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Preface to the September 2022 Issue

The September 2022 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 Turkey.

Initially, the Corporate Law section of this issue discusses the topic of indebtedness of shareholders and directors in joint stock companies and the changes in the Turkish Commercial Law over time, whilst the Banking and Finance Law section explains the developments on sustainability in the Turkish Banking Sector.

The Competition Law section of this issue comprises five articles and analyses the key developments of the field. The section highlights and summarizes the Turkish Competition Board's recent notable decisions, providing substantial details on the dual application of settlement and leniency regulations, based on the Board's recent Beypazarı/Kınık decision where these mechanisms were combined and applied simultaneously for the first time, and comprehensively evaluating an unconditional approval decision of the Board. The Competition Law section also addresses the eminent decisions of the judiciary bodies in which the administrative court, through analysing the selective distribution mechanism in depth, annulled the Board's no-go decision for an individual exemption. Moreover, the administrative court's stay of execution upon the Board's decision to fine a hindrance of on-site inspection is examined thoroughly, by challenging the strict approach adopted by the Turkish Competition Authority until now. Further, the section also discusses the Turkish Competition Board's approach to full functionality of joint ventures, in light of a recent reasoned decision.

Further, the Employment Law section of the September 2022 issue delves deep into the High Court of Appeal's assessment on the validity of resignation letters. The Data Protection Law section, on the other hand, focuses on two separate guidelines prepared by the Turkish Personal Data Protection Authority.

The Internet Law section assesses the recent amendments planned for the Press Law and Internet Law. The following section on Telecommunications Law addresses the same amendments and also provides an all-encompassing evaluation on the anticipated Over the Top (OTT) Service Regulations. Lastly the IP Law sheds light on the Regulation on Collective Management Organizations and summarizes the developments introduced.

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

September 2022

Corporate Law

Debt Restrictions for Shareholders and Board Members of Joint Stock Companies

Prior to the enactment of the Turkish Commercial Code No. 6102 ("**TCC**"), it was a common practice in many joint stock companies for shareholders to have a "shareholder current account" or a similar account to enter the funds introduced or withdrawn by the shareholders into the company's books, also commonly referred to as "drawings".

In order to terminate mismanagement of these accounts in practice, and halt the abuse of the share capital of companies, the TCC introduced restrictions and prohibitions regarding the shareholders and board members' indebtedness to their companies, addressing the principle of capital protection under the two-pillar structure of debt restriction and arm's length principle.

I. The Original Scope and Application of the TCC

Initially, the TCC stipulated that shareholders and certain members of their families could not become indebted to the company, except for cases where the debts arose from (i) the shareholders' share capital subscriptions, or (ii) transactions as a requirement of the company's scope of activity and the shareholder's enterprise, provided that such transaction was subject to terms that were identical or similar to terms would be applicable in similar cases.[1] The same restrictions were set forth under a separate article of the TCC with respect to the company's board members and their related persons (*i.e.*, those particular family members prescribed under the law), along with transactions involving those capital stock companies in which these board members or their related persons held 20% of the total shares.

II. Current Form of the Legislation

While most of the provisions of the TCC remained the same, slight yet significant amendments were made through the Law on Amendment of the Turkish Commercial Code and the Law on the Entry into Force and Application of the Turkish Commercial Code Numbered 6335 ("**Law No. 6335**"). Accordingly,

- The scope of the prohibition got restricted to solely those shareholders with outstanding debts arising from their capital subscription undertakings, in cases where the total free share capital reserves and profits of the company were insufficient to meet the company's financial liabilities of the previous fiscal year;
- the prohibition on the board members and their related persons was limited to only those who were not shareholders; and
- the subject of the criminal sanctions set forth for non-compliance with these provisions was changed from the debtor to the lender.

Given that the main goal of these restrictions is to preserve the company's share capital, while enhancing creditworthiness and implementing a proper commercial practice, these restrictions are applicable irrespective of the company's size, or whether it is private or publicly trading. That being said, certain transactions, including but not limited to

[1] Commonly referred to as "the arm's length principle" in corporate law.

warranties and guarantees provided amongst individual companies under the same group of companies, as well as borrowings explicitly stipulated under the Turkish banking law are specifically excluded from the scope of the prohibitions. It is important to note that the legislation does not require the payment of the entire capital subscription by all the shareholders, but rather necessitates the payment of the due capital subscription for that particular shareholder who is also the prospective debtor. In other words, shareholders may become indebted to the company so long as their capital commitments that fall due have been paid accordingly.

III. Consequences In Case of Non-Compliance

Non-compliance refers to the violation of the required conditions stipulated under the relevant articles, hence the actual financial loss of the company is not a precondition, and a breach may actually arise irrespective of the loan's effects on the company's annual financial returns. Certain additional sanctions, nonetheless, may be applicable if the company incurs a loss due to the loan granted.

Identifying a non-compliant transaction within the company may be relatively challenging in practice, as the annual (ordinary) general assembly meetings review the financial statements of the previous year, and the debt owed by the board member or the shareholder might be already paid back before the next ordinary general assembly. This substantially increases the significance of certain rights such as the right to obtain information and to conduct compliance inspections.

Despite the fact that the TCC does not stipulate specific sanctions with regard to non-compliance, the resolutions of the board of directors and the general assembly which are in violation of the capital protection principles are deemed to be void outright. Hence the inference is that anyone who has a legitimate interest will technically be able to bring a claim for the annulment of the board of directors' and/or the general assembly resolutions which violate the said principle. It should be also noted that as the TCC deems the Board to be the company's competent body in general, the adoption of a resolution on granting a loan to a shareholder naturally falls within the authority of the board of directors.

In addition to the foregoing legal implications, the TCC also imposes a judicial fine of at least 300 (three hundred) days on those executing the relevant loan transaction on behalf of the company. This judicial fine would correspond to at least TRY 6,000 (approximately EUR 300) when calculated over the minimum daily amount, depending on the court's decision.

Given that the above sanction provision is of criminal nature, the burden of proof will lie on the plaintiff and not the lender, nevertheless, the entire board of directors could be held criminally liable upon the implementation of a non-compliant resolution. It is significant to note that other criminal charges, such as embezzlement, may also be brought, depending on the case at hand.

IV. Conclusion

As explained in detail above, the capital protection measures introduced by restricting the shareholders and board members taking loans from their joint stock companies, and the arm's length principle stipulated under the same provisions were initially constructed strictly, to end the mismanagement of shareholder current accounts. The provisions, however, required amendments to accommodate the fast-paced commercial practice and urgent financial transactions.

In line with the amendments brought by the Law No. 6335, the shareholders, board members and their related persons were allowed to become indebted to the company under somewhat more lenient conditions. Nevertheless, it is critical to establish the extent of authorities for each company body concisely and even stipulate more comprehensive conditions on becoming indebted to the company under the articles of association in order to avoid the foregoing consequences, to increase the efficiency of corporate governance and to ensure sufficient liability on part of the decision-makers and debtors, both.

Banking and Finance Law

Sustainability in the Turkish Banking Sector

I. Introduction

There is no longer any doubt that sustainability is an essential issue everywhere in the world. Sustainable development was therefore defined as "*development that meets the needs of the present without compromising the ability of future generations to meet their own needs*" in the report named "Our Common Future" (commonly known as the Brundtland Report) published by the United Nations. Almost all industries, services and sectors are now focused on how they can achieve sustainability and in time, the banking sector has also formulated its own principles of "sustainability" in various ways.

Along with the many countries in the world, Turkey has also established guidelines, drew up plans, and published reports in order to determine how sustainability can be achieved in the banking sector. Turkish banks are directed to take these guidelines, plans and reports into consideration before making any investment decisions within the scope of applicable legislation.

II. Developments in Turkey with Regard to Sustainability in the Banking Sector

One of the initial forays into emphasizing the significance of sustainability was the creation of the BIST Sustainability Index in 2014 by Borsa Istanbul for those companies (and banks) whose shares are traded in the Istanbul stock exchange. With the BIST Sustainability Index, companies are able to evaluate their performance, and consequently, adopt new targets to further improve their performance, while allowing them to develop their risk management corporate transparency, accountability and sustainability.

In parallel with the global developments related to sustainability in the banking sector, the Banks Association of Turkey published sustainability guidelines for the sector in the same year. Recommended for all banks in Turkey, the guidelines include 10 main principles to achieve sustainability, which are (i) assessment and management of environmental and social risks arising from banking activities, (ii) contribution to sustainable development goals, (iii) tackling climate change and adapting to climate change, (iv) financial health and inclusion, (v) human rights and employee rights, (vi) inclusion and equal opportunity, (vii) stakeholder engagement and communication, (viii) corporate governance, (ix) corporate capacity improvement and (x) monitoring and reporting.

In addition to the above, the Banking Regulation and Supervision Agency ("**Agency**") also published guidelines, plans and reports with regards to sustainability in the Turkish banking sector. For example, under its "Good practice guidelines", the Agency published the Guidelines on Credit Granting and Monitoring, setting out the requirements for banks to establish policies and practices aimed at environmental and social risks in their lending activities. Another example is the Sustainable Banking Strategy Plan published by the Agency, which highlights three main purposes: (i) managing and monitoring the environmental risk in an efficient way, (ii) improving the available financing needed for transition to sustainable economy, and (iii) collaboration with the related parties.

