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LEGAL INSIGHTS QUARTERLY

December 2024 – February 2025

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Preface to the December 2024 Issue

The December 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 focuses on share capital decrease transactions in limited liability companies from a Turkish corporate law perspective, by examining the legal framework designed to protect the interests of companies and their stakeholders.

While the Banking and Finance Law section addresses the rules and requirements that will apply to financial holding companies, the Capital Markets Law section discusses the fundamental concepts and key provisions regarding crypto-asset service providers and platforms with regards to Crypto Asset Law published in July 2024.

The Competition Law section of the December 2024 issue reviews two mergers and acquisitions cases, one of which includes an assessment of *de facto* sole control under the Turkish merger control regime, and the other examines the Turkish Competition Board's inclusive analysis of joint venture criteria. This section further provides insight into the Competition Board's assessment of market practices in the employment sector. Furthermore, the section reviews two abuse of dominance cases, which evaluate the impact of exclusivity agreements on dominant position.

Moving on, the Dispute Resolution section provides a look into Mediation and Arbitration (Med-Arb) as an alternative dispute resolution method within the scope of Turkish regulation and IBA Regulation.

The section on Data Protection Law offers a detailed examination of the latest amendments to the Law No. 6698 on the Protection of Personal Data on the transfer of personal data abroad, which intends to align the Turkish legislation on personal data with the GDPR.

Moving on, the Internet Law section provides insight into the Communiqué on Commercial Electronic Message Management System Integrators published in September 2024, whereas the Telecommunications Law section examines the Communiqué Amending the Internet Domain Names Communiqué, published by the Information and Communication Technologies Authority. Moreover, the Employment Law section sheds light on a decision of the High Court of Appeals which examines an employee's dismissal due to unauthorized access to another employee's payroll details. Finally, the Intellectual Property Law section elaborates a decision of the Civil Chamber of the High Court of Appeals on trademarks, with emphasis on the concept of vested rights.

December 2024

Corporate Law

Brief Overlook: Share Capital Decrease in Limited Liability Companies

As per the Turkish Commercial Code No. 6102 ("***TCC***"), a limited liability company must be incorporated with a minimum share capital of TL B50,000, unless a higher share capital is required under the special legislation that the relevant company may be subject to. Shareholders of the company may always resolve to set a higher share capital amount, depending on the needs of the company. The share capital amount, which the shareholders determine during incorporation, shall be registered with the trade registry. Following incorporation of the limited liability company, again, depending on its needs and decision of the shareholders, the share capital may be further increased or decreased, provided that it does not fall under the minimum mandatory level. This article will particularly focus on capital decrease transactions in limited liability companies from the Turkish corporate law perspective.

In general, a limited liability company may decrease its share capital, if a certain amount of the share capital is surplus to the company's needs, or for the purpose of elimination of the loss as a result of an adverse balance. However, in either case, the share capital amount cannot fall under TL 50,000. Share capital decrease in a limited liability company can be decided by the shareholders, and through amending articles of association of the company.

If the share capital is being decreased due to having a surplus capital for the company's business and activities, receivables of the creditors must be secured first. For that purpose, Article 473 of the TCC states that general assembly cannot decrease the share capital if the company lacks sufficient assets to fully cover the receivables of its creditors. Accordingly, the existence of sufficient assets must be established by a report to be prepared by a certified accountant, or independent auditors in cases where the company is subject to an independent audit.

In addition to the foregoing, as a procedural step, the board of directors of the company must prepare a report as to the (i) reason, (ii) purpose and (iii) method of the contemplated share capital decrease. The general assembly may decide on the share capital decrease only after it reviews and approves this report prepared by the board of directors.

As the next step, the board of directors shall publicly announce the planned capital decrease to the company's creditors, by publishing the announcement in the trade registry gazette 3 (three) times in total, with 7 (seven) days intervals, so that any creditor could request the repayment of their due receivables or request the company to provide adequate security for their receivables that have yet to fall due. Additionally, the company must also send letters to its known creditors to inform them of the share capital decrease plan. In order for the creditors to choose the repayment or security options before the capital decrease takes place, they must apply to the company within 2 (two) months as of publication of the third announcement in the trade registry gazette. In addition, if the company is subject to an independent audit, sufficient information regarding the reasons and contemplated procedure stipulated for the share capital decrease must be also published on the company's mandatory website.

Following completion of the foregoing procedural steps required by the TCC, share

capital decrease should be registered with the trade registry, after which the share capital decrease may be implemented officially, and decreased part of the share capital may be returned to the shareholders.

As stated above, the share capital of a limited liability company may be also decreased to eliminate the loss as a result of an adverse balance sheet. In this case, as main objective of the share capital decrease is fixing the company's financial situation, rather than returning of certain part of the share capital amount to the shareholders, it is deemed that in theory there is no risk for the creditors. Accordingly, pursuant to Article 474 of the TCC, the board of directors of the company may, as an exception, forego making the announcements to the creditors for repayment or securitization of their receivables. In such a case, the board of directors must resolve on whether they are indeed foregoing the announcement to creditors.

It is also worth noting that if (i) the share capital will be decreased to fix technical insolvency of a limited liability company (*i.e.* the circumstance where assets of the company are not sufficient to pay its debts) and (ii) articles of association of the company stipulates additional payment obligations to the shareholders, other than their share capital undertakings, then as per Article 592 of the TCC such additional payment obligations must be fully paid first. In other words, if foregoing circumstances exist, the share capital cannot be decreased until the additional payment obligations of the shareholders are duly fulfilled.

All in all, as share capital decrease may jeopardize the interests of the creditors in most cases, the lawmaker has stipulated a set of rules to secure their rights. On the other hand, in some instances, the financial strength of the company may need to be prioritized, and such a situation might temporarily prevail over the interests of the creditors for the ultimate benefit of all stakeholders.

Banking and Finance Law

Turkiye: A Closer Look at Financial Holding Companies

Financial holding companies are typical holding companies. Main purpose of a financial holding company is the management and financial control of group companies engaging in financial services to increase profitability of the group. A "financial holding company" essentially refers to a parent entity of certain group companies where (i) all or majority of their affiliates are credit institutions, or (ii) majority of their affiliates are financial institutions, provided that at least one of them is a credit institution. Conducting financial activities is a strictly regulated sector in Turkiye and financial holding companies are subject to Banking Law No. 5411 ("***Banking Law***") as well as other secondary legislation. In this regard, the Banking Regulation and Supervision Agency ("***BRSA***") is the competent public institution authorized to set out principles and procedures for financial holding companies. Based on this authority, the BRSA issued the Regulation on Financial Holding Companies ("***Regulation***") to elaborate the rules and requirements that will apply to financial holding companies. Some of the fundamental corporate rules and other significant requirements applicable to financial holding companies can be briefly summarized as follows:

- Incorporation of a financial holding company is subject to prior

approvals of the Ministry of Trade and the BRSA.

- A financial holding company must be in the form of a joint-stock company with at least five shareholders. A limited liability company is not suitable to operate as a financial holding company.

- More than 50% of the paid portion of the share capital of a financial holding company must be allocated to its affiliates. From this point of view, a financial holding company is not allowed to freely utilize its share capital.

- In order to increase the share capital of a financial holding company, the increased amount must be contributed in cash, without using internal resources. In other words, during the share capital increase transactions, the shareholders must fund the company in cash.

- Average of total assets belonging to affiliates of a financial holding company according to the last three accounting periods shall reach certain ratios, as detailed in the Regulation.

- Shareholders of a financial holding company holding 10% or more of the share capital or voting rights or having the privilege to appoint members to the board of directors must hold and sustain certain qualifications which are mainly related to reliability, financial strength and reputation.

- Executives of a financial holding company mainly consist of the board of directors, general manager, deputy general manager or authorized signatories. Such executives must have certain qualifications which are similar to the qualifications sought for the shareholders.

- Direct and indirect share transfers in a financial holding company exceeding certain ratios as specified in the Banking Law or granting privilege to nominate members to board of directors or audit committee are subject to prior approval of the BRSA.

- Any amendment to articles of association of a financial holding company is subject to prior approval of the Ministry of Trade and the BRSA. Unless the amendment text is approved by the BRSA, the proposed amendment cannot be approved at the general assembly level and registered with the trade registry.

- The managing organ of the financial holding companies is the board of directors, which is responsible for (a) establishing internal control, risk management and internal audit systems, (b) ensuring their functionality, appropriateness and adequacy, (c) securing financial reporting systems and (d) determining authorities and responsibilities within the financial holding company.

- Financial holding companies are subject to external audit and financial reporting requirements, on a consolidated basis with all their affiliates.

- As per the relevant regulations of the BRSA, a financial holding

company is required to internally calculate and determine the adequacy of its share capital on a consolidated basis and to aside legal reserves, in order to maintain a strong financial position that is sufficient to cover the risks and losses.

- Incorporation of a branch or representative by a financial holding company abroad is subject to prior approval of the BRSA.

As a type of financial institution, financial holding companies are under tight scrutiny and control of the BRSA. In that sense, many of the requirements applicable to the banks as specified under the Banking Law and its secondary legislation also apply to the financial holding companies in most cases. Consequently, financial holding companies must always operate in accordance with the Banking Law, the Regulation, other secondary legislation as well as other implementation rules that could be introduced and shaped per market dynamics by the BRSA from time to time.

Capital Markets Law

Era of Crypto-Asset Platforms in Turkiye

Law No. 7518 published in the Official Gazette on July 2, 2024 ("***Crypto Asset Law***") has regulated crypto-assets within the scope of Capital Markets Law No. 6362 ("**CML**") and brought clear definitions for fundamental concepts and key provisions regarding crypto-asset service providers and platforms ("***Crypto-Asset Platforms***"). Thereafter, the Capital Market Board ("***CMB***") has further declared conditions as to incorporation, founders, shareholders and executives of the Crypto-Asset Platforms with its principle resolution numbered i-SPK.35.B and dated August 8, 2024 ("***Resolution Principle***"). The Resolution Principle was published in the CMB Bulletin numbered 2024/38.

Although it could be deemed that some of the provisions of the Resolution Principle are redundant with the Crypto Asset Law, it also elaborates certain aspects of the conditions as to incorporation, founders, shareholders and executives of the Crypto-Asset Platforms. On that account, the Resolution Principle constitutes an integral part of the Crypto Asset Law. In this article, we will provide brief summary of the conditions set out under the Resolution Principle.

