 retroactively.

II. The Dispute Subject to the Decision

In the relevant dispute, the plaintiff filed a lawsuit seeking (i) the annulment of the defendant's trademarks by claiming that these had been registered in bad faith and were intended to create confusion, and (ii) the determination of unfair competition, among other claims.

The first instance court ruled in favor of the plaintiff and concluded that there had been both unfair competition and trademark infringement in the case at hand, and therefore decided to annul the disputed trademarks. Within the scope of its decision the first instance court concluded that the defendant's registered trademarks should be annulled retroactively, meaning that the trademarks would be deemed null and void starting from the date of registration. Accordingly, the first instance court ruled that the decision should be applied retroactively, beginning from the date of registration. However, upon the defendant's appeal, the 11th Civil Chamber of the High Court of Appeals ruled that the annulment of a trademark cannot have retroactive effect, and therefore, the use of the trademark before the annulment decision cannot constitute unfair competition. Accordingly, the High Court overturned this particular aspect of the first instance court's decision.

Further to the decision of the 11th Civil Chamber, the first instance court issued a decision affirming and upholding its original ruling. In this decision, the first instance court determined that, since the annulled trademark had been registered in bad faith, it would be unjust and unlawful to provide the defendant with a period of protection between the registration date and the annulment date. Upon the first instance court's second decision ratifying its original ruling, the file was sent to the General Assembly of the High Court of Appeals for the final decision on the matter.

III. Evaluation of the Decision of the General Assembly of the High Court of Appeals

In its Decision, the General Assembly dwelled on the question of whether the

plaintiff's use of the registered trademark until the finalization of the annulment decision was legally permissible and whether it amounted to unfair competition. The General Assembly concluded that the use of a registered trademark constituted trademark infringement and unfair competition where the trademark had been registered in bad faith, and that in such cases, the annulment decision could be applied retroactively.

The Decision stipulated that, at the time of filing, the now-abrogated Decree-Law No. 556's provisions should have governed the resolution of the dispute. According to Article 44/1 of the Decree Law, the court's ruling on trademark annulment carries a retroactive effect, nullifying the trademark's registration as of its registration date. There are, however, two exceptions to this retroactive effect and the "*use of a trademark that is registered in bad faith*" is not one of them. Consequently, seeking compensation on the basis of claims relating to trademark infringement and unfair competition is permissible in cases where the infringing trademark was registered in bad faith. Therefore, the pivotal factor here is the presence of bad faith in the registration of the infringing (latter) trademark. To wit, if there is no bad faith in the registration, one cannot make a claim regarding unfair competition or infringement of the trademark.

In conclusion, the General Assembly of Civil Chambers holds the position that the fact that a defendant has been using its registered trademark, which was later annulled by the courts, cannot be a valid defense against compensation claims made on the basis of trademark infringement or unfair competition claims. In other words, setting forth a defense on the basis of registration against a claim for compensation for damages caused by a trademark that has been registered in bad faith is not permissible, as such a malicious registration is an action contrary to the principle of good faith and such actions cannot be protected by the law.

IV. Conclusion

The General Assembly of the High Court of Appeals, in its decision concerning trademark protection, has established that, under the purview of Decree-Law No. 556, if one's bad faith in registering one's trademark is not conclusively established, there are no permissible legal grounds for claiming trademark infringement or unfair competition, even if the trademark in question is later annulled by the courts. However, it is important to note that, with this Decision, it is now established that, in cases where the trademark is registered in bad faith, the annulment decision shall be applied retroactively. Consequently, it was also affirmed that the use of a trademark registered in bad faith does not qualify as the "exercise of a legitimate right," even during the period of registration, and no form of bad faith can warrant legal protection.

ELIG Gürkaynak Attorneys-at-Law is an eminent, independent Turkish law firm based in Istanbul. The firm was founded in 2005.

ELIG Gürkaynak is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations.

Our legal team consists of 95 lawyers. We take pride in being able to assist our clients in all fields of law. Our areas of expertise particularly include competition law, corporate law, M&A, contracts law, white collar irregularities and compliance, data protection and cybersecurity law, litigation and dispute resolution, Internet law, technology, media and telecommunications law, intellectual property law, administrative law, real estate law, anti-dumping law, pharma and healthcare regulatory, employment law, and banking and finance law.

As an independent Turkish law firm, ELIG Gürkaynak collaborates with many international law firms on various projects.

For further information, please visit www.elig.com

ELİG
GÜRKAYNAK
Attorneys at Law

Çitlenbik Sokak No: 12 Yıldız Mah. Beşiktaş 34349, İstanbul / TURKİYE
Tel: +90 212 327 17 24 – Fax: +90 212 327 17 25
www.elig.com