In 2017, those banks which were members of the United Nations Global Compact, signed the Global Compact Turkey Declaration on Sustainable Finance, which addresses the evaluation of environmental and social risks in loan processes and the integration of these risks into related policies. Signatory banks declared that they would take environmental and social risks into consideration in their assessment of loans in the amount of 10 million USD or above. Furthermore, in 2019, some Turkish banks announced that they would follow the Principles for Responsible Banking declared by the United Nations Environment Program Finance Initiative. The aim is to ensure that by adopting the said principles, the banking sector operates in compliance with The United Nations Sustainable Development Goals and the Paris Agreement on Climate Change.

In 2020, the Capital Markets Board ("**CMB**") amended its Corporate Governance Communiqué ("**Communiqué**") to ensure that public companies take the necessary actions to achieve sustainability in their corporations. The CMB has also published the Sustainability Principles Compliance Framework setting out the principles that public companies should follow in order to ensure sustainability. Public companies which are subject to the corporate governance principles provided under the Communiqué are required to adopt the principles determined in the Sustainability Principles Compliance Framework. Also, these companies are obliged to monitor and publicly report on their compliance with these principles, or their reasons for failing to do so, through their annual reports.

III. Conclusion

In line with the policies established by the public and regulatory bodies, banks take into account environmental and social factors while making investment decisions. As with many other countries around the world, Turkish public authorities and regulatory bodies have set out principles and published guidelines and plans within the scope of applicable legislation, in order for banks established in Turkey to consider sustainability in their assessments and decision making processes. Accordingly, banks in Turkey endeavor to take the relevant actions for adapting and complying with these policies and guidelines in their operations, as well as expanding such obligations to their corporate customers. One specific example of this is that currently, general credit agreements of many banks in Turkey include specific provisions allocated to the protection of environment as part of their sustainability objectives and require corporate debtors to pursue their activities in compliance with relevant environment laws and regulations, by way of contractual framework and warranties.

Capital Markets Law

Change of Company Status in non-Listed Entities: Public to Non-Public Company

I. Introduction

According to Capital Markets Law No. 6362 ("**CML**"), shares of joint stock companies with more than 500 (five hundred) shareholders are deemed to have been offered to the public,[2] excluding those companies whose shares are traded on the stock exchange (publicly-traded companies) and companies that raise money from the public through crowdfunding. As per Article 4 of the Communiqué on Principles Regarding the Exclusion of Corporations from the Scope of the Law and the Obligation to Trade their Shares on Stock Exchange ("**Communiqué No. II-16.1**"), such corporations are required to apply to the Capital Markets Board ("**CMB**") for listing as per the relevant regulations, once they achieve a public company status as per the above CML designation. Companies in question must apply to CMB for their shares to be listed and traded on the stock exchange, latest within 2 (two) years as of the date they become "public." In this article, we will discuss the ways by which these public companies can be excluded from the scope of the CML.

II. Exclusion of Corporations from the Scope of the Capital Markets Law

Pursuant to the Communiqué No. II-16.1, it is possible to exclude public companies from the scope of the CML based on the 6 (six) following grounds: (i) a decision of the general assembly, (ii) nature of its shareholding structure, (iii) the number of shareholders, (iv) their financial figures, (v) issues concerning continuity of activities and (vi) an *ex officio* exclusion from the scope of the CML. Below, we will explain each of the foregoing reasons that could trigger the said exclusion.

1. Decision of the General Assembly

As per Article 5 of the Communiqué No. II-16.1, among the companies that are considered public due to the number of shareholders, those who do not want their shares to be traded on the stock exchange can choose to be excluded from the scope of the CML by way of a general assembly resolution. In such a case, corporations shall apply to the CMB for approval, before announcing the agenda of the general assembly meeting. The agenda and invitation for the general assembly which includes the item for exclusion from the scope of the CML shall be announced within 10 (ten) business days from the date of notification of the CMB's decision on the subject, whereas the general assembly shall be convened within 2 (two) months as of such date.

The agenda of the general assembly should include the following items: (i) removal from the scope of the CML on the ground that the company does not prefer its shares to be publicly traded, (ii) acknowledgement that shareholders,

[2] As these companies are only deemed public due to the number of shareholders, and not because their shares are being traded on a stock exchange, this article will refer to them as only "public companies" to distinguish from those companies whose shares are "publicly-traded".

including those who did not attend the general assembly, have the right to exit, except for those who voted in favor of the decision to be excluded from the scope of the CML, and (iii) the price for shares to be applied in the exercise of such exit right, the period granted for the exercise and the method of process for exercising the right to exit. The share price to be used in the exercise of the exit right shall be determined based on the appraisal report prepared in accordance with the relevant regulations of the CMB, and which expressly declares said price to be fair and reasonable.

In the relevant general assembly, the decision should be resolved with the affirmative votes of at least two-thirds of the total number of shareholders, or by the affirmative votes of three fourths of total number of votes. The shareholders, other than those who voted in favor of the decision to be excluded from the scope of the CML, are allowed to exercise their exit rights from the company with no other conditions. The period granted for the exercise of the exit right starts within maximum 6 (six) business days following the date of the general assembly, and lasts for at least 2 (two) years.

2. Shareholding Structure

According to Article 6 of the Communiqué No. II-16.1, corporations may be excluded from the scope of the CML upon approval of the CMB by proving that (i) more than 95% (ninety-five percent) of their share capital belong to a maximum of 50 (fifty) shareholders, or (ii) more than 50% (fifty percent) of their capital directly and/or indirectly belongs to special provincial administrations, municipalities or other public authorities, and evince the same with the list of attendees of a general assembly held within the last six months.

It is also possible to make an application for exclusion from the scope of the CML with information and documents other than the list of attendees. In that case, it is obligatory for corporations to commission and submit an expert report demonstrating they fall under the exclusion, based on the expert's assessment of the relevant documentation.

3. Number of Shareholders

As per Article 7 of the Communiqué No. II-16.1, corporations that have less than 500 (five hundred) shareholders may be excluded from the scope of the CML, upon approval by the CMB. For this, the shareholding structure must be demonstrated with the following supporting documents: (i) list of attendees, (ii) share ledger, (iii) accounting records and documents showing the dividend distribution, (iv) records and documents pertaining to the subscriptions by to the company capital during incorporation and subsequent share capital increases and (v) the court appointed expert's report with respect to the corporation's transactions with the shareholders, if any. Also, according to Article 7/2 of the Communiqué No. II-16.1, the date of the list of attendees which the expert report is based upon, must not be earlier than 1 (one) year before the application date and the share ledger must be up-to-date.

4. Financial Figures of the Company

Article 8 of the Communiqué No. II-16.1 stipulates that, based on independently audited financial statements of the last two (2) years prior to the date of application, prepared in accordance with CMB regulations, corporations (i) which have less than TRY 10,000,000 (ten million Turkish Liras) total assets, or (ii) whose total net sales revenues and total sum of other revenues (excluding net sales revenues) are both less than TRY 5,000,000 (five million Turkish Liras), or (iii) are deemed insolvent, can be excluded from the scope of the CML upon approval of the CMB.

5. **Issues Related to the Continuity of Activities**

Pursuant to Article 9 of the Communiqué No. II-16.1, as to continuity of the activities, corporations which (i) are *ex officio* declared to be defunct or deemed defunct by the relevant trade registry directorates as per the Ministry of Trade regulations and such declaration announced in the trade registry gazette, or (ii) which voluntarily or involuntarily go into liquidation, including liquidation upon bankruptcy, or (iii) which have been declared bankrupt, can be excluded from the scope of the CML upon approval of the CMB. The foregoing circumstances must be evidenced with copies of the trade registry gazette announcements or relevant court judgments, and if any, a copy of the resolution of the authorized corporate body.

6. ***Ex officio* Exclusion from the Scope of the CML**

Apart from the options listed above, the CMB may also decide to exclude public companies from the scope of the law, *ex officio*. According to Article 10 of the Communiqué No. II-16.1:

- If the CMB determines that one or more of the conditions for exclusion listed in Articles 6, 7, 8 and 9 of the Communiqué exist, the relevant corporation may be excluded from the scope of the CML *ex officio* by the CMB without seeking an expert report, special independent auditor's report or any other information or documents.

- Although they do not meet any of the conditions listed in Articles 5, 6, 7, 8 and 9 of the Communiqué, those corporations that have failed to apply for their shares to be traded in the stock exchange within the requisite period, may be excluded from the scope of the CML by the CMB *ex officio*.

- Corporations that were engaged in an activity for which a concession had been granted, but whose operating permit has been revoked in accordance with the applicable legislation, may be excluded from the scope of the CML by the CMB *ex officio* if they do not change their field of activity within 1 (one) year following the termination of the relevant concession or operating permit.