First of all, the corporate law related, and structural conditions sought for incorporation of a Crypto-Asset Platform according to the Resolution Principle are generally as follows:

- Crypto-Asset Platforms must be incorporated in the form of a joint-stock company,
- All shares of the company must be registered shares,
- Shares must be issued in exchange for cash contributions from the shareholders,
- Share capital of the company must be at least TL 50,000,000 and fully paid in,
- Equity of the company shall not fall under TL 50,000,000,
- Articles of association of the company must comply with the CML and other applicable legislation,
- Founders of the company must meet the conditions listed within

the CML and other applicable legislation,

- Title of the company must include the Turkish translation of the following phrase: "Crypto-Asset Purchase and Sale Platform" (*i.e.,* Kripto Varlık Alım Satım Platformu in the Turkish language),

- Field of the activity of the company must be exclusively determined for purchase, sale, initial offering or distribution, exchange, transfer and necessary custodial services of crypto-assets,

- Company's board of directors must consist of at least 3 (three) members and the majority of them must hold a four-year university degree,

- The shareholding structure of the company must be clear and transparent.

Moreover, the Resolution Principle requires the founders and shareholders of the Crypto-Asset Platforms to have the following qualifications:

- Not being bankrupt, declared concordat, had a restructuring application through conciliation, approved and no postponement of bankruptcy decision should have been issued against them under Law No. 2004,

- They must not have owned 10% or more shares or held control in certain company types or entities in certain sectors, such as factoring, financial leasing, insurance, payment systems and capital markets, whose activity licenses were revoked for reasons other than voluntary liquidation,

- They must not have been previously convicted of certain crimes such as bribery, fraud, forgery, fraudulent bankruptcy under the relevant laws,

- They must not be subject to a transaction ban under Article 101/1-a of the CML,

- They must have the necessary financial standing, as well as the credibility and reputation required for the business,

- They must not have been previously responsible for the revocation of an entity's license by the CMB.

The above conditions also apply to the real persons who have the right to receive at least 50% of the dividend, or the right to be represented in the board of directors, either by electing or nominating more than half of the members in the board of directors of the Crypto-Asset Platform company. If a founder of a Crypto-Asset Platform is a legal entity, then the shareholders of this entity who directly or indirectly hold 10% or more of the shares or having right to be represented in the board of directors of such legal entity regardless of their shareholding ratio, must also satisfy the foregoing conditions.

Furthermore, according to the Resolution Principle, the directors, board members, general manager, deputy general manager, any other persons having equivalent duties, as well as those individuals with signatory powers, are deemed executives, and the executives must also hold the same qualifications as those stipulated for the founders and shareholders (save for the financial standing prerequisites).

The Resolution Principle also provides a list of the documents and information that must be provided by the Crypto-Asset Platforms to evidence their compliance to the foregoing conditions, and other rules pertaining to technological infrastructure and operations. In this regard, Crypto-Asset Platforms must submit their articles of association along with the other documents and information required by CMB. CMB is also authorized to request additional information and documentation depending on the case at hand.

In case of a breach of the conditions outlined above, Crypto-Asset Platforms may be subject to the sanctions stipulated under Articles 99/A and 109/A of the CML, regarding unauthorized crypto-asset service provider activities. Accordingly, the CML may remove or block access to online content related to such unauthorized capital market activities, file lawsuits for returning the relevant funds or capital market instruments to their rightful owners, cancel licenses of the responsible executives and staff, restrict their signatory authorities and block relevant advertisements. In addition to the foregoing, real persons or representatives of legal entities operating without a valid permit might face imprisonment and judicial fines.

The CMB has comprehensively regulated the incorporation and operation procedures of Crypto-Asset Platforms through its Resolution Principle. In this respect, Crypto-Asset Platforms operating or intending to operate in the crypto market must comply with the standards set forth by the CMB. These rules and standards aim to ensure a secure and transparent business environment for investors, enterprises and other players in the market. Considering the increasing public interest in cryptocurrencies and other digital assets, the Resolution Principle set by the CMB represents an appropriate and timely step. However, as the crypto market develops in Turkiye, it is possible to see specific communiqués and further regulations governing the legal framework of Crypto-Asset Platforms to keep up with the recent technological and financial advancements.

Competition / Antitrust Law

Turkish Competition Board's Tat Gıda/Memişoğlu Decision Reinforces the Decisional Practice on the Acquisition of De Facto Sole Control under Turkish Merger Control Regime

I. Introduction

On October 3, 2024, the Turkish Competition Authority ("***Authority***") published the Turkish Competition Board's ("***Board***") reasoned decision regarding the acquisition of 49.04% of the shares in and sole control over Tat Gıda Sanayi AŞ ("***Tat Gıda***") by Memişoğlu Tarım Ürünleri Ticaret Ltd. Şti. ("***Memişoğlu***").[1] The decision involves a detailed assessment of whether the acquisition of a minority shareholding by Memişoğlu would lead to *de facto* sole control over Tat Gıda based on historic general meeting attendance and voting patterns in general assembly meetings of Tat Gıda. The Board's assessment on this front reinforces its established decisional practice in previous cases that involved acquisition of *de facto* sole control.

[1] The Board's Tat Gıda/Memişoğlu decision dated 08.02.2024 and numbered 24-07/128-52

II. Legal Background on the Assessment of *De Facto* Sole Control Under Turkish Merger Control Regime

The rules governing *de facto* sole control under Turkish merger control regime are akin to the rules under the EU Merger Regulation ("***EUMR***") as the relevant legislation in Turkiye is closely modelled on the EUMR and the European Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 ("***CJN***").

Paragraph 45 of the Authority's Guidelines on Cases Considered as a Merger or Acquisition and the Concept of Control ("***Control Guidelines***") indicates that a minority shareholder may also be deemed to have sole control on a *de facto* basis. In particular, a minority shareholder could be deemed to hold *de facto* control over an entity, if it is highly likely to achieve a majority vote at the shareholders' meetings, given the level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders' meetings in previous years. Accordingly, based on the past voting patterns, the Board would conduct a prospective analysis and take into account foreseeable changes of the shareholders' presence which might arise following the transaction. In this respect, where - on the basis of its shareholding, the historic voting pattern at the shareholders' meeting and the position of other shareholders - a minority shareholder is likely to have a stable majority of the votes at the shareholders' meeting, then that large minority shareholder is considered to have sole control.

There are also various cases where the Board analysed whether a shareholder is highly likely to achieve a majority at the shareholders' meetings, taking into account the historic voting patterns at the general assemblies and the position of other shareholders; and therefore acquires *de facto* sole control over the relevant undertaking:

- In its WorxInvest/Gimv decision,[2] considering the historic voting pattern at Gimv's general assembly meetings and the widely dispersed shareholding structure of Gimv, the Board noted that it is highly likely that WorxInvest's acquisition of 27.81% of the shares of Gimv will *de facto* confer WorxInvest a stable majority of the votes cast. Furthermore, considering that no director group holds any veto rights at the level of Gimv's board of directors and that decisions are taken with a simple majority, WorxInvest's representation at the board of directors will ensure that other members of the board will not be able to adopt strategic decisions in Gimv, without WorxInvest's approval. In this respect, the Board concluded that WorxInvest will acquire *de facto* sole control over Gimv.

- In its DP/JFL decision,[3] the Board considered the attendance rates in DP's shareholders' meetings in the last four years and considered that JFL's shares constituted a majority in the relevant shareholders' meetings. The Board assessed that it was highly likely that JFL would

[2] The Board's WorxInvest/Gimv decision dated 21.02.2024 and numbered 24-09/154-64.

[3] The Board's DP/JFL decision dated 02.12.2021 and numbered 21-58/820-402.

hold a stable majority in shareholders' meetings in the future. Strategic business decisions of DP are adopted in the shareholders' meetings by majority vote. Considering that JFL will have a stable majority in DP's shareholders' meetings, the Board remarked that JFL will be able to nominate all of the members of the board of directors of DP, therefore JFL will be able to exercise decisive influence over the strategic decisions of DP and acquire *de facto* control over DP.

- In its Çiftay/Batıçim decision,[4] the Board indicated that Çiftay will acquire 30.0247% of Batıçim's shares; Batıçim is governed by its board of directors; and the members of the board of directors of Batıçim are appointed by the general assembly. Considering the attendance rates of Batıçim's shareholders in the general assembly meetings, the Board remarked that Çiftay, as a minority shareholder, will have a stable majority of votes in the general assembly meetings of Batıçim and therefore Çiftay will acquire *de facto* control over Batıçim.

- In its METRO/EPGC decision,[5] the Board assessed the attendance rates in METRO's shareholders' meetings in the last five years and considered that EPGC's shares constituted a majority in the shareholders' meetings. Due to EPGC's shareholding, attendance rate in METRO's shareholders' meetings and the fact that the significant changes in the shareholding structure of METRO in the last five years did not affect the attendance of minority shareholders, the Board assessed that it was highly likely that EPGC would maintain the majority in the shareholders' meetings in the future. Based on the functions of the shareholders' meeting and the supervisory board of METRO, the Board indicated that in case EPGC had majority in the shareholders' meeting, it would also have *de facto* majority in terms of the decisions of the supervisory board. Members of METRO's board of directors are appointed by the simple majority of the supervisory board and the decisions of the board of directors which require the approval of the supervisory board include the approval of annual budget. To that end, the Board indicated that EPGC would control the shareholders' meeting due to its consistent majority and therefore would have decisive influence over the appointment of the members of the supervisory board. This would also enable EPGC to indirectly exercise decisive influence over the formation of the board of directors that is authorized to adopt all the strategic decisions regarding the commercial policies of METRO. In this respect, the Board concluded that EPGC would acquire *de facto* control over METRO.

[4] The Board's Çiftay/Batıçim decision dated 08.07.2021 and numbered 21-34/477-239.

[5] The Board's METRO/EPGC decision dated 17.12.2020 and numbered 20-54/756-336.

- In its Venator/SK decision,[6] the Board indicated that nominees for the board of directors of Venator were approved by the simple majority of the shareholders present in the annual general assembly of Venator. The Board indicated that considering the attendance levels in the previous shareholders' meetings of the shareholders that possessed voting rights, and the fact that Venator's shares were widely dispersed among different shareholders, SK would have the simple majority in the shareholders' meeting and would be able to approve or reject the members of the board of directors without requiring the approval of other shareholders.

- In its Koç/KFS/YKB decision,[7] Board indicated that quorum of decision and quorum of meeting for YKB's shareholders' meeting were determined as the simple majority, and analysed the attendance and voting rates of the shareholders' meetings between 2013 and 2019. The Board took into account the lowest affirmative vote rate excluding KFS (which was jointly controlled by Koç Group and UniCredit S.p.A. prior to the transaction) and concluded that Koç Group would have the majority that would enable it to exercise *de facto* sole control over YKB as a result of the transaction, in conjunction with the rate of voting shares of Koç Group in YKB and public shares of YKB owned by Koç Group and Koç Family (persons ultimately controlling the Koç Group).

- In its ACCIONA/Nordex decision,[8] the Board indicated that in terms of Nordex's management structure, 2/3 of the board of directors would consist of independent directors and the remaining 1/3 would consist of directors to be appointed by ACCIONA. Quorum of decision of Nordex's shareholders' meeting is simple majority of the present shareholders. In this respect, the Board remarked that if the attendance rate of the shareholders' meeting fell under 59.8%, ACCIONA would hold the majority in the shareholders' meeting. Furthermore, the Board took into account the attendance rate of the shareholders' meeting in the last five years and positions of other shareholders of Nordex and concluded that even though ACCIONA was a minority shareholder, it was highly likely that ACCIONA would consistently hold majority of the votes in the shareholders' meeting of Nordex and therefore ACCIONA would acquire *de facto* sole control over Nordex.

III. The Board's Assessment Whether the Acquisition of Minority Shareholding in Tat Gıda Would Lead to De Facto Sole Control

In the present case, the Board noted that Tat Gıda is controlled by Koç Holding AŞ ("***Koç Group***") prior to the transaction and

[6] The Board's Venator/SK decision dated 26.11.2020 and numbered 20-51/703-311.

[7] The Board's Koç/KFS/YKB decision dated 28.01.2020 and numbered 20-07/71-39.

[8] The Board's ACCIONA/Nordex decision dated 10.02.2016 and numbered 16-04/65-23.

analysed whether the acquisition of 49.04% of Tat Gıda's shares by Memişoğlu would confer control over Tat Gıda. The transaction parties submitted that the meeting and decision quorums in Tat Gıda's shareholders' meetings are based on simple majority. In other words, more than 50% of the shares are required to be present at the meeting and an affirmative vote of more than 50% of the participants is required to adopt a decision at the shareholders' meetings. It was also indicated that Tat Gıda's business and management will be handled by Tat Gıda's board of directors which will consist of at least five and up to thirteen members, who will be appointed by Tat Gıda's general assembly. The general assembly has the authority to determine the number of the members of Tat Gıda's board of directors, as well as to appoint these members. In addition, both the quorum of meeting and quorum of decision for the board of directors are simple majority of the total number of directors.

In this respect, the Board examined the attendance rates in Tat Gıda's shareholders' meetings between 2013 and 2023, the lowest ratio of affirmative vote in these meetings as well as the ratio of affirmative votes by non-Koç Group shareholders. In this respect, the Board determined that Memişoğlu's shareholding of 49.04% will represent a significant majority based on the attendance rates at Tat Gıda's shareholders' meetings in the relevant time period. To that end, the Board also found that it is highly likely that Memişoğlu's shareholding of 49.04% at the shareholders' meeting will allow Memişoğlu to establish a stable majority at Tat Gıda's shareholders' meeting in the future. To that end, the Board concluded that Memişoğlu will acquire *de facto* sole over Tat Gıda as a result of the transaction.

IV. The Board's Substantive Assessment Regarding the Affected Markets

After concluding that the transaction results in a change in control over Tat Gıda on a lasting basis, the Board proceeded with assessing whether the transaction will result in the significant impediment of effective competition in any markets in Turkiye.

The Board found that there is a horizontal overlap between the activities of Tat Gıda and Memişoğlu in Turkiye in the market for instant soup. Although brand recognition is deemed to be important in the market for instant soup, the Board evaluated that the transaction will not lead to any competitive concerns in this market due to very low market shares of the transaction parties, limited market share increment as a result of the transaction, absence of any legal barriers to entry and the existence of a high number of national and local brands active in this market.

The Board also determined that there is a vertical relationship between Tat Gıda's activities in the downstream market for convenience food and Memişoğlu's activities in the upstream market for dried legumes in Turkiye. Considering the market shares of the undertakings active in the market for convenience food in Turkiye, the Board found that Tat Gıda is market leader in Turkiye, followed by Yayla Agro Gıda San. ve Tic. AŞ ("***Yayla***") and Dardanel Önentaş Gıda San. AŞ ("***Dardanel***").

In terms of whether the transaction would lead to any input foreclosure concerns, the Board examined whether the combined entity's competitors in the downstream market would be unable to access to sufficient alternative sources of supply in case Memişoğlu supplied its entire produce of dried legumes to Tat Gıda. The Board

analysed the sales of dried legumes made by Memişoğlu to its customers in Turkiye and found that Tat Gıda is not the only buyer of Memişoğlu's dried legumes, in fact Tukaş Gıda Sanayi ve Ticaret AŞ ("***Tukaş***") is Memişoğlu's largest customer. Furthermore, the Board determined that there are many large and relatively small players in the upstream market for dried legumes, Memişoğlu's existing customers would still have access to alternative suppliers even if Memişoğlu ceased to supply, there are no barriers to import, and there are many alternative sources of supply both in and outside Turkiye. As such, the Board concluded that the transaction will not result in any input foreclosure concerns.

In terms of any potential customer foreclosure concerns, the Board examined the purchases of dried legumes made by Tat Gıda and found that Memişoğlu is not the only supplier from whom Tat Gıda procured dried legumes, and Başhan Tarımsal Ürünleri Paz. ve San. Dış Tic. AŞ ("***Başhan***") is Tat Gıda's largest supplier for this product. Furthermore, the Board considered that there are no barriers for export in the market for dried legumes and therefore the undertakings active in this market have alternative customers both in Turkiye and abroad. To that end, the Board assessed that suppliers of dried legumes will have alternative buyers even if Tat Gıda stopped purchasing dried legumes from them, and therefore the transaction will not lead to any customer foreclosure concerns. Against the foregoing, the Board unconditionally approved the transaction.

V. Conclusion

The decision holds significance as it reinforces the Board's settled decisional practice regarding the assessment of *de facto* sole control on the basis of historic voting patterns and attendance rates at the shareholders' meetings of acquired undertakings. Through this decision, the Board provides further guidance to the question whether an acquisition of a minority shareholding could confer control on a lasting basis, and thus result in a notifiable concentration from a merger control perspective due to specific governing procedures and mechanisms of target entities.

Analysing Employment Practices in Automotive Sector: A Competition Law Perspective[9]

I. Introduction

The Turkish Competition Board ("**Board**"), within the scope of its decision[10] regarding Doğuş Otomotiv Servis ve Ticaret A.Ş. ("***Doğuş Otomotiv***") negative clearance/exemption application, decided that the practice of recommending base salaries for employees in Doğuş Otomotiv's authorised dealers would benefit from the Block Exemption Communiqué on Vertical Agreements No. 2002/2 ("***Communiqué No. 2002/2***").

II. The Board's Sectoral Analysis and Assessments on the Relevant Product Market

With regards to the sector, the Board acknowledged that the automotive sector is characterized by product differentiation and

[9] This article first appeared in Mondaq as "Analysing Employment Practices In Automotive Sector: A Competition Law Perspective" (https://www.mondaq.com/turkey/antitrust-eu-competition-/1485422/analysing-employment-practices-in-automotive-sector-a-competition-law-perspective)

[10] The Board's Doğuş Otomotiv decision dated 07.09.2023 and numbered 23-41/796-280

that high competition in the market relies not only on pricing but also on several other factors. Effective marketing, prompt responses to changing demands, the ability to develop new models, a diverse product range, and a broad service network are all crucial elements of competition in the market.

The Board emphasized that the quality of after-sale services directly impacts customers' brand loyalty of the consumers. Surveys and studies indicate a significant connection between the quality of the service and the salaries of the employees who provide these services firsthand. The Board determined that automotive sales and after-sale services are vital for gaining customer loyalty, and the motivation of the employees working in these sectors has an impact on the quality of the service. Therefore, employees' motivation is closely tied to their salaries. Doğuş Otomotiv's application refers to recommending base salaries for "*sales executives, sales consultants in the sales management job family; workshop executives, service engineers, foremen, service consultants, damage consultants, disposition experts, disposition associates, technicians in the service support job family; spare part executives, spare part associates, warehouse attendants in the spare part job family; warranty experts, warranty associates, HR executives, HR associates, customer relations executives, customer relations associates, accounting specialists, accounting executives, accounting associates, sales support specialists, sales support associates, customer advisors in management and operational support job family*" employees by Doğuş Otomotiv.

The Board evaluated the recommended base salaries as crucial input in the automotive sales and after-sales services, noting their potential impact on the labour market. However, in line with the Para. 20 of the Guidelines on the Definition of Relevant Market and based on its assessment that the application would not give rise to competition law concerns, the Board left the market definition open and did not specify a geographic market.

III. Background Information on the Application

Doğuş Otomotiv has a wide range of authorised dealers and an extensive distribution network in the Turkish market. As the distributor of various brands, Doğuş Otomotiv conducts both sales and after-sales services through its dealers. Doğuş Otomotiv primarily focuses on exporting and delivering branded vehicles to its dealers. Therefore, Doğuş Otomotiv deems it important to provide high-quality services to customers through its dealers and authorised dealers.

Doğuş Otomotiv's negative clearance/exemption application pertains to its motivation to provide quality services. In its application, Doğuş Otomotiv stated that the practice of recommending base salaries would vary by province and region, would not include side benefits, and the relevant table would be shared only with the shareholders and executives of the dealers and authorised dealers, via e-mail.

IV. The Board's Assessments on Article 4 of Law No. 4054 and Communiqué No. 2002/2

a. Negative Clearence

Under Article 4 of Law No. 4054, *"agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or*

indirectly in a particular market for goods or services" are illegal and prohibited. Article 5 of Law No. 4054 regulates the requirement of negative clearance. To be eligible for a negative clearance certificate, an agreement, decision, practice, or merger and acquisition must not be contrary to Articles 4, 6, and 7 of Law No. 4054.

In line with the foregoing, the Board assessed that one of the main factors ensuring labour mobility is the difference in salaries. Despite the recommended nature of the relevant application, it may impact salary fixing and therefore eliminate competition between the authorised dealers and dealers in terms of labour and salaries, ultimately restricting labour mobility. In this respect, the Board held that the application falls within the scope of Article 4 of Law No. 4054, and therefore, a negative clearance certificate cannot be issued for Doğuş Otomotiv's application.

b. Exemption

The Board considered the relationship between Doğuş Otomotiv and its dealers and authorized dealers as a vertical relationship and determined that Communiqué No. 2002/2 will be applicable. Although the Board stated that Communiqué No. 2002/2 should be taken into consideration in the evaluation of the application, it also emphasized the need for interpretation to determine the abstract norm. Therefore, the Board indicated that in the absence of any case law addressing the specific nature of a certain practice and whether it constitutes competition restriction, it would be appropriate to reason by analogy.