- Corporations who failed to receive the CMB's notifications due to not being found at their address 2 (two) times consecutively, may be deemed inactive and excluded from the scope of the CML by the CMB, if, as a result of on-site inspection by the Board, they cannot be found at the registered address that was published in the trade registry gazette.

- Corporations whose shares were permanently banned from trading on and removed from the relevant stock exchange(s), are excluded from the scope of the CML by the Board *ex officio* if the stock exchange does not decide to re-list their shares within 1 (one) year following the removal decision.

Furthermore, corporations may also be excluded from the scope of the CML upon their request or *ex officio* by the CMB, following the completion of the takeover bid transactions. In addition, corporations that are de-registered from the trade registry due to merger, split-off or other reasons, are also deemed to fall out of CML's scope, as of the date of announcement of the relevant transaction in the trade registry gazette.

III. Conclusion

Despite being deemed as a public company within the scope of the CML, it is also possible to be excluded from the scope of the law in various ways. It is important to determine whether one of the above-mentioned options can be used to get excluded from the scope of the CML, or whether such public companies are obliged to abide by and comply with the CML in full.

Competition / Antitrust Law

Turkish Competition Board Found the two Daimler Transactions Closely Related and Accepted the Single Transaction Argument

The Turkish Competition Board ("***Board***") has published its reasoned decision [3] pertaining to its evaluation concerning the acquisition of sole control of the Truck and Bus Business of Daimler AG ("***DAG***") by Daimler Truck AG ("***DTAG***") and ultimately by Daimler Truck Holding AG ("***DTHAG***").

The transaction subject to notification was reported to be one of the interim steps of the global internal restructuring of Daimler group. Within the scope of the proposed transaction, DTHAG was initially planned to be spun-off from DAG; and then, certain parts of the truck and bus business of Mercedes Benz AG ("***MBAG***") and Daimler Mobility AG ("***DMO***") were to be transferred to DTAG and its subsidiaries, and ultimately to DTHAG. In this respect, approximately 20 entities and assets relating to the truck and bus business, whose shares were currently held by DAG would be spun-off by way of transfer; and the same activities would be carried out under DAG group, and thereby the same kind of products and services would be provided to the market.

The Board stated that as a result of the spin-off and the existing Control, Profit and Loss Transfer Agreement between DAG and DTAG, DTHAG would acquire control by taking DAG's place as of the effective date of the mentioned spin-off, and DTHAG would not be controlled by any entity. After the consummation of the spin-off process, all of the outstanding shares in DTHAG would be listed under the Frankfurt Stock Exchange. In this respect, the Board concluded that the transaction in question qualified as an acquisition as it resulted in a change in the control structure of DTHAG, the parent company of DTAG, on a lasting basis within the meaning of Article 5 of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***"). The Board further clarified that had the transfer to DTHAG taken place before the Spin-Off, the said transaction would have been considered as an intra-group transaction, which would render it a non-notifiable transaction due to lack of change in control. However, with the Spin-Off process, the transfers were deemed to be taking place between two separate groups.

[3] The Board's *Daimler* decision dated 16.12.2021 and numbered 21-61/879-425.

Before delving into its substantive analysis, the Board evaluated whether the proposed transaction constitutes a single transaction. The Board stated that, considering that DTHAG will acquire joint control over the entities and assets included in the transferred business and each of the transfers will be realized ultimately by the same undertakings, the conditions under paragraphs 30 and 32 of the Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control ("***Control Guidelines***") were satisfied. Further, despite the fact that transfers to be realized within the scope of the transferred business were not legally linked to one another, they were still related to each other closely enough to constitute a single transaction within the meaning of Article 5(4) of the Communique No. 2010/4.

In line with this assessment, the Board acknowledged that the proposed transaction was realized through a series of linked transactions within the meaning of spin-off of DTHAG from DAG and the transfer of trucks and bus business of MBAG and DMO to DTAG, as part of the global restructuring of the Daimler Group. Consequently, the Board stated that the proposed transaction ultimately constituted a single transaction.

After its assessment on the structure of the transaction, the Board provided brief summary of the business activities of the transaction parties. First for DTAG, the Board stated that the company was active in the manufacturing and sales of trucks and buses with a product portfolio which includes specialised vehicles used in municipal services, as well as light, medium and heavy duty business trucks used for long distance distribution and construction site transportation. Its truck brands include: Mercedes-Benz, Freightliner, Western Star, FUSO and BharatBen. In addition, the Board stated that DTAG was projected to be active in the area of providing finance for trucks and buses through financial service companies.

The Board also provided insight on the activities of DTHAG, the ultimate acquirer who would indirectly acquire the transferred business from DAG. The Board stated that DTHAG was only active in Turkey through its wholly owned subsidiary Mercedes-Benz Türk A.Ş. and also had a truck and bus manufacturing factory in Turkey.

On the other hand the Board stated that the transferred business comprised approximately 20 entities and assets that are mostly engaged in leasing and financing services for trucks and buses, or providing retail and aftersales services for these vehicles. The only entity that is subject to the transfer with respect to Turkey was Mercedes-Benz Finansman Türk A.Ş. The Board highlighted that the activities of the transferred business to be transferred from DAG to the DTAG was active in the (i) manufacture and sale of trucks and buses and (ii) financial services for such vehicles. In this respect, the Board evaluated the Turkish and global market shares of DAG and its competitors in these aforementioned sectors.

The Board ultimately concluded that there were no horizontal and/or vertical overlaps in terms of the proposed transaction, and there would be no change in the competition conditions due to the fact that within the scope of the proposed transaction, only the truck and bus business was planned to spun-off from DAG, and the proposed transaction aimed to preserve the pre-spin off situation. The Board also concluded that the competitive structure would be maintained post-transaction, given that there were several strong competitors active in the same relevant market.

All in all, the Board ultimately stated that the proposed transaction would not significantly impede effective competition and thus, granted an unconditional approval to the transaction.

The Turkish Competition Board's Approach Towards Full-Functionality of Joint Ventures: A Divergence between the Turkish Competition Authority and the European Commission?

I. Introduction

The Turkish Competition Authority published the Turkish Competition Board's ("***Board***)" reasoned decision[4] concerning the acquisition of joint control over Europcar Mobility Group S.A. ("***Europcar***") ultimately by Volkswagen AG ("***Volkswagen***"), Trinity Investments Designated Activity Company ("***Trinity***") and Pon Holdings B.V. ("***Pon***") ("***Transaction***"). The Board unconditionally approved the Transaction after a Phase I review conducted pursuant to Articles 7 and 10 of Law No. 4054 on Protection of Competition ***(***"***Law No. 4054***"***)*** and relevant provisions of the Communiqué No. 2010/4. The reasoned decision of the Board provides significant remarks in terms of its approach to joint venture ("***JV***") transactions, more specifically in terms of the full-functionality criterion.

[4] The Board's *Volkswagen -Trinity – Pon/Europcar* decision dated 25.11.2021 and numbered 21-57/803-398.

II. Assessment of the Transaction

The Transaction involved the acquisition of shares of Europcar by a special purpose company, which is ultimately jointly controlled by the JV parents, namely, Volkswagen, Trinity and Pon. Therefore, the transaction resulted in JV parents' indirect joint control over Europcar. Prior to the Transaction, Europcar was not controlled by any person and/or undertaking from a competition law standpoint.

The Board determined there were no horizontal overlaps between the activities of Volkswagen, Trinity and Pon on one hand, and Europcar on the other hand, in Turkey. Having said that, the Board also assessed the Transaction on the basis of a potential vertical relationship between Volkswagen's activities in terms of the manufacture and supply of (i) passenger and (ii) commercial vehicles in the upstream markets, and Europcar's activities in terms of car rental services in the downstream market in Turkey. Taking into account the negligible market shares of Volkswagen and Europcar respectively in conjunction with the competitive landscape/dynamics of the relevant markets, the Board concluded that the Transaction would not result in any risks for input and customer foreclosure, and therefore, it would not raise any competitive concerns. Accordingly, the Board unconditionally approved the Transaction with its decision dated 25.11.2021 and numbered 21-57/803-398.

III. Board's Approach to Full-functionality

As a general rule, to qualify as a concentration subject to merger control before the Authority, a joint venture must be of a full-function character and satisfy two criteria: (i) existence of joint control in the joint venture and (ii) the joint venture being an independent economic entity established on a lasting basis (*i.e.*, having adequate capital, labor and an indefinite duration). To that end, as set out under paragraphs 81-93 of the Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control ("***Control Guidelines***") which are akin to if not the same as paragraphs 94 to 101 of the Consolidated Jurisdictional Notice of the European Commission "***CJN***")), a full-function joint venture must: (i) have sufficient resources to operate independently, (ii) engage in activities beyond one specific function for the parents, (iii) be independent from the parent companies in the sale and purchase activities, and (iv) operate on a lasting basis.