The Board assessed that Doğuş Otomotiv's provision of a recommended salary list to its dealers and authorized dealers to be considered in the determination of the salaries of their employees, constitutes a purchase price recommendation. The Board stated that Article 4(a) of Communiqué No. 2002/2, could be considered similar and apply to the concrete case due to the non-existence of a specific provision for the concrete case.

The Board conducted its regulatory assessments in the following steps:

1. **Article 2 of the Communiqué No. 2002/2:** Firstly, the Board identified the scope of the vertical agreements considering the *"agreements concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of purchase, sale or resale of particular goods or services"* definition in Article 2 of the Communiqué No. 2002/2,

2. **Article 4(a) of Communiqué No. 2002/2:** Considering the vertical nature of the application, the Board determined Article 4(a) of Communiqué No. 2002/2 *"Preventing the purchaser from determining its own selling price. It is to such an extent that the provider may determine the maximum selling price or recommend the selling price, on condition that it does not transform into a fixed or minimum selling price as a result of the pressure or encouragement by any of the parties."* shall apply,

3. **Para. 17 of the Guidelines on Vertical Agreements:** With regards to the Article 4(a) of Communiqué No. 2002/2 the Board referenced Para. 17 of the Guidelines on Vertical Agreements

"Article 4.1(a) of the Communiqué concerns obstruction of the buyer undertaking's freedom to determine its own prices. Accordingly, setting fixed or minimum sales prices for the buyer is absolutely prohibited. However, the supplier may set maximum sales prices for the buyer or offer recommended sales prices to the buyer, provided these do not transform into fixed or minimum sales prices. In order to ensure that maximum or recommended sales prices notified to the buyer do not become minimum or fixed prices, price lists or packaging of the product must clearly indicate that the prices concerned are maximum or recommended prices",

4. **<u>Article 2.2 of Communiqué No. 2002/2 and Para. 219 of the Guidelines on Vertical Agreements:</u>** Considering Article 2.2 of Communiqué No. 2002/2 *"The exemption granted by this Communiqué shall be applied provided the market share of the provider in the relevant market where it provides the goods and services comprising the subject matter of the agreement does not exceed 30%"* and Para. 219 of the Guidelines on Vertical Agreements *"Where the supplier's market share does not exceed 30%, recommended price and maximum price practices are evaluated within the scope of the block exemption, as mentioned in the relevant chapters. The following explanations will provide guidance in the assessment of individual cases where the market share threshold is exceeded and where the block exemption must be withdrawn."* the Board assessed that Doğuş Otomotiv's market share specifically for each job family, and for "service and spare part job family" in total does not exceed 30%,

5. **<u>Para. 221 of the Guidelines on Vertical Agreements:</u>** Under Para. 221 of the Guidelines on Vertical Agreements *"The most important factor in the assessment of possible anti-competitive effects of maximum or recommended prices is the market position of the supplier. The stronger the position of the supplier, the higher the risk of maximum or recommended prices being used somewhat uniformly by resellers, since they may use these prices as a focal point. Resellers may find it hard to deviate from the price recommended by such an important supplier. Under these circumstances, if maximum and recommended prices result in uniformity of price levels, these practices are not likely to fulfill the conditions of Article 5 of the Law."* the Board indicated that recommended salaries provided by Doğuş Otomotiv could be perceived as reference salaries for dealers and authorised dealers.

The Board further assessed that the primary concern of the application could potentially relate to intra-brand price competition. To ascertain whether Doğuş Otomotiv's recommended salary practice would restrict intra-brand price competition and potentially lead to price fixing within the brand, the Board examined the average salaries received by occupational groups. These salaries are established as advisory

base salaries across Doğuş Otomotiv's subsidiaries and dealers in 2021 and 2022. The evaluation concluded that these salaries fluctuate over time and there is no indication of fixed salaries within the relevant occupational groups.

The Board also assessed that career opportunities within the service and spare part job family are more limited compared to the operational support job family. In this regard, the Board examined the potential for salary fixing among the relevant job families. It determined that there are differentiated salaries between Doğuş Otomotiv and its subsidiaries, as well as between dealers active in the same province where Doğuş Otomotiv and its subsidiary are present. Furthermore, the Board found that there are no standardized practices regarding salaries of the employees even within Doğuş Otomotiv's subsidiaries themselves.

Furthermore, the Board requested information from Doğuş Otomotiv's dealers and its subsidiary to gather their opinions on the planned practice by Doğuş Otomotiv. According to the responses, 82% of the dealers expressed that receiving a list of recommended base salaries from Doğuş Otomotiv would be beneficial as it could assist in attracting higher-quality employees. However, they emphasized that while the recommendations may guide them in determining salaries, they retain the independence to decide employee salaries.

Additionally, 15% of the dealers indicated that a negative clearance or exemption application from Doğuş Otomotiv would not adversely affect them. They stated that they would continue applying their policies regarding salaries independently.

V. Conclusion

Consequently, since Doğuş Otomotiv's relevant total market share does not exceed the 30% market share threshold specified in Communiqué No. 2002/2, and it is understood that there is no concern that authorised dealers and dealers apply a standard salary by accepting the salaries recommended by Doğuş Otomotiv as a reference, it is considered that Doğuş Otomotiv can benefit from exemption within the scope of the Communiqué No. 2002/2. In the light of the foregoing substantive assessment, the Board unanimously decided that a negative clearance certificate cannot be issued for the application pursuant to Article 4 of Law No. 4054, but it can grant exemption within the scope of Communiqué No. 2002/2.

Turkish Competition Board's Comprehensive Analysis of Joint Venture Criteria: GEHC / CMDC decision

I. Introduction

On September 26, 2024, the Turkish Competition Authority (the "***Authority***") published the Turkish Competition Board's (the "***Board***") reasoned decision,[11] concerning the acquisition of joint control over Sinopharm Pharmaceutical Imaging Co., Ltd. ("***JV***") by China National Medical Device Co., Ltd. ("***CMDC***") and GE Healthcare (China) Co., Ltd. ("***GEHC China***"). The proposed transaction was unconditionally approved pursuant to Law No. 4054 on Protection of Competition ("***Law No. 4054***") and the relevant provisions of Communiqué No. 2010/4 on the Mergers and Acquisitions Requiring the

[11] The Board's decision dated 23.11.2023 and numbered 23-54/1037-372.

Approval of the Competition Board ("***Communiqué No. 2010/4***").

The Board's decision provides an up-to-date insight into the criteria for the transactions concerning the establishment of a green-field joint venture.

II. The Board's Assessment on Joint Venture Criteria

According to its assessment on joint control, the Board noted that the JV's Board of Directors will be composed of 5 directors, where CMDC will have the right to nominate three directors and GEHC China will have the right to nominate two directors, and decisions of the Board of Directors will require the affirmative votes by more than half of the directors. However, the Board remarked that decisions on investment, product strategies, appointment and removal of the general manager and examination and approval of intellectual property agreements required the approval of at least two-thirds of votes of shareholders in the Shareholders Meeting. Against this background, the Board indicated that although CMDC will have the right to nominate three directors, it would not be able to determine business plan, investment plan and marketing plan of the JV and/or appoint the senior management without the approval of GEHC China. Therefore, the Board noted that the JV would be jointly controlled by GEHC China and CMDC.

As per the full functionality criteria, the Board determined that the JV would have sufficient resources to operate independently in the market, it would have its own management and personnel to conduct its commercial businesses. Secondly, the Board noted that JV would have activities beyond one specific function for the parents. JV would develop and manufacture certain medical equipment and devices in China and would be able to expand its product portfolio to other high-end devices such as MR in future. While CDMC and GEHC China were planning to help JV in certain matters, such as applying for the certificates of medical device registration, establishment of manufacturing facilities and building a manufacturing capacity, the Board noted that these activities were mostly related to the establishment of the JV and would not disrupt its independent nature.

Furthermore, the Board indicated that the JV would conduct its business activities on a lasting basis. Considering that the JV was planned to operate in the market for thirty years, the Board decided that this duration was sufficient to create a permanent change in the market structure. Lastly, the Board noted that while there was no predetermined supply or purchase guarantee between the JV and CMDC, JV would supply the components of all products to be developed, manufactured or commercialized from the affiliates of GEHC China for a five-year period.

According to paragraph 85 of the Guidelines on the Concept of Control, circumstances where the strong presence of parent companies in the upstream or downstream markets give rise to large sale and purchase relations between the joint venture and the parents may prejudice the full-functionality of the JV. That said, such sales and purchases may be tolerated if they will take place for an initial start-up period (up to 3 years) depending on the dynamics of the market in question, considering that they may be necessary for the JV to get a foothold in the market. However, there are decisions, such as Celenase/Blackstone (28.11.2017, No. 17-39/623-270), Itochu/Hitachi (15.12.2022, No. 22-55/857-355) and İGA (19.12.2019, No. 19-45/769-

331), where the Board considered that a sale purchase relation of the JV with its parents for period of five years would not hinder full functionality character of the JV.

Against this background, in determining whether the JV depended on its parents for sales and purchases, the Board examined the following two criteria: (i) the JV should provide an added value to products or services provided from its parents, and (ii) the JV should have necessary facilities and be likely to obtain a substantial proportion of its supplies not only from its parent companies but also from other competing sources.

While examining the first criterion, the Board stated that (i) the products to be supplied to JV from GEHC China were mainly raw materials to be used in CT and ultrasound devices, (ii) JV was planning to use additional financial resources and hire qualified personnel to manufacture these CT and ultrasound devices by using the raw material supplied by GEHC China. In this regard, the Board decided that the JV would generate added value to the products supplied from GEHC China. In terms of the second criterion, the Board indicated that the JV would have the right to determine and occasionally amend the components of the purchasing relationship. Moreover, the Board remarked that JV will attain the right to manufacture certain components or to buy them from third parties, as of the third year of the exclusive purchase period. In this respect, the Board decided that the JV would not be dependent on its parents for sales and purchases and therefore, met the criteria to be considered as a full function joint venture.

III. Board's Competitive Assessment on the Transaction

The Board noted that GEHC is active in imaging, mobile diagnostics, and monitoring technologies in Turkiye and supplies various products such as pharmaceutical imaging, CT and ultrasound devices. On the other hand, the Board indicated that China National Pharmaceutical Group Corporation, which was parent company of CMDC, imports various products in Turkiye such as biological products, chemical raw materials and medical device consumables.

In light of the information provided by the parties, the Board decided that there were no overlaps between the parties' activities in Turkiye and accordingly, the transaction would not significantly impede competition in Turkiye.

IV. Conclusion

The Board concluded that the proposed transaction would not significantly reduce effective competition under any market definition in Turkiye and granted its unconditional approval to the proposed transaction.

Navigating Dominance and Compliance: Insights on the Turkish Competition Board's EssilorLuxottica Decision

I. Introduction

On August 8, 2024, the Turkish Competition Authority ("***TCA***") published on its official website the decision of the Competition Board (the "***Board***") regarding EssilorLuxottica S.A. ("***Essi-Lux***").[12] Essi-Lux is a vertically integrated leader in

[12]The Board's Essi-Lux decision dated 17.08.2023 and numbered 23-39/749-259.

optical products, known for its registered brands like Ray-Ban, Varilux, and Transitions, as well as licensed brands such as Chanel, Prada, and Versace.

II. Background

Essilor's merger with Luxottica in 2018 was conditionally approved by the Board.[13] The commitments required Essi-Lux to maintain separate sales channels for ophthalmic lenses, frames, and sunglasses and to avoid any form of exclusivity that would prevent retailers from purchasing similar products from competitors. These requirements were intended to address the Board's concerns about horizontal and conglomerate effects, as Essi-Lux's high market share across optical product categories could potentially harm competition.

The current case arose from concerns that Essi-Lux's subsequent agreements and practices breached these commitments by indirectly creating exclusivity, primarily through bundled sales and long-term contracts, which incentivized retailers to rely solely on Essi-Lux products.

III. The Board's analysis of Essi-Lux's conduct

The Board defined three relevant product markets in the decision: (i) ophthalmic machinery and supplies, (ii) wholesale of ophthalmic lenses, and (iii) wholesale of contact lenses. The relevant geographic market was defined as Turkiye. The Board's findings emphasized that Essi-Lux held a dominant position in each market, justifying scrutiny under Article 6 of Law No. 4054.

As a vertically integrated entity, Essi-Lux serves as both a manufacturer and supplier of lens-cutting machines. The Board found that Essi-Lux's strategy involved providing these machines to optical stores on very favourable terms or even free of charge in certain cases in exchange for purchasing ophthalmic lenses from Essi-Lux. This approach was argued to create exclusivity in the ophthalmic lens market, by employing sales and credit policies that competitors could not match, resulting in practices that may exclude competitors. Accordingly, the investigation examined whether Essi-Lux engaged in practices via contracts, sales campaigns, discount systems, and similar applications that could exclude competitors or create exclusivity in the wholesale market for ophthalmic lenses.

The Board initially reviewed contracts containing exclusivity clauses signed during the period when the commitments from the 2018 Essilor/Luxottica decision were in effect. Additionally, Essi-Lux's bundled sales practices combining sales of ophthalmic lenses and machines were assessed. The Board found that all packages offered by Essi-Lux, including bundled sales agreements with optical retailers, covered costs. Furthermore, a price-cost analysis of the lens-cutting machines provided in these contracts revealed that Essi-Lux's machine costs fell below a designated cost percentage threshold for a sample of 50 optical retailers. This finding supported the Board's view that Essi-Lux's practices likely excluded competitors from the ophthalmic lens manufacturing and wholesale market.

The Board further evaluated that Essi-Lux's practice of offering machines and equipment free of charge, or at a discounted

[13] The Board's decision dated 01.10.2018 and numbered 18-36/585-286.

rate, contingent upon achieving specific ophthalmic lens purchase targets, constituted a target discount, with potential to exclude competitors.

Contracts involving ophthalmic lens and machine-bundled sales from Altra, İşbir, and Opak were examined, and it was observed how closely optical retailers adhered to their purchase commitments. The analysis of these contracts and compliance levels revealed that optical retailers adhered strictly to these commitments, often securing discounts or access to machines/equipment at lower prices or even for free. The Board noted that the documents obtained during on-site inspections further revealed that Essi-Lux closely monitored contracts and monthly purchases of optical retailers, with provisions allowing for machine retrieval in the event of non-compliance.

The Board decided that a comparative analysis of optical retailers' purchase levels before and after entering agreements with Essi-Lux showed that the number of retailers increasing their purchases grew over the years, suggesting that Essi-Lux was utilizing its ophthalmic lens and machine/equipment agreements more effectively. Additionally, an examination of payment terms in Essi-Lux's contracts revealed that competitors struggled to match the long-term payment options Essi-Lux offered, incentivizing retailers to purchase from Essi-Lux.

An analysis of the closure rates among customers involved in ophthalmic lens and machine bundled sales between 2018 and 2021, with an 80% benchmark threshold, showed that a significant number of optical retailers in these bundles either closed or redirected their purchases toward Essi-Lux. The Board concluded that this supported the assessment that competitors were likely excluded from the market.

In conclusion, Essi-Lux, being both a producer of ophthalmic lenses and machines, offered advantageous terms to optical retailers conditional on their commitment to ophthalmic lens purchases. This included providing machines/equipment free of charge or at a discount, which allegedly encouraged retailers to purchase both lenses and equipment from Essi-Lux. According to the Board, the target discount feature of this practice, combined with long-term contracts, strengthened the likelihood of optical retailers buying from Essi-Lux. Furthermore, the close monitoring of these agreements was considered to shift retailers' purchases toward Essi-Lux, creating *de facto* exclusivity and a restrictive impact on competitors.

IV. Conclusion

The decision primarily focused on Essi-Lux's practices of bundled sales and long-term contracts, which allegedly induced exclusivity in the market and restricted competitors' access to the market, thereby constituting a violation of competition law under Article 6 of Law No. 4054.

By opting to impose only a daily administrative fine under Article 17 of Law No. 4054, rather than combining it with an additional fine under Article 16 (despite the recommendation of the case handlers), the TCA underscores its ongoing effort to align Turkish competition law practices with Turkish criminal law principles. However, the decision's rejection of Essi-Lux's argument - that fines for non-compliance with commitments should not exceed 10% of base revenues – will likely remain a topic of debate.

Upholding Ne Bis in Idem: The Turkish Competition Authority's Approach to Exclusivity Agreements in Nesine Decision[14]

I. Introduction

The Turkish Competition Authority ("***TCA***") has recently announced its reasoned decision concerning abuse of dominance by D Elektronik Şans Oyunları ve Yayıncılık AŞ ("***Nesine***"), a sports betting company in Turkiye, through exclusivity agreements entered into with potential customers of its competitors.[15]

The subject of the investigation was the exclusivity provisions in the contracts signed between Nesine and its advertisers/sponsors within the scope of advertising, promotion and sponsorship activities, allegedly preventing Nesine's competitors from working with the said undertakings.

The decision is interesting as it involved important competition law mechanisms available in Turkish competition law including (i) commitments submitted by Nesine, (ii) interim measure imposed by the TCA on the exclusivity clause between Nesine and Maçkolik (a popular mobile application and website for consumers allowing live score tracking) until the end of the investigation, and (iii) the TCA's instructions to Nesine to cease its certain exclusivity arrangements to restore the competition in the relevant market.

The decision is also significant as it deals with abuse of dominance assessments stemming from exclusivity clauses and its relationship with the *ne bis in idem* principle.

This article will begin by examining the TCA's approach to defining the relevant product market, followed by an analysis of its assessment of abuse of dominance. It will then address the commitments submitted by Nesine and the interim measure imposed by the TCA, before concluding with a review of the decision.

II. Relevant Product Market

The TCA has first evaluated whether the "games of chance" and "betting games" can be considered in the same relevant product market. The former is used for games in which the chances of earning a prize are completely dependent on "luck" of the participant, while the latter depends also on the skills, experience and knowledge of the participant in addition to the "luck" factor. According to the TCA, betting games may be further broken down into two categories: parimutuel betting and fixed odds betting. The difference between the types is that estimation of potential final earnings is not possible in the former while being clear at the time of the betting activity in the latter.

The TCA has established in a previous case[16] that games of chance and betting games are not considered to be in the same relevant product market as, among other reasons, they are subject to different rules and regulations. In light of this approach, it was considered that the said separation of markets is also applicable in the case at hand.

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[14] This article first appeared in Mondaq as "Upholding Ne Bis in Idem: The TCA's Approach to Exclusivity Agreements in Nesine Decision" (https://www.mondaq.com/turkey/antitrust-eu-competition/1527062/upholding-ne-bis-in-idem-the-tcas-approach-to-exclusivity-agreements-in-nesine-decision)

[15] The TCA's decision numbered 24-11/194-78 and dated 29.02.2024.

[16] The TCA's decision numbered 14-26/548-236 and dated 07.08.2014.

After establishing that "games of chance" and "betting games" constitute two separate relevant product markets, the TCA went onto assessing whether physical channels and online channels for betting are two separate relevant product markets.

Physical betting shops require the participant to be present at the shop to place a bet, while online betting sites offer more convenience to the participants by being accessible through any smart mobile device or computer with internet access. According to official figures, between the years 2019-2022, online betting's market share rose to 87.74% from 78.12%, presumably due to covid-19 and its effects on digitalization. Due to the differences required to complete the betting process, the TCA concluded that online and physical channels are not in the same relevant product market.

All in all, the TCA has concluded that the relevant product market should be determined as "fixed-odd betting games played through virtual betting sites" in assessing whether Nesine abused its dominant position.

III. Dominant Position Assessment of the TCA

The TCA firstly examined the amount of active users (*i.e.* users with betting slips) and how that translates into market share, where Nesine was determined to be the top earner. One important factor to consider was that "live betting" was legalized in Turkiye in 2019, causing all participants of the practice to search for a legitimate platform. Nesine was reported to have made this transition very efficiently through integrating the necessary systems into their operations, gaining large amounts of participants during the period which is said to have resulted in the current economic standing of the platform.

Secondly, the barriers for entry into the industry was examined. It was found that the entry into and activities in the betting games industry was strictly regulated by the Spor Toto Organization of Turkiye ("***STTB***") with failure to comply with its regulations resulting in cancellation of license. The threat of business shutdown is also cited as a reason for new undertakings' hesitation about entering the industry, with the claim being supported by the fact that the last entry into the industry took place in 2010.

Thirdly, factors around network externality were examined. As the user network of a firm in this industry widens, it can provide external services[17] and spend financial resources on advertisements and sponsorships. Nesine, due to its financial advantage over competing firms, was subject to far less financial restrictions in providing these services. Consequently, these advantages create a cycle where Nesine is able to gain and spend more while other firms are unable to compete.