Within the scope of its assessment on the matter at hand, the Board provided significant remarks in terms of (i) the rights conferring joint control to the parties and (ii) the full-functionality requirement. For the sake of completeness, paragraph 78 of the Control Guidelines (which is akin to if not the same as paragraph 91 of the CJN) provides that a transaction involving several undertakings acquiring joint control of another undertaking or parts of another undertaking from third parties will constitute a concentration without it being necessary to consider the full-functionality criterion. Unlike the decision of the European Court of Justice in *Austria Asphalt v. Bundeskartellamt* (C-248/16), the precedents of the Turkish Competition Board and/or the Turkish administrative courts do not provide similar guidance on this front. On the other hand, there are several cases where the Board referred to paragraph 78 of the Control Guidelines and did not assess whether the JV in question satisfied the full-functionality criterion (*e.g.*, Juki Corporation (19.01.2022; 22-04/57-26), CMLKK/Lodos (14.08.2018; 18-28/468-227), Goldman Sachs/ Ömerbeyoğlu-DGpays (08.04.2021; 21-20/240-102)). There are also decisions where the Board still analyzed the full-functionality of the JV despite referring to paragraph 78 of the Control Guidelines (*e.g*. Permira/Warburg-Tilney/Smith & Williamson (09.07.2020; 20-33/414-190), ISC/TDR-Aggreko (29.04.2021; 21-24/290-132)). In Goldman Sachs/ Ömerbeyoğlu-DGPays, the Board applied the underlying principle in terms of paragraph 78 of the Control Guidelines (*i.e.*, there is no need to consider the full-functionality criterion if joint control is acquired from third parties) despite the fact that one of the joint control acquiring entities (Ömerbeyoğlu) was already a shareholder of the target (DGPays) prior to the relevant transaction (*i.e.*, there was room to argue that joint control was not acquired from third parties).

For the case at hand, in terms of the rights conferring control, the Board concluded that the appointment and dismissal of Europcar's CEO is a unanimity matter requiring approval of all of the JV Parents and this is sufficient in and of itself to conclude that the Transaction at hand is an acquisition of joint control over Europcar ultimately by Volkswagen, Trinity and Pon. To provide further color on this front, the Board previously resolved that veto rights regarding the appointment and dismissal of high level/senior management (such as the general manager, CEO, CFO etc.) are considered as strategic veto rights and that such rights alone are sufficient to conclude that the undertakings in question will be jointly controlled by the relevant transaction parties.[5]

Moreover, the Board identified the transaction as a concentration affecting the structure of the relevant markets and requiring mandatory merger control filing in Turkey. To that end, the Board referred to paragraphs 78 and 79 of the Control Guidelines (which are closely modeled on paragraphs 91 and 92 of the CJN) and concluded that the full-functionality criterion is required to be sought only in case of greenfield joint venture transactions (*i.e.*, the establishment of a joint venture via acquisition of joint control over an existing undertaking does not require the consideration of the full-functionality criterion). This conclusion of the Board further supports the principles set forth under the paragraphs 78 and 79 of the Control Guidelines and paragraph 91-92 of the CJN. That being said, the wording of the Board's reasoned decision does not provide any insight as to whether the Board would consider that a transaction concerning the acquisition of joint control over an existing undertaking, which was solely controlled by one of the JV parents (and not by a third party) prior to the transaction, would also fall under the principles in paragraphs 78 and 79 of the Control Guidelines (*i.e.*, this rather exceptional situation would come into play only in terms of the acquisition of joint control over the undertakings that are previously controlled by third parties).

While an almost identical wording of the Control Guidelines can be found under paragraphs 91 and 92 of CJN, the case law within the European Union ("***EU***") diverges towards a different direction, with the long debated, yet still required and expected- guidance of the *Austria Asphalt* decision[6] of the Court of Justice of the European Union ("***CJEU***"). The CJEU held that the acquisition of control by a third party in an existing undertaking is not caught by the EU merger control regime if the resulting joint venture will not be a "*full function*" joint venture post-transaction. Having said that, the Board's stance on the matter is yet to be tried before an administrative court.

IV. Conclusion

Although occasionally its motives are not very clear from the wording of the decisions,[7] the Board has been aligning its assessments on the grounds found in the Control Guidelines in its various decisions,[8] concluding that the full-function criterion is not necessary for a transaction to constitute a concentration. However, as the Board's approach has not yet been challenged by a judicial review, the question whether the Board will continue to overlook the full-functionality criteria regarding the establishment of joint control over existing undertakings still

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

[6] Case C-248/16 Austria Asphalt

[7] The Board's *I Squared Capital-TDR Capital/ Aggreko* decision dated 29.04.2021 and numbered 21-24/290-132, para. 7. The relevant part of the Board's decision is as follows: "*Since it is understood that the establishment of the joint venture on an active undertaking would be deemed as a concentration, without the need to consider the full functionality criterion separately, the full functionality was also evaluated within the scope of the aforementioned notification*".

[8] The Board's Goldman Sachs-Ömerbeyoğlu/Dgpays decision dated 08.04.2021 and numbered 21-20/240-102, para. 8; The Board's *Consortium/Lodos Elektrik* decision dated 14.08.2018 and numbered 18-28/468-227 para. 22.

remains to be answered in light of future developments.

Selective Distribution Systems in the Pharmaceutical Sector[9]

I. Introduction

Ankara's 13th Administrative Court ('Administrative Court') annulled [10] the Turkish Competition Board's ('Board') decision, dated 3 September 2020 and numbered 20-40/553-249, rejecting the exemption application of Johnson & Johnson Sıhhi Malzeme Sanayi ve Ticaret Ltd. Şti. ('J&J') ('Board's decision'). The distribution system that is assessed by the Board within the scope of J&J's exemption application concerns the distribution of four medicines, namely, Darzalex, Imbruvica, Stelara and Zytiga, manufactured by J&J by nine pharmaceutical warehouses within the scope of a quantitative selective distribution system ('Warehouse Sales Agreement' or the 'Agreement'). Through the exemption application, J&J requested the Board to determine that the Agreements benefit from the block exemption per the Block Exemption Communique No 2002/2 on Vertical Agreements ('Communique No 2002/2') or else, satisfies the conditions for an individual exemption as per Article 5 of the Law No 4054 on the Protection of the Competition ('Law No 4054').

[9] This Article first appeared in The Legal 500: In-House Lawyer – Competition - Summer 2022, Legal Briefing

[10] Ankara 13th Administrative Court's decision numbered 2021/778 E and 2022/966 K, dated 27 April 2022.

II. The Board's decision

1. The vertical restrictions envisaged by the Agreement

The Agreement envisaged a quantitative selective distribution system by J&J covering the distribution of Darzalex, Imbruvica, Stelara and Zytiga within the pharmacy channel. The Board noted that the Agreement would reduce the number of warehouses in J&J's distribution network in the pharmacy channel from 40 to nine. The Board also remarked that per the selective distribution system these nine warehouses are prohibited to sell/supply the medicines subject to the Agreement with warehouses and/or distributors outside the scope of the selective distribution system and to barter such medicines with such warehouses and/or distributors. Additionally, the Agreement prohibited sales of the relevant medicines outside of Turkey or sales of such medicines within Turkey with the intent of resale to natural or legal persons located outside of Turkey. In that context, J&J was considered to have aimed to restrict parallel exports.

In terms of its assessment regarding the selective distribution, the Board emphasized that distribution systems that are non-qualitative (*i.e.,* distribution systems where distributors are chosen based on objective criteria such as training of sales personnel, quality of service and product portfolio) and directly or indirectly restricting the number of re-sellers are within the scope of Article 4 of the Law No 4054. The Board further explained that quantitative and/or qualitative selective distribution systems could benefit from the block exemption per the Communique No 2002/2 even if it is applied simultaneously with vertical restrictions such as a non-compete clause or an exclusive distribution system, on the condition that (i) the market share of the supplier does not exceed 40% threshold and (ii) active sales between authorised distributors as well as active sales from authorised distributors to end-users are not restricted. That being said, the Board remarked that an assessment on whether a selective distribution system would benefit from block exemption or not would boil down to elements such as whether the nature of the product would require selective distribution, whether inter and intra brand competition is restricted and cumulative effects that may result from parallel networks.

2. **The Board's assessment on the selective distribution system**

Against the foregoing, the Board assessed whether the products in question require selective distribution by their nature and whether the criteria set forth for the selective distribution are necessary for effective distribution of such products. The Board further noted that selective distribution systems are generally applied for the products within automotive, cosmetic, or durable consumer goods sectors with a view to protect the brand image. Additionally, the Board noted that in such sectors the suppliers may be inclined to set criteria regarding the quality of sales points or sales personnel, professional and technical capabilities and after-sales repair and warranty services to protect the brand image.

In terms of its assessment on whether medicines would fall within the scope of products that would necessitate selective distribution by its nature, the Board remarked that wholesale level of medicine supply would not require such a distribution system by its nature. That being said, the Board dug deep into the medicines subject to the Agreement and assessed whether the respective products require a selective distribution system by their nature. To that end, the Board assessed whether following arguments of J&J would deem the relevant medicines eligible for a selective distribution system requirement: (i) Darzalex, Imbruvica, Stelara and Zytiga require expertise and are sold at a more expensive retail price than other medicines sold by J&J in the market, (ii) Darzalex and Stelara are biotechnological medicines that requires delivery under cold chain, (iii) Imbruvica and Zytiga are conventional products that are produced via high technology. Despite J&J's arguments, the Board concluded that the medicines at question do not differ from most of other medicines and did not necessitate a selective distribution system given that most of other medicines also require delivery under cold chain and are produced by way of a sophisticated technology. Furthermore, the Board remarked that the main purpose of the Agreement subject to the application is to implement an export ban and J&J aimed to monitor export of such products by way of limiting the number of its distributors. Relatedly, the Board considered such aim to be reasonable, however concluded that application of a selective distribution system is not necessary to achieve such purposes.