The TCA has also found out that according to Similarweb,[18] Nesine was the 40th most visited website in Turkiye in 2023, while its closest competitor active in the same relevant product market, Bilyoner, was at 316th place followed by other competitors at 443rd, 640th, 1622nd, and 2515th places. Although not the sole determinator, this point has factored in establishing that Nesine is in dominant position in the "fixed-

[17] Live broadcasting of matches for the betting game participants during the game.

[18] Similarweb is a website aimed at measuring website traffic (*e.g.* number of visitors, duration of website visit)

odd betting games played through virtual betting sites".

IV. Nesine's Exclusivity Agreements

Due to regulations on payments and earning rates,[19] the betting games industry is not open to competition in financial benefits. Consequently, firms resort to advertisements and sponsorship to further bring in participants, as the competition takes place on attracting more customers to the platform, rather than on pricing. Competitors compete on parameters such as brand visibility (advertisement, promotion and sponsorship agreements), bonus distribution, customer experience offered on betting sites (website speed, design, ease of use), customer relations, speed of solving customer problems, speed of withdrawals, commission arrangements with banks, live match broadcasts and the variety of matches broadcasted, and digital games subject to special permission. As a result, opportunities for ads and sponsorships that increase the visibility of the betting platform have become crucial in this sector.

The TCA has found out that Nesine had agreements, many of which included exclusivity clauses, with major stakeholders in Turkiye such as largest sports clubs, basketball tournaments, media companies and websites or applications that meaningful for Nesine's and its competitors' customers (such as live score trackers). In addition, Nesine's non-exclusive agreements are shorter in duration and contain lower contract prices compared to those with exclusive agreements. It has also been found that Nesine pays less advertising and sponsorship fees for these undertakings. On the other hand, Nesine's competitors conduct advertising, promotion and sponsorship activities with much fewer initiatives and much less budget compared to Nesine.

The TCA has also identified a trend where Nesine's sponsorship spendings have been increasing significantly over the years, surpassing the ones of Bilyoner (Nesine's largest competitor) in 2020, and doubling in 2022 compared to 2021.

In light of above, it has been assessed by the TCA that Nesine's exclusivity agreements with sports clubs, applications and for sports clubs' field advertisements, which are the most effective advertising and sponsorship areas for reaching the target consumer audience, have actual and potential restrictive effects on competition. Therefore, it has been concluded that Nesine's exclusionary practices through exclusive agreements violated the Law No. 4054.

V. Violation through Exclusivity Clauses and Ne bis in Idem

The TCA has remarked that exclusivity agreements can be considered within the scope of Article 4 of the Law No. 4054 prohibiting anti-competitive agreements, while the same practices can also be assessed in terms of abuse of dominant position through "exclusionary practices" under Article 6 of the Law No. 4054. Indeed, in instances where the TCA has initiated investigations against practices surrounding anti-competitive exclusivity arrangements, it generally evaluated the

[19] As per the relevant legislation, the odds for sports games are set by a single entity, Şans Girişim, and all the firms are required to use the same odds, with extremely few exceptions on rare occasions for limited timeframes.

said practices within the scope of both Article 4 and Article 6.[20]

On the other hand, the possibility of repeated punishment arises if the same anti-competitive behaviour violates both Articles 4 and 6 of the Law No. 4054. This is against the *ne bis in idem* principle which, in essence, prohibits repeated punishment for the same action.[21]

Considering above, the TCA has this time evaluated the alleged practices within the scope of only Article 6 and emphasized that regardless of whether Article 4 or Article 6 is applied, the same assessments will be made due to the exclusionary nature of the exclusivity clauses.

VI. Interim Measures Regarding the Contract with Maçkolik

During the investigation process, the Board issued a decision[22] containing interim measures surrounding Nesine's agreement with Maçkolik as the agreement was deemed to pose a serious threat of damaging the competitive landscape irreparably. The agreement was broadly about Maçkolik exclusively offering advertising services to Nesine during sports match broadcasts for a three-year period.

One aspect that specifically caused concern was that if Nesine's ads did not receive a certain number of clicks, Maçkolik would pay penalty fees to Nesine. However, this clause resulted in Maçkolik displaying even more ads of Nesine, which made it even more challenging for competing firms to have a chance of putting forward ads on Maçkolik.

According to the interim measure, Nesine and Maçkolik had to stop implementing the aforesaid clauses that, directly or indirectly, prevented Nesine's competitors from advertising on Maçkolik until the final decision of the TCA.

VII. Commitments Submitted by Nesine

Within the scope of the ongoing investigation, Nesine submitted two sets of commitments to alleviate the concerns surrounding its exclusivity arrangements. Both sets of commitments were rejected by the TCA after consulting with the counterparts of the said exclusivity arrangements, on the ground that the commitments were not suitable for resolving the concerns nor effectively applicable.

VIII. Final Decision

The TCA decided that Nesine abused its dominant position in "fixed-odd betting games played through virtual betting sites" through the use of exclusivity clauses with major stakeholders such as major sports clubs and tournaments, among others; and thus, preventing its competitors' opportunities to advertisement and sponsorship opportunities, which are the main decisive parameters of the competition in the market. As a result, the TCA imposed an administrative monetary fine (approx. TL 78 million, corresponding

[20] The TCA's decisions numbered 00-26/292-162 and dated 17.07.2000; numbered 07-70/864-327 and dated 10.09.2007; numbered 10-14/175-66 and dated 08.02.2010; numbered 11-34/742-230 and dated 06.06.2011; numbered 15-28/345 and dated 07.07.2015; numbered 17-08/99-42 and dated 23.02.2017; numbered 21-04/53-22 and dated 21.01.2021.

[21] The TCA's decision numbered 21-13/173-74 and dated 11.03.2021.

[22] The TCA's decision numbered 23-27/520-176 and dated 15.06.2023.

to USD 2.3 million with today's exchange rate) on Nesine.

In addition to the administrative monetary fine, the TCA instructed Nesine (i) to remove the provisions in its agreements with sports clubs regarding advertisement and sponsorship (apart from the agreements regarding jerseys) that may cause direct or indirect exclusivity, (ii) not enter into new agreements with sports clubs (apart from the agreements regarding jerseys) that include provisions that may cause direct or indirect exclusivity on the same matters, (iii) remove the provisions in its agreements with sports clubs regarding field (*e.g.* football pitch or basketball court) advertisements that may cause direct or indirect exclusivity, (iv) not enter into new agreements with sports clubs that include provisions that may cause direct or indirect exclusivity on field advertisements, and (v) not enter into procurement or advertisement agreements with Maçkolik that include provisions that may cause direct or indirect exclusivity.

IX. Conclusion

The Nesine decision provides an important precedent in Turkish competition law by clarifying the TCA's approach to assessing exclusivity agreements within the context of abuse of dominance. The decision focused on Nesine's extensive use of exclusivity clauses with major stakeholders in the sports betting industry, concluding that these practices had restrictive effects on competition in the market for fixed-odd betting games played through virtual betting sites.

The TCA's assessment was based on detailed considerations of Nesine's dominant position, the market dynamics, and the role of exclusivity agreements in limiting competitors' access to advertising and sponsorship opportunities. The TCA applied only Article 6 of the Law No. 4054 to avoid the risk of overlapping with Article 4, reflecting the importance of adhering to the *ne bis in idem* principle in competition law enforcement.

Dispute Resolution

Mediation And Arbitration (Med-Arb) as an Alternative Dispute Resolution Method

I. Introduction

Arbitration has become an increasingly popular method for resolving disputes, allowing parties to avoid lengthy, costly, and often inefficient judicial processes. In Turkiye, arbitration enjoys similar popularity, with growing adoption driven by an arbitration-friendly approach in both international and domestic lawmaking, as well as the establishment of independent arbitral institutions such as the Istanbul Arbitration Centre. As a result, arbitration has evolved into a preferred method for handling complex disputes within Turkiye.

In addition to arbitration, mediation has also been introduced as an alternative dispute resolution mechanism. For certain disputes, "mandatory mediation" has been established as a required step before proceeding to litigation in Turkish courts. Although commercial disputes involving receivables and compensation claims are subject to mandatory mediation, Article 18/A(18) of the Mediation Law provides an exemption: mandatory mediation does not apply where an arbitration clause is in place, or where the law requires arbitration or another specific alternative dispute resolution method for the dispute.

Parties may also choose to include mediation proceedings as a pre-requisite to

arbitration, adding another layer of flexibility in resolving disputes.

II. Med-Arb Method

In practice, arbitration clauses having a mediation proceeding as a pre-requisite are considered as "multi-tier dispute resolution clauses/agreements." Indeed, the International Bar Association ("***IBA***"), in its Guidelines for Drafting International Arbitration Clauses ("***Guidelines***") coins the term "multi-tier dispute resolution clauses" for arbitration clauses which provide a mediation process prior to the arbitration itself. IBA, in its Guidelines, provide three important points in drafting a multi-tier dispute resolution clause, which include mediation as a pre-requisite for the arbitration: (i) the clause should specify a period of time for negotiation or mediation, triggered by a defined and undisputable event (*i.e.* a written request), after which either party can resort to arbitration, (ii) the clause should avoid the trap of rendering arbitration permissive, not mandatory, (iii) the clause should define the disputes to be submitted to negotiation or mediation, and to arbitration in identical terms.

The IBA Guidelines align with Turkish High Court of Appeals precedents, particularly regarding the need for arbitration to be mandatory, rather than permissive. The Turkish High Court of Appeals has further emphasized in its decisions[23] that an arbitration agreement must be definitive, clearly reflecting the parties' intent for arbitration to serve as the final and binding method for resolving any disputes arising under the agreement.

III. Conclusion

While arbitration is often a preferred method of resolving complex and prolonged disputes, given its advantages over traditional court litigation, it still carries potential downsides, such as significant costs. As a viable alternative, the Med-Arb process offers an efficient path to even swifter dispute resolution, often at a lower cost than either arbitration or litigation alone. Mediation, by its very nature, seeks to foster mutually beneficial outcomes, aiming for solutions that satisfy both parties. This collaborative approach can lead to resolutions that are not only effective but also agreeable to both sides. Therefore, when drafting contracts, including a Med-Arb clause carefully crafted in line with the IBA's Guidelines can provide a mechanism for addressing disputes promptly and economically, minimizing time and financial burdens while maximizing satisfaction for the parties involved.

Data Protection Law

Recent Developments on Turkish Standard Contracts

Law No. 6698 on Protection of Personal Data ("***DPL***") which is the main legislation on data protection in Turkiye, has gone through a significant amendment in the first half of 2024. The amendments mainly affected Article 6 (*Conditions related to the processing of special categories of personal data*), Article 9 (*Transfer of personal data abroad*) and Article 18 (*Minor Offences*) of the DPL. The objective of the amendments was to align the Turkish data protection legislation with the European Union's

[23] The decisions of Turkish High Court of Appeals 15th Civil Chamber (i) numbered 2016/5313 File, 2017/3922 Decision dated November 13, 2017, (ii) numbered 2016/10552 File 2017/256 Decision dated November 13, 2017, and (iii) numbered 2016/5600 File, 2017/512 Decision dated February 9, 2017

(“***EU***”) General Data Protection Regulation (“***GDPR***”).

One of the highly anticipated changes was related to the transfer of personal data abroad as the previous version of the DPL created a substantial challenge for data controllers and processors considering that it provided very limited options as legal ground for cross-border data transfers. Obtaining data subjects’ consent was the principal rule under the previous version of Article 9 of DPL. To be able to transfer personal data without needing to obtain explicit consent, legal conditions stipulated under Article 5/2 and Article 6/3 should have been met and an adequacy decision should have existed regarding the country to which the transfer will take place. Data controllers had a third alternative in the absence of an adequacy decision which was the undertaking that they can sign with the third party that they are transferring data to. As the Turkish Personal Data Protection Board (“***Board***”) has not yet announced an adequacy decision, data controllers had to rely on explicit consent which actually undermined its validity in practice or sign an undertaking which is subject to the Board’s approval that usually took more than a year to be concluded.

The lawmaker addressed this issue with the amendments, which comprehensively changed Article 9. The amendments entered into force on June 1, 2024. Accordingly, the amended Article 3 mainly includes three options for the transfer of personal data abroad as (i) transfers relying on adequacy decisions, (ii) transfers based on appropriate safeguards, and (iii) *ad hoc* cases. Since the Board still has not published an adequacy decision, data controllers who regularly transfer personal data abroad are expected to provide the appropriate safeguards to be able to continue their transfers in line with the law. In this regard, if data controllers satisfy the data processing conditions set forth in Article 5 and 6 of DPL and data subject is able to exercise his rights and seek effective legal remedies in the recipient country, then data can be transferred if one of the appropriate safeguards is met by the transferring party. Such safeguards can be summarized as (i) existence of a non-international agreement, (ii) binding corporate rules, (iii) standard contractual clauses or (iv) undertaking letter. The lawmaker provided a grace period for the implementation of Article 9, therefore, although the amendments entered into force on June 1, 2024, the previous versions of Article 9 also remained in force until September 1, 2024.

On July 10, 2024, the Regulation on the Procedures and Principles Regarding the Cross-Border Transfer of Personal Data (“***Regulation***”) was published on the Official Gazette and entered into force on the same day. Regulation sets forth the details about the implementation of Article 9. On the same day as the Regulation, the Board also published the four types of standard contractual clauses and binding corporate rules which are mostly similar to those used pursuant to the GDPR.

As also seen in EU’s practice, data controllers and processors were expected to mostly rely on the standard contractual clauses as this is the only appropriate safeguard that does not require further approval of the Board. Instead of approval data controllers or data processors who sign standard contractual clauses are expected to notify the Data Protection Authority (“***Authority***”) in five business days upon signature. The parties can decide on who will bear this obligation. Accordingly, the President of the Authority, Faruk Bilir, mentioned in his speech on October 10, 2024, that the Authority has received 717

notifications regarding the signature of standard contractual clauses. On October 25, 2024, the Authority published an announcement. As per the announcement that referred to the Board's decision with number 2024/1793 and dated October 17, 2024, "standard contract notification module" was made available to data controllers and processors to enable them to more effectively fulfil their obligations to notify the Board. Considering the high volume of notifications and challenges related to tracking, the module can indeed be considered a development that was greatly needed.

Further on the standard contractual clauses, both DPL and Regulation stipulate that the standard contractual clauses should be executed as published by the Board. The only discretion that the parties have on the standard contractual clauses are regarding the annexes which will be drafted in accordance with the transfer at hand.

It is understood that although DPL and Regulation provide a decent amount of detail on the cross-border data transfers and new instruments, they do not cover some issues that are encountered in practice during the execution and notification processes of the standard contractual clauses. In addition to the module that was launched recently, the Authority and Board are expected to publish more announcements and a comprehensive guide on the requirements related to the signature and notification of the standard contractual clauses.

Internet Law

The Communiqué on Commercial Electronic Message Management System Integrators is Published

The Communiqué on Commercial Electronic Message Management System Integrators ("***Communiqué***") was published in the Official Gazette of September 18, 2024, with number 32666[24] and entered into force on the same date. This Communiqué regulates the procedures and principles on tracking and recording recipients' consent or rejection for receiving commercial electronic messages under the Message Management System ("***IYS***"), the realization of these transactions through integrators or by service providers through IYS, the authorization of integrators and the revocation of their authorization.

Communiqué defines "integrator" as a company authorized by the Ministry of Commerce to provide services to service providers in sending commercial electronic messages, recording the recipients' consent and rejection information in the IYS, obtaining consent through the IYS and exercising the right to reject, and regulates the conditions required for integrator authorization and the obligations of the integrator.

I. Authorization

According to the Communiqué, in order to provide services to service providers as integrators in terms of recording the commercial electronic message consent and rejection transactions to IYS or performing these transactions through IYS, an

[24]https://www.resmigazete.gov.tr/eskiler/2024/09/20240918-6.htm (last accessed on October 30, 2024)

authorization must be obtained from the Ministry of Commerce.

In order to be eligible, the Communiqué provides that the integrator comply with certain conditions, such as: the IT system, software, hardware and server infrastructure to be used in the integrator service must be located in a database within the borders of the Republic of Turkiye; they must engage at least five personnel, including network security experts, database experts, system experts, quality systems experts and software development experts, either by employing them directly or through outsourcing; the company must be established as a joint stock or limited liability company in accordance with the Turkish Commercial Code; and the technical infrastructure of the company should have a redundant structure that can ensure business continuity 24/7 without any interruption in commercial electronic message consent and rejection processes, have a trace recording (log) mechanism, must be protected against unauthorized access, adjust all information systems used within the company to use the same consistent time source and work synchronously.

The application for the integrator authorization, together with the documents specified in the Communiqué, is made to the organization authorized by the Ministry of Commerce to establish the Commercial Electronic Message Management System. Following a pre-evaluation phase where any missing information or documentation is completed, the organisation sends the application to the Ministry of Commerce. The Ministry of Commerce may also request additional information or documents, and upon evaluating the application, then informs the organisation about the applicants found eligible and granted authorisation as integrators. The organization ensures that a contract is established with the integrator that regulates all technical, administrative and financial procedures and principles, including the integrator's remote access to the IYS. The integrator authorisation is non-transferable.

II. Responsibilities

The Communiqué sets out several responsibilities for integrators. For instance, the integrator shall be liable to comply with the relevant legislation for the protection of personal data obtained during the transactions it makes and the services it provides within the framework of this Communiqué, and for taking all kinds of technical and administrative measures to prevent unlawful access to and misuse of such data. The service provider shall be jointly responsible with the integrator, if personal data is processed by the integrator on its behalf. In addition, if the Integrator stores the consent and rejection information received from the recipients to send commercial electronic messages, it will be jointly and severally responsible for their submission together with the service provider.

If the integrator acts in violation of the obligations set out in the Communiqué or no longer complies with one of the conditions required for authorization, then its integrator authorization will be revoked by the Ministry of Commerce, unless the integrator remedies these violations or ensure it complies with the required conditions within the relevant period granted. The integrator whose authorization is revoked cannot apply for a new integrator authorization until one year has passed.

III. Conclusion

To conclude, with this Communiqué, the requirements for entities providing integrator services are expanded, and it is

understood that there will be a tighter control on message management system.

Telecommunications Law

The Internet Domain Names Communiqué is Amended by the Information and Communication Technologies Authority

On June 14, 2022, TRABIS, the TR Network Information System, was launched under the Information and Communication Technologies Authority ("***ICTA***"). Within the scope of the development of TRABIS, the Communiqué Amending the Internet Domain Names Communiqué ("***New Communiqué***")[25] was published in the Official Gazette on June 10, 2023, and some updates needed for the management of domain names were announced. The procedures and principles regarding the initial allocation of domain names in the ".a.tr" structure regulated by the ICTA decision and the issues to be implemented in this process entered into force on September 14, 2023.

With the amendment made to the first paragraph of Article 5 of the Communiqué on Internet Domain Names ("***Communiqué***")[26] which regulates the procedures and principles regarding the application to be made by the parties wishing to operate as Registry Agency ("***RAs***") within the scope of the Internet Domain Names Regulation ("***IDN Regulation***"),[27] the security fee that the RAs are obliged to pay is increased and it is further provided that the security fee will be increased annually, based on the revaluation rate to be determined by the Ministry of Treasury and Finance.

In terms of the rules regarding the technical infrastructure of the RAs regulated in Article 8 of the Communiqué, it is determined that the RAs shall use IP addresses that are different from those which the RAs use to connect to the test system. RAs are able to conduct internet domain name applications through resellers. Article 12 of the Communiqué, which stipulates that RAs may conduct transactions regarding Internet Domain Name Owners ("***IDNs***") with third party resellers, has also been amended, and it has been regulated that RAs will request certain information regarding the reseller they will work with, and in case of any changes in this information, such changes will be notified to the ICTA within ten business days.

At the same time, paragraph 2 of Article 15 of the Communiqué has been amended with respect to the errors and defects that may occur during the allocation of IDNs, and it is stipulated that the ICTA may decide to correct these records in the event that the records arising from systemic errors are notified by the RAs during the IDNs allocation process or are detected by the ICTA *ex officio*.

The New Communiqué also made amendments to the information required under the application form for the Internet Domain Name, its allocation and operation. Article 14 of the Communiqué, which regulates the procedures and principles of IDNs application, has been amended, as

[25] https://www.resmigazete.gov.tr/eskiler/2023/06/20230610-3.htm (last accessed on October 28, 2024)

[26] https://www.resmigazete.gov.tr/eskiler/2013/08/20130821-27.htm (last accessed on October 28, 2024)

[27] https://www.resmigazete.gov.tr/eskiler/2010/11/20101107-2.htm (last accessed on October 28, 2024)

well. Pursuant to the relevant amendments, among the acceptance, declaration and undertakings to be obtained by the RAs from the applicants within the scope of the electronic application form, it has been added that in the event that an alternative dispute resolution process regarding the IDN's is initiated, the applicant will participate in this process and the name, surname and e-mail information notified to the RAs will be shared with the relevant Dispute Resolution Service Provider ("DRP") or the complainant within the scope of the dispute resolution process. The title of Article 22 of the Communiqué has been changed from "Sale, transfer and waiver" to "Sale and transfer." In this context, paragraph 5 of the Communiqué, which stipulates that the use of the IDNs will be suspended for two months from the day the IDNs owner waives the IDNs and the IDNs allocation process will be renewed upon the application of the IDNs owner within this period; otherwise, the IDNs will be re-allocated, has been repealed.