Consequently, the Board held that the distribution system at hand could not be deemed as a selective distribution system, due to the characteristics of the products. Hence, despite the fact that market shares of the products (*i.e.*, Imbruvica, Zytiga, Stelara and Darzalex) subject to the Agreement were below 40% (*i.e.*, the threshold set forth under the Communique No 2002/2 was not exceeded for any of the pharmaceuticals concerned as of the date of the application[11]), the Board decided that the Agreement did not benefit from a block exemption, and J&J's preventing its authorised dealers from selling the relevant medicines to unauthorised resellers should be treated as a restriction on active and passive[12] sales. In light of this, the Board proceeded with an individual exemption analysis.

3. The Board's individual exemption analysis

Within the scope of the individual exemption analysis, the Board first remarked that the agreement at hand would not satisfy the criteria of ensuring new developments or improvements or economic or technical improvement in the production or distribution of goods, and in the provision of services, given that the distribution system at hand could not be deemed as a selective distribution system. In that case, the Board remarked, that the clause stipulating the selective distribution system of the Agreement would merely function as a restriction on resale activity of the distributors and it is not necessary for ensuring the availability of the relevant products within Turkey.

As regards to the criteria of customers benefitting from such developments and/or improvements, the Board first remarked that the Agreement may have positive effects for accessibility to the relevant products within Turkey given that the Agreement envisaged an emergency distribution system, which would enable allocation of additional quota of medicines to a given authorised distributor. That being said, the Board underscored that limiting the number of distributors that undertake the distribution of the respective products within Turkey would hamper and/or impede consumers' access to these medicines. To that end, the Board concluded that the consumers would not benefit from the developments and/or improvements arising from the Agreement.

In terms of the criteria of not eliminating competition in a significant part of the relevant market, the Board focused on J&J's market shares regarding these medicines within the pharmacy channel and the portion that these medicines take within J&J's total sales. Consequently, the Board concluded that the possibility that unauthorised pharmaceutical warehouses could not offer the medicines distributed under the Agreement under their own portfolio would have a negligible effect on the relevant market. To that end, the Board concluded that the Agreement would not eliminate competition in a significant part of the relevant market.

In terms of the criteria of not restricting competition more than necessary to achieve the goals set out in the first and the second criteria, the Board simply noted that the fundamental aim of the Agreement is to ban exports of the relevant products and the relevant clause of the Agreements setting out the selective distribution system would exceed beyond such aim and would restrict competition more than what is necessary to achieve efficiency in distribution and consumer benefit. To that end, the Board concluded that the

[11] With the new amendment introduced by the Communiqué No 2021/4 on the Amendments to the Block Exemption Communiqué on Vertical Agreements ('Communiqué No 2021/4'), which promulgated in the Official Gazette dated 5 November 2021 and No 31650, the threshold regarding the supplier's market share(s) for the market(s) for the contract goods has now been lowered to 30%.

[12] Fulfilling demands of customers from another buyer's region or customer group, which are not a result of active efforts by the buyer constitutes 'passive sales', even when the buyer delivers the goods to the customer's address. (Guidelines, para 24).

Agreement failed to meet the final condition for being granted an individual exemption.

Against the foregoing, the Board concluded that the Agreement could not be granted individual exemption either.

III. Annulment decision of the Administrative Court

Following the Board's decision, J&J filed a lawsuit before the administrative courts for the annulment of the decision. In its examination, the Administrative Court noted that while quantitative selective distribution systems should be under a stricter scrutiny within the scope of Article 4 of Law No 4054, there is no legislative provision that prohibits quantitative selective distribution agreements.

Furthermore, the Administrative Court countered the Board's argument that the Agreement would hamper and impede the consumers' accessibility to the relevant medicines due to the selective distribution clause and limitation of the number of distributors, by way of indicating that all cities within Turkey would be supplied by at least two pharmaceutical warehouses within the scope of the distribution system set out by the Agreement. Furthermore, the Administrative Court noted that the emergency distribution system would also prevent supply bottlenecks. Additionally, the Administrative Court underscored that the Agreement did not restrict the pharmacy channel, which is the downstream market for the pharmaceutical warehouses that distribute the medicines and any pharmacy that would require the medicines at question could access to them.

In terms of the Board's approach that only the agreements covering the products that require selective distribution system by their nature would benefit the protective cloak of the block exemption, such as the products offered within automotive, cosmetic, or durable consumer goods sectors, the Administrative Court confined itself to address the Board's remarks within the scope of its individual exemption analysis and did not address the Board's remarks on how the block exemption rules would be applied to selective distribution systems. In that context, the Administrative Court considered the Board's argument that the pharmaceutical industry does not require technical and professional capabilities, after-sales services as unfounded, given that supply of pharmaceuticals requires technical and professional capabilities as well as after-sales feedback from the consumers within the scope of the applicable regulations to the relevant sector. That being said, the Administrative Court did not shed light on the issue on whether a product that does not require the selective distribution system by its very nature should be precluded from the protective cloak of the block exemption.

Lastly, the Administrative Court remarked that the Board's conclusion that the relevant clause of the Agreement stipulating the selective distribution system is not necessary to achieve the aim of export ban is unfounded, given that J&J substantiated that it could not prevent the exportation of such medicines despite the fact that these medicines are traced with barcode numbers labelled on them.

Accordingly, the court considered the fact that the Competition Authority can withdraw the exemption decision in case of a change in any event that constitutes the basis for the exemption decision within the scope of Article 13 of the Law No 4054, and therefore deemed the rejection of the exemption application is unlawful and annulled the Board's decision.

IV. Main takeaways from the case

The Board's decision was a 'once in a blue moon' case in the sense that the Board refused to determine that the Agreement benefits from the protective cloak of the block exemption, despite the fact that J&J's market share for the medicines covered by the Agreement were each below 40% (*i.e.*, the threshold set forth under the Communique No. 2002/2 was not exceeded for any of the pharmaceuticals concerned as of the date of the application). The reason that such an approach was exceptional is that such a case is explicitly guided under the Guidelines on Vertical Agreements ('Guidelines'). Paragraph 172 of the Guidelines provides that both 'qualitative and quantitative selective distribution may benefit from the block exemption up to the 40% market share threshold, even if combined with other non-hardcore restraints, such as non-competition or exclusive distribution, provided active selling by the authorised distributors to each other and to end users is not restricted'. Additionally, the Guidelines explicitly sets out that 'The Communiqué grants exemption to selective distribution networks, regardless of the nature of the product'.

The Administrative Court's decision is crucial in the sense that it blocked a categorical preclusion of quantitative selective distribution systems except for the sectors such as automotive, cosmetics and durable consumer goods.

Leniency and Settlement: Together for the First Time

I. Introduction

With the recent amendments to Article 43 of the Law No 4054 on the Protection of Competition ("***Law No 4054***") and the enactment of Regulation on the Settlement Procedure ("***Settlement Regulation***"), the settlement mechanism has been officially introduced to Turkish competition law. With the enactment of the Settlement Regulation, parties to the investigation may now settle by, *inter alia*, accepting the infringement and benefit from an up to 25% reduction in administrative monetary fines to be imposed.

Article 10 of the Settlement Regulation also allows the undertakings to benefit from the Regulation on Active Cooperation for Detecting Cartels ("***Leniency Regulation***"), if the leniency application was submitted to the Authority before the settlement text was (*i.e.*, before the settlement negotiations are finalized and put in writing). In other words, the undertakings are able to benefit from the reduction envisaged under both regulations, which is similar to the EU regime.

The recent decisions of the Turkish Competition Board ("***Board***") concerning Kınık Maden Suları A.Ş ("***Kınık***") and Beypazarı İçecek Pazarlama Dağıtım Ambalaj Turizm Petrol İnşaat Sanayi ve Ticaret A.Ş. ("***Beypazarı***"), constitute the first combined application of the Settlement and Leniency Regulations.[13] In

[13] Available only in Turkish at: https://www.rekabet.gov.tr/tr/Guncel/aktif-isbirligi-ve-uzlasma-kurumlarinin--fd72d3e60cdcec11a22000505685ee05 (Accessed 27.06.2022).

its *Kınık* decision[14], the Board applied 25% reduction under the Settlement Regulation (the highest reduction possible) and 35% reduction under the Leniency Application, which amounted to a total of 60% reduction in the administrative monetary fine. Thus, the monetary fines imposed to Kınık decreased drastically from TRY 2,322,328.75 to TRY 928,931.50.