Article 27 on the initial allocation of IDNs in the "a.tr" structure, which is included under the regulations on the opening of new level IDNs has been radically amended, as follows:

- The first paragraph stipulates that the IDNs listed in the relevant subparagraphs for "a.tr" shall be allocated free of charge before the first allocation of IDNs in the "a.tr" structure. Pursuant to the relevant amendment, IDNs in the structure of "a.org.tr" are excluded from the scope of IDNs to be allocated free of charge. Therefore, the second paragraph of the same article regarding the process to be followed in the "a.org.tr" application has been repealed.
- The provision stipulating that the referred IDNs cannot be sold or transferred, and the provision stipulating that the auction will be held after allocations have been made according to the priority of trademark owners have been repealed.
- The fifth paragraph has become "After the allocation made according to the provision of the first paragraph, the extension-based domain name ownership priority provision shall be applied." and the seventh paragraph has become "After the allocations made according to the extension-based domain name ownership priority provision, the first-come, first-served rule shall be applied to the eligible IDNs."

In line with the transition to the principle of undocumented allocation in terms of IDNs, the provision in Article 28 of the Communiqué stipulating that in case of undocumented allocation of new second level domain names in the structure of "a.new.tr", the "trademark owners" priority provision will be applied first, has been brought to an end by changing the phrase "trademark owners" to "extension-based domain name ownership". In parallel with this, the title of Article 29 of the Communiqué, which was "Priority of trademark owners", has been amended as "Priority of extension-based domain name ownership".

In addition, the statement in the first paragraph of the same Article that trademark owners will be given priority before the auction has been amended as "the owners of IDNs registered on the date specified in the procedures and principles set forth in this paragraph." In addition to

these amendments, the provisions on auction under Article 30 of the Communiqué have been annulled. The phrase “by using the automated means of its electronic connection to TRABIS” in the regulation on IDNs storage in Article 31 of the Communiqué has been removed and the second sentence of the first paragraph of the Article has been revised as “RAs cannot store IDNs by applying for and/or allocating IDNs on behalf of itself and/or its employees for sale, transfer and similar purposes.” The second sentence of the second paragraph, which determines the sanction to be imposed in case it is detected that IDNs are stored, has been amended to state that an administrative sanction, including termination of the RAs activity, will be imposed.

Consequently, substantive amendments were made to the Communiqué regulating the procedures and principles regarding the identification and operation of RAs and the lifecycle of internet domain names with the “.tr” extension within the scope of the IDN Regulation. The New Communiqué has introduced fundamental changes in the allocation, management and operation of internet domain names and in the responsibilities of RAs in carrying out these processes, as well as changes in the life cycle of internet domain names, the opening of new level internet domain names and their storage.

Employment Law

Unintentional Access to Colleague's Payroll Data cannot be Grounds for Immediate Termination, Rules the High Court of Appeals

I. Introduction

High Court of Appeals 9th Civil Chamber, with its decision dated April 17, 2024, and numbered 2019/31923 (“***Decision***”), rendered a significant decision when examining whether an employee's dismissal, due to having examined a coworker's payroll document without permission, was justified. The Decision sheds light on fundamental aspects of employment law, including the principles of proportionality and equal treatment.

II. Dispute Subject to the Decision

During a night shift, the plaintiff found a payroll document on his supervisor’s desk, revealing that a newly hired colleague with a rather junior position compared to the plaintiff, is paid a higher salary. Upon questioning the human resources department about the reason for the discrepancy, the plaintiff was subjected to a disciplinary investigation for taking a document from the supervisor’s desk without permission. The employer subsequently terminated the plaintiff’s employment agreement.

Upon termination of his employment agreement, the plaintiff filed a reinstatement lawsuit against the employer. After examining the parties’ claims, the first instance court ruled for invalidity of the termination and reinstatement of the plaintiff. The first instance court, in its decision, noted that the employee’s actions cannot be considered as abuse of the employer’s trust. The defendant employer objected to the decision and brought an appeal before the Regional Court of Appeals.

The Regional Court of Appeals upheld the lower court’s ruling, dismissing the employer’s objections. The Regional Court of Appeals clarified that the actions of the employee were not aimed to disclose personal data but to discover the reason for difference in salaries. It is further clarified

that although the employer is not obliged to pay the same salary to all employees, the principle of equal treatment mandates that any discrepancies in pay should be explained to the relevant employee. So, this cannot be deemed as a just cause for termination of the plaintiff's employment. The employer again objected to and appealed the Regional Court of Appeals' decision.

III. Evaluations of the High Court of Appeals

The High Court of Appeals determined that while the plaintiff had found the payroll of a recently hired employee by coincidence, and indeed examined the payroll document containing personal data, the purpose was to inquire about an apparent salary discrepancy, rather than to unlawfully disseminate or misuse the information. The High Court of Appeals emphasized that the plaintiff's actions lacked the severity required for immediate termination under Article 25 of Labor Law No. 4857, which outlines the conditions for termination based on just cause.

The High Court of Appeals also highlighted that the employer did not consider less severe disciplinary measures. Under the principle of proportionality, employers should resort to alternative measures before termination. In this case, the court found that termination of the employment relationship was excessive, as the employee's conduct did not undermine or violate the trust necessary to continue the employment relationship. Moreover, the High Court of Appeals also makes note of the principle of equal treatment, since the employer is obliged to explain salary discrepancy between the employees in equal status.

Based on the foregoing reasons, the High Court of Appeals ultimately ruled that the termination was invalid.

IV. Conclusion

The decision underscores the crucial balance between an employer's right to maintain workplace discipline and an employee's right to equal treatment under labour law. The High Court emphasizes that while the employee's actions may warrant some form of sanction, such as disciplinary measures, termination should always be considered a last resort.

Intellectual Property Law

Legal Analysis on the Trademark Dispute Between "Frico" and "Frigo" in Turkiye in Light of Vested Rights

I. Introduction

The 11th Civil Chamber of the High Court of Appeals, in its decision dated February 14, 2024, numbered 2022/4782 E., 2024/1104 K. ("***Decision***"), ruled on a case involving the annulment of a decision by the Turkish Patent Re-Examination and Evaluation Board ("***REEB***") regarding the trademark application for "Frico." This Decision emphasizes the concept of vested rights, which offers robust protection against the potential refusal or invalidation of a later trademark based on a likelihood of confusion.

II. The Dispute Subject to the Decision

In the dispute, the plaintiff filed a lawsuit asserting that (i) their registered trademark "Frigo" had been in continuous use in Turkiye since the early 1950s, particularly for ice cream products, (ii) the defendant's application to register the trademark "Frico" for dairy products was likely to

cause consumer confusion due to the similarity between the trademarks and the well-known status of “Frigo,” and (iii) the plaintiff also raised concerns about the defendant’s alleged bad faith in filing the application.

In response, the defendant argued that the “Frico” trademark had been in global use since 1971 and registered in Turkiye since 1988. They contended that (i) “Frico” and “Frigo” target different markets, with “Frigo” primarily associated with ice cream of Class 30, and “Frico” focused on cheese and dairy products of Class 29, and (ii) “Frigo” is a generic term in some languages, meaning “refrigerator” in Italian, which reduces its distinctiveness.

The first-instance court dismissed the lawsuit, primarily on the grounds that, while there is a moderate degree of similarity between the trademarks, the “Frico” trademark has been registered and in use since 1988. The court noted that it resembles earlier trademarks held by the defendant, qualifying it as part of a series of trademarks. Consequently, the defendant was found to have a vested right to use the trademark for “milk and dairy” products. The court also ruled that, although previous decisions acknowledged the earlier and genuine use of the “Frigo” trademark, it does not have sufficient recognition among most consumers and does not meet the requirements under Article 8/4 of Decree Law No. 556. Additionally, the court found that there was insufficient evidence to support the plaintiff's claim of the defendant’s bad faith.

Both parties appealed the first-instance court’s decision to the Regional Court, which upheld the original ruling. The Regional Court found that, while there is similarity between the contested trademarks under Article 8/1(b) of Decree Law No. 556, the requirements of Article 8/4 were not sufficiently met. The court noted that the defendant has held a valid trademark registration for “milk and dairy” products in Class 29 since 1988, and that the trademark has been genuinely used. Given that “Frico” is the dominant element of the defendant’s previous trademarks, the court recognized it as part of a series of trademarks, granting the defendant vested rights to use it for “milk and dairy” products. Additionally, the court concluded that the plaintiff’s allegations of bad faith were unsubstantiated.

Following the appeals by both parties against the decision of the Regional Court of Appeal, the case file was forwarded to the 11th Civil Chamber of the High Court of Appeals for a final ruling on the matter, in accordance with the applications submitted by both parties.

III. Evaluation of the Decision of the 11th Civil Chamber of the High Court of Appeals

On February 14, 2024, the 11th Civil Chamber of the High Court of Appeals issued a significant ruling in favour of the defendant, affirming the earlier decision of the Regional Court. In its decision, the High Court found no substantive or procedural grounds to overturn the ruling of the first-instance court.

The High Court reiterated the defendant’s vested rights to the “Frico” trademark in Turkiye, emphasizing the importance of genuine, consistent and extensive use over time. These ruling highlight the significance of established use and vested rights in protecting trademark identity and provides clarity on the application of trademark law in situations where there is a likelihood of confusion.

In conclusion, the 11th Civil Chamber of the High Court of Appeals underscores the critical role that the concept of vested rights plays in trademark disputes. The court asserts that when a trademark has been consistently used, the rights acquired through such use cannot be easily dismissed, even in cases involving claims of similarity.

IV. Conclusion

The High Court emphasizes the importance of vested rights in trademark law through this decision. While a new trademark application can be rejected due to likelihood of confusion with earlier trademarks, the protection of vested rights enables applicants with prior registrations to secure trademarks that might otherwise be rejected. It is crucial to note that the later application must share the same essential elements as the earlier registrations that substantiate the claim of vested rights and must be sought for the same goods and services.

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