Subsequently, in its *Beypazarı* decision where Beypazarı made a leniency application after Kınık, the Board again applied 25% reduction under the Settlement Regulation and 30% reduction under the Leniency Application, resulting in a total 55% reduction to the administrative monetary fine. Thus, the monetary fines imposed to Beypazarı were also decreased drastically, from TRY 21,885,323.28 to TRY 9,848,395.48.[15]

In this article we will briefly discuss the dual application of Leniency and Settlement Regulations.

II. Dual Application of the Settlement and Leniency Regulations

The Settlement Regulation sheds light on the dual application of the Leniency Regulation and Settlement Regulation. As per Article 10 of the Settlement Regulation, the undertaking may make a separate application in order to also benefit from the leniency scheme. To be able to do that, the undertaking concerned must first apply for leniency, before the settlement negotiations are finalized and the settlement text is submitted.

Needlessly to say, for an undertaking to be able to apply for leniency, the alleged infringement must first constitute a cartel. Article 3 of the Leniency Regulation defines cartels as agreements restricting competition and/or concerted practices between competitors for: (i) fixing prices, (ii) allocation of customers, providers, territories or trade channels, (iii) restriction of supply or imposing quotas, and (iv) bid-rigging.

In light of the above, for an undertaking to benefit from both the Settlement Regulation and Leniency Regulation, the infringement in question must be a cartel arrangement and that the leniency application must be made before the submission of the settlement text.

III. Conditions to fulfil under the Leniency Regulation

Since detecting the existence of a cartel is notoriously difficult, considering its secretive nature, the Guidelines on the Explanation of the Regulation on Active Cooperation for Detecting Cartels ("***Active Cooperation Guidelines***") states that the Leniency Regulation is helpful in identifying the cartels, by granting immunity from or reduction in fines for those undertakings and their employees that make a leniency application.

According to Article 6 of the Leniency Regulation, in order to be eligible for a full-immunity or a reduction in fines, an undertaking must fulfill the following conditions:

- **(i)** Submit information and evidence in respect of the alleged cartel including the products affected, the duration of the cartel, the names of the undertakings party to the cartel, specific dates, locations and participants of cartel meetings,

[14] The Board's *Kınık* decision dated 14.04.2022 and numbered 22-17/283-128.
[15] The Board's *Beypazarı* decision dated 18.05.2022 and dated 22-23/379-158.

(ii) Not conceal or destroy information or evidence related to the alleged cartel,

(iii) End its involvement in the alleged cartel except when requested otherwise by the assigned unit [of the Authority] on the ground that detecting the cartel would be complicated without their continued involvement,

(iv) Keep the application confidential until the end of the investigation, unless requested otherwise by the cartel unit,

(v) Continue its active cooperation until the Board makes the final decision after the investigation is completed.

1. Applying for a grace period

The undertaking concerned can ask for a time extension to submit the foregoing information. This time extension request may be made for full-immunity or reduction in administrative monetary fines. In order for an extension to be granted, the undertaking must provide information concerning the products affected by the cartel, the duration of the cartel arrangement and the names of the undertakings party to it.[16]

2. No significant added value is needed

Unlike the European Commission's practice, there is no requirement under the Active Cooperation Guidelines to submit evidence which would contribute significant added value to the evidence already in the Authority's possession. However, the Board, in practice, seems to expect to derive some form of added value from the evidence submitted by the undertaking concerned. Indeed, according to the Board, an acceptance to the contrary may mean that even the evidence submitted with the investigation notice may be used for a leniency application.[17] Additionally, the Board expects the undertaking concerned to provide the connection between the documents submitted and the subject of the investigation as best as possible.[18] For example, the Board stated in its *Ambarlı Ro-Ro* decision that the undertaking concerned (*i.e.*, Kale Nakliyat Seyahat ve Turizm A.Ş.) significantly contributed to the investigation by submitting: documents which go back to a date earlier than the documents seized during the dawn raid, documents which supplemented the information exchange regarding prices and, detailed information and documents pertaining to the parties to the infringement and how the infringement took place.[19]

In its *Gaziantep Oto Ekspertiz* decision,[20] the Board evaluated Süper Test Oto Ekspertizlik Hizmetleri San. ve Tic. Ltd. Şti.'s ("***Süper Test***") leniency application. Süper Test submitted information and documents pertaining to the names of the cartel participants, dates of the meetings regarding the cartel, its location and participants. The Board noted that it understood that the meetings continued to take place in October 2015, June 2017, November 2018, December 2018 and January 2019. In this scope, the Board

[16] Active Cooperation Guidelines, para 55.

[17] The Board's *Ambarlı Roro* decision dated 18.04.2019, and numbered 19-16/229-101, para 169.

[18] *Ambarlı Roro* decision, para 170.

[19] *Ambarlı Roro* decision, para 178.

[20] The Board's *Gaziantep Oto Ekspertiz* decision dated 09.07.2020 and numbered 20-33/439-196.

stated that the information given in this context coincided with the dates, parties and content of the documents obtained during the dawn raid.[21] The Board concluded that Süper Test contributed to the investigation by submitting information on the starting date of the violation, the duration of the infringement, parties to the infringement and how the infringement took place and, granted reduction in administrative monetary fines.[22]

3. Conditions to fulfill to receive full-immunity

An undertaking may benefit from full-immunity if the leniency application is made prior to the initiation of the preliminary inquiry. An undertaking may still be eligible for full-immunity even where there is sufficient evidence to conclude that Article 4 of the Law No 4054 (which is akin to Article 101 TFEU) is infringed, granted that the application is made prior to initiation of the preliminary inquiry.[23] Additionally, if the Board does not possess evidence which establishes that Article 4 of the Law No 4054 is violated, the undertaking concerned may still benefit from full-immunity, even if the application is made after the initiation of the preliminary inquiry. Nevertheless, this application must be made before the receipt of the investigation notice.[24] In all other situations, subject to fulfillment of Article 9 of the Leniency Regulation, the undertaking concerned may be eligible for reduction.

[21] *Gaziantep Oto Ekspertiz* decision, para 76.
[22] *Gaziantep Oto Ekspertiz* decision, para 78.
[23] Active Cooperation Guidelines, para 15. The Guideline clearly states "*a decision to initiate a preliminary inspection is taken*" is designated as the relevant time period.
[24] Article 4 of the Leniency Regulation.

IV. Conditions to fulfill under the Settlement Regulation

As stated above, the undertaking concerned must apply for leniency before submitting the settlement text, if it aims to reap the reductions available under both regulations. To initiate the settlement procedure, the undertaking concerned shall apply to the Authority in writing. This application must be made before the receipt of the investigation report.

There is no set time limit envisaged under the Settlement Regulation for the Authority to either accept or decline the request. Initiation of the Settlement does not mean that the undertaking concerned accepts the alleged violation and if the application is withdrawn before duly submitting the settlement text, the Authority cannot use the information gathered during the settlement negotiations. The Authority ensures that the undertaking concerned is sufficiently informed, *inter alia*, about the content of the allegations concerning the settlement party, the nature and the scope of the alleged violation etc. Within fifteen days following the entry of the settlement text into the Authority records, the investigation is concluded for the settling party with the Board's final settlement decision establishing the violation and setting out the administrative fines to be imposed on the settling party.

V. Possibility of further reductions

As explained above, with its *Kınık* and *Beypazarı* decisions, the Board showed that dual application of settlement and leniency is possible under the Turkish competition law regime. However, whether a third reduction could still be possible after the settlement and leniency reductions, is still under dispute.

According to the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position ("***Regulation on Fines***") when determining the fines to be imposed on the undertakings, following the calculation of the base fine, aggravating and mitigating factors will be considered within the framework of Articles 6 and 7 of the Regulation on Fines and an increase and/or a reduction shall be made.

Under Article 7(3) of the Regulation on Fines, in case the undertakings that engaged in "other (*i.e.*, non-cartel) violations" admit to such violations and engage in active cooperation, the administrative monetary fine shall be reduced by one-sixth to one-fourth. In the Board's *Philips* settlement decision,[25] due to the 25% reduction in the administrative fine for settlement, it is considered that the other provisions regarding active cooperation or admittance of the violation cannot be applied, otherwise, two discounts would be applied for the same behavior. Therefore, it has been decided that there is no mitigating factor to be applied to the administrative monetary fine within the framework of the Article 7(3) of the Regulation on Fines.

On the other hand, dual discounts can be applied under the Leniency Regulation and the Settlement Regulation for cartel behavior, even if there is no added value to the evidence that is already in the Authority's possession. For instance, in its *Kınık* and *Beypazarı* decisions, the Board applied separate discounts under the aforementioned regulations despite there being no added value by the undertakings to the evidence the Authority had.

Additionally, considering that cartel behavior is the most serious infringement in competition law, it can be argued that this practice is unjustified since the undertakings who committed less serious or detrimental infringements cannot benefit from double discounts provided in the Regulation on Fines and the Settlement Regulation, while the cartelist is allowed to benefit from dual discounts under the Leniency Regulation and Settlement Regulation.

The Administrative Court Stayed the Execution of the Board's Decision That Imposed an Administrative Monetary Fine on Sahibinden for Hindrance of the On-Site Inspection

The Ankara 2nd Administrative Court stayed the execution of the Board's decision that imposed an administrative monetary fine on Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret A.Ş. ("***Sahibinden***") for hindering the on-site inspection carried out at the premises of the undertaking by the Authority.

The Authority conducted an on-site inspection at the premises of Sahibinden, within the scope of an ongoing full-fledged investigation launched by the Board's decision of April 1, 2021, against thirty-two undertakings including Sahibinden to determine whether the relevant undertakings violated Article 4 of Law No. 4054 by way of engaging in gentlemen's agreements in labor markets across Turkey. The Board decided with its decision of May 27, 2021 (21-27/354-174) that the relevant on-site inspection was obstructed by an employee who deleted some correspondences in WhatsApp group chats on the date of the on-site inspection, subsequent to the arrival of the case

[25] The Board's *Philips* decision dated 05.08.2021 and numbered 21-37/524-258.

handlers at the undertaking's premises ("***Board's Decision***").

According to the technical review of the Authority's Informatics and Communication Technologies Department on an employee's personal mobile device, the Authority found out that messages in a WhatsApp group have been deleted after the initiation of the on-site inspection. During the Authority's searches in mobile devices of other employees, the Authority also found out that there was actually a correspondence in the relevant WhatsApp group although this correspondence could not be seen in the relevant employee's device. Accordingly, the Board imposed an administrative monetary fine of 0.05% of Sahibinden's annual turnover for hindrance of the on-site inspection.

Subsequently, Sahibinden applied for a stay of execution before the Ankara 2nd Administrative Court. Arguing that the Board's decision is unlawful, based on the grounds that (i) the allegedly deleted messages were personal correspondences of the relevant employees and they were on their personal devices, and that (ii) as they were deleted by only one employee, the case handlers had been able to obtain these messages from other participants of the relevant group chat. Sahibinden also argued that this act alone would not be considered as hindrance of the on-site inspection since the relevant documents and the information have been obtained by the case handlers without any obstacle. On the other hand, the Authority claimed that since the correspondences were deleted after the on-site inspection had been commenced, this act alone led to hindrance of the on-site inspection.[26]

In its decision to stay, the Ankara 2nd Administrative Court stated the following:

- the undertaking concerned has informed its employees of the on-site inspection and specifically asked all its employees to provide the case handlers with the information/document requested and not to delete e-mail messages and mobile phone correspondences,

- the allegedly deleted correspondences were still obtained during the on-site inspection from other employees' devices,

- the mobile device of the relevant employee, which the messages have been found to be deleted from, is the personal device of the employee and that the deleted messages do not contain any work related matters.

Based on the findings above, the Ankara 2nd Administrative Court concluded that the relevant act of deleting messages cannot form a basis for the imposition of an administrative monetary fine. The Ankara 2nd Administrative Court also assessed that there is no concrete information or document proving that the plaintiff has indeed committed the mentioned act. To that end, the Ankara 2nd Administrative Court ordered the stay of execution of the Board's Decision on the grounds that the Board's Decision is unlawful and its execution would lead to irreparable damage.

The Authority appealed this stay of execution decision of the Ankara 2nd Administrative Court before the Ankara Regional Administrative Court, and requested its annulment. The Ankara

[26] The Ankara 2nd Administrative Court's decision dated April 15, 2022 and numbered 2022/254 E.

Regional Administrative Court rejected the Authority's request.[27]

Conclusion

Pursuant to Article 15 of Law No. 4054 and the Guidelines on the Examination of Digital Data during On-Site Inspections, the Authority is authorized to inspect all digital documents and information during the on-site inspections. According to the relevant guidelines, (i) the case handlers should conduct a quick review to determine whether portable communication devices (mobile phones, tablets, etc.) contain digital data that belong to the undertaking and accordingly decide whether the device can be inspected or not. In line with this, the case handlers inspect personal devices and the Authority imposes monetary fines on the undertakings in case of the deletion of the data.

The Ankara 2nd Administrative Court's decision is noteworthy as the court has not accepted the Board's strict approach that there should be a violation and an administrative monetary fine in all cases where the Authority finds out any messages have been deleted after the on-site inspection has started. The Ankara 2nd Administrative Court's decision emphasizes that the Board, in evaluating such deletions, should consider whether (i) the deleted data has been obtained anyhow from other devices, (ii) the relevant mobile device is a personal device and (iii) the data concerns work related matters.

[27] Ankara Regional Administrative Court, 8th Administrative Chamber's decision dated May 18, 2022 and numbered 2022/320.

Employment Law

The High Court of Appeals Rules on the Validity of Letters of Resignation

The validity of employee letters of resignation is an issue that has been widely discussed before the Turkish courts. Indeed, the courts acknowledge that it is considerably common for an employee to have signed a letter of resignation without free will,[28] which renders the letter of resignation invalid. In particular, it is accepted that determining whether a letter of resignation is valid requires careful examination, especially if an employee had the right to terminate their employment agreement with just cause, since in that case they would be entitled to severance and notice pay, as opposed to resignation.

In this scope, as per the established jurisprudence of the High Court of Appeals, it is considered that it would not be correct to pay regard to a letter of resignation if the employee had the right to go for immediate termination with just cause and they were about to proceed accordingly, but the employer obtained a letter of resignation from them by undue influence.[29] The jurisprudence provides

[28] The 9th Civil Chamber of the High Court of Appeals' decision numbered E. 2015/21438 K. 2019/19009 and dated November 4, 2019; the 9th Civil Chamber of the High Court of Appeals' decision numbered E. 2015/11667 K. 2015/18755 and dated May 25, 2015; the 22nd Civil Chamber of the High Court of Appeals' decision numbered E. 2017/5615 K. 2017/3909 and dated February 27, 2017; the 7th Civil Chamber of the High Court of Appeals' decision numbered E. 2016/195 K. 2016/3219 and dated February 15, 2016.

[29] The 9th Civil Chamber of the High Court of Appeals' decision numbered E. 2015/21438 K. 2019/19009 and November 4, 2019; The 9th Civil Chamber of the High Court of Appeals' decision numbered E. 2016/3259 K. 2017/1048 and February 6, 2017; the 9th Civil Chamber of the High Court of Appeals' decision numbered

that, in such a case, it should be accepted that the respective employee had actually terminated their employment agreement with just cause and treated accordingly.

There are various court decisions on this matter, ruled at first instance or appeals stages, which provide that it would be a contradiction to the ordinary course of life for an employee to submit a letter of resignation, of their own volition, by giving up their compensation and other rights even though they were entitled to terminate their employment agreement with just cause; thus it must be accepted that the letter of resignation submitted by the employee is invalid.[30] These decisions do not specifically evaluate whether or not the employee's will was indeed influenced; rather, it is presumed that if an employee submitted a letter of resignation despite being entitled to terminate their employment agreement with just cause, they had done this under undue influence, without free will and thus their letter of resignation is invalid.

In this regard, in a surprising turn of approach, on May 10, 2022, the High Court of Appeals rendered a decision wherein it set forth that ruling that a letter of resignation is invalid merely on account of the fact that the employee had the right to terminate their employment agreement with just cause would be unlawful ("**Decision**").[31] Indeed, the High Court of Appeals adjudicated in the Decision that "*The First Instance Court's acceptance of the request for severance pay with the reasoning that 'it would not be correct to validate a letter of resignation if the employee had the right to go for immediate termination with just cause' is also evidently contrary to the rule that the burden of substantiation and proof lies with the party claiming a fact*". Moreover, the High Court of Appeals emphasized that adopting the principle of "*investigating the employee's actual will by subjecting the letters of resignation drafted by employees to a different review mechanism*", which is a principle that exists in labor law, cannot and should not result in completely disregarding the procedural rules regarding proof of a claim. Accordingly, considering that the plaintiff employee did not fulfil their burden of proof and that it cannot be established that the employment agreement was terminated with just cause in that particular case, the High Court of Appeals held that it is evident that the plaintiff employee's request for severance pay should have been rejected.

In conclusion, with this Decision, the High Court of Appeals has clearly set forth that the fundamental criteria in assessment of the validity of a letter of resignation are whether or not the employee who submitted such a letter did so as a result of undue influence and whether or not it can be proven that the employee terminated the employment agreement with just cause.[32]

E. 2008/27800 K. 2010/13980 and dated May 20, 2010.

[30] Bursa Regional Court of Appeals' decision numbered E. 2020/2455E. K. 2020/2077. See also the 9th Civil Chamber of the High Court of Appeals' decision numbered E. 2015/8470 K. 2017/2322 and dated February 21, 2017; the 30th Civil Chamber of the Istanbul Regional Court of Appeals' decision numbered E. 2017/1430 K. 2017/1211 and dated September 25, 2017.

[31] The 9th Civil Chamber of the High Court of Appeals' decision numbered E. 2022/4884 K. 2022/5756 and dated May 10, 2022.

[32] See the General Assembly of Civil Chambers of the High Court of Appeals' decision numbered E. 2014/2437 K. 2017/718 and dated April 12, 2017; the 22nd Civil Chamber of the High Court of Appeals' decision numbered E. 2017/5615 K. 2017/3909 and dated February

Accordingly, in case these criteria are not met, it would not be lawful to presume that a letter of resignation is invalid and, depending on the circumstances surrounding a specific case, accept that the party terminating the employment agreement was actually the employer or the employee had terminated their employment agreement with just cause.

Litigation

Debtors are Granted Sale Authorization under the Law on Enforcement and Bankruptcy

I. Introduction

With the Law on the Amendments to the Enforcement and Bankruptcy Law and Certain Laws No. 7343, which was published in the Official Gazette dated 30.11.2021 and numbered 31675 and entered into effect on the same date, Article 111/A was added to the Law on Enforcement and Bankruptcy No. 2004 ("Law"). According to Article 111/A of the Law, the debtors have been granted the right to sell their seized properties voluntarily and upon their requests.

The purpose of this amendment is to allow a debtor to sell its seized property at a higher price. Before this amendment, the seized properties used to be sold at auction by the enforcement offices, with the initial starting price set at 50% of the estimated value of the seized property. This constitutes a high risk of selling the seized property at a price lower than its real market value. With this amendment, the debtor may request authorization to sell the seized property outside the auction process, in order to sell the property at its value.

The principles and procedures of the sales authorization to be granted to the debtors pursuant to the Article 111/A of the Law were set out in the Regulation on Granting Sales Authorization to the Debtor Pursuant to the Law on Enforcement and Bankruptcy ("Regulation") and published in the Official Gazette dated 28.05.2022 and numbered 31849, entering into effect on the same day. This article briefly explains the above procedures and principles under the Regulation with respect to the sale authorization granted to the debtor.

II. Procedures and Principles Set Forth in the Law and Regulation

According to Article 87 of the Law, once the debt is certain and the execution proceeding is at the stage of seizure, the sequestrator determines the value of the seized property. If the property is listed under some type of registry, such property is appraised by the experts authorized by the Ministry of Justice. According to Article 111/A of the Law and Article 7 of the Regulation, the debtors may request to be granted the authority to sell their seized properties voluntarily, within 7 days following the date of receiving the notification of appraisal. Upon the request of the debtor for authorization, the bailiff issues a certificate of authorization in order for the debtor to sell his/her seized property. In cases where no appraisal was made, the debtor itself may also request an appraisal.

In the event of the debtor's request for sale, the sale price shall not be less than 90% of the estimated value of the property,

27, 2017; the 22nd Civil Chamber of the High Court of Appeals' decision numbered E. 2014/35226 K. 2015/762 and dated January 22, 2015.

or the sum of the receivables that are secured by that property and that have priority over the receivables of the persons requesting the sale, whichever is higher, and in addition to this amount, the total costs of the enforcement proceedings for the seized property, up to this stage.

In case such authorization is granted to the debtor, "Form No. 57" shall be issued as per Article 4 of the Regulation, which sets out information related to the creditor, the debtor, the seized property, the estimated price of the seized property, the minimum sale price etc.. Upon the debtor's request for authorization, once the appraisal is final, the bailiff issues a certificate of authorization and serves this certificate to the debtor.

With the certificate of authorization, the bailiff ceases the enforcement sale procedure and grants the debtor 15 days for sale. The debtor is obliged to inform the enforcement office within 15 days, of (i) the name, surname and Turkish ID number of the buyer, (ii) the company title, Central Registration System number, trade registry number, and tax number if the buyer is a legal entity, (iii) the agreed price, and (iv) the distinctive features of the property. Similarly, the buyer is obliged to inform the enforcement office of (i) his/her name, surname and Turkish ID number, (ii) the title, Central Registration System number, trade registry number, and tax number if it is a legal entity, (iii) notification address, (iv) contact information, (v) bank account information, (vi) the agreed price and (vii) distinctive features of the property, within 15 days. If the sale is duly concluded within 15 days and the sale price is paid to the enforcement file by the buyer, then the bailiff (after examining the necessary documents and determining the conditions are met) will immediately send the file to the enforcement court to get its approval of the sale and finalize the transfer of ownership. The enforcement court will render a final decision on approval or rejection of the sale, latest within 10 days. The enforcement court will not hold any hearing to render this decision.

If the sale is approved by the enforcement court, the ownership of the property will be transferred to the buyer, and the attachment on the property released. Approval of the enforcement court on the sale is required in order for the sale transaction to be completed. With the approval decision, the buyer will be the new owner of the property. The necessary transactions for the transfer and delivery of the property will be conducted by the enforcement office. It is important to note that, according to the Article 14 of the Regulation and the Article 111/A of the Law, all of the attachments on the property will be released before the property is transferred. Also, the buyer shall be liable for all the costs that arise due to the transfer and delivery of the property. In the event of rejection by the enforcement court, the sale price will be paid back to the buyer within 3 business days following the date that the court decision is sent to the enforcement office. The reimbursed sale price will be paid into the bank account which was notified to the enforcement office by the buyer.

III. Conclusion

The rationale of this sale authorization granted to the debtors by the Law and Regulation is to enable the debtors to sell their properties at a higher price. Before this authorization, the debtors' properties could only be sold by the enforcement office in an auction, with a starting price much lower than the actual market value of the property. In this way, the debtors are able to pay their total debt or a bigger portion of their debt, by voluntarily selling their seized properties.

Data Protection Law

New Guidelines on Loyalty Programs and Cookies Introduced by the Turkish Personal Data Protection Authority

I. Draft Guideline on the Processing of Personal Data in Loyalty Programs

1. Introduction

The Turkish Personal Data Protection Authority ("DPA") has published a Draft Guideline on Processing of Personal Data in Loyalty Programs ("Loyalty Programs Guideline") on June 16, 2022. The Loyalty Programs Guideline is still in draft version and was opened to public consultation until July 16, 2022.

The Loyalty Programs Guideline mainly provides detailed information on the categories of personal data processed within the scope of loyalty applications, legal grounds for the processing of personal data, the discussion of the personal data processed within the framework of loyalty programs in the context of general principles, issues to be considered within the scope of loyalty practices in fulfilling the obligation of providing information by data controllers, as well as practice cases.

2. Important Issues Clarified under the Loyalty Programs Guideline

a. Definition of Loyalty Programs

In the Loyalty Programs Guideline, which aims to examine the processing of personal data carried out within the scope of loyalty programs in the context of personal data protection legislation, loyalty programs are defined as "*Programs that aim to increase the sales and profitability of a company while providing benefits to the customer through the implementation of all or some of the following strategies, such as providing the customer with points/gifts/advantages within the framework of various criteria in return for shopping, by processing the customer's personal data that will enable them to be distinguishable or identifiable in terms of the business, monitoring the customer's shopping habits, and providing personalized product/service offers by analyzing the processed personal data.*" Accordingly, loyalty programs are a package of benefits that are provided to reward long-term and regular customers and to instill customer loyalty.

The Loyalty Programs Guideline classifies such loyalty programs as: (i) programs rewarding regular customers based on consistency, (ii) programs enabling rewards in an interface where the identity of the customer is determined and their demographic/payment records are directed to the business database, (iii) programs targeting a limited and privileged customer base in return of a subscription fee, (iv) programs targeting many customers with easy and free subscription, (v) programs based on rewarding points in return for purchases, visits, likes on social media pages, downloading application, enlisting to e-mail subscription, etc. (vi) layered loyalty programs based on the spending thresholds that a customer reaches, (vii) paid/VIP loyalty programs, (viii) programs enabling refunds on payments, (ix) programs targeting ethical values such as donations in return for purchases, (x) programs enabling partnership, (xi) loyalty programs provided within a game application, and (xii) combined programs with mixed rewards.

In the Loyalty Programs Guideline, data controllers within the scope of loyalty programs are determined as loyalty program implementers. On the other hand, the Loyalty Programs Guideline only considers real person customers as data subjects.

b. *Categories of Personal Data Processed within the Scope of Loyalty Programs*

The Loyalty Programs Guideline also remarks on the type of personal data processed within the scope of loyalty programs, although it varies from application to application.

(i) Personal data actively and voluntarily provided by the customer (it can be processed by filling in the name, contact information etc. in the membership form personally by the customer)

(ii) Personal data passively provided by the customer (if the loyalty program is used in a mobile application, this would constitute processing the IP address, location data, etc.)

(iii) Customer data from other sources (data obtained by analyzing data actively provided by a customer, with other passively collected user data, or data from unidentified datasets and performing analyzes based on this combined data)

The annexes of the Loyalty Programs Guideline provide detailed case examples of personal data processed within loyalty programs through Radio Frequency Identification Technology (RFID), as well as categories of personal data.

c. *Determination of Legal Reasons for Processing Personal Data*

The Loyalty Programs Guideline states that in terms of personal data processed within the scope of loyalty programs, the legal reasons must be determined correctly, by taking the purpose of processing into consideration. For example, the processing of the phone number in order to benefit from the loyalty card application and make it identifiable, and the processing of the phone number data for the purpose of sending commercial electronic messages to the person, would be based on different legal reasons.

If the purpose of the loyalty program is to only provide points/gifts/advantages to the customer in return for shopping within the framework of the determined criteria, the processing of customer's personal data in order to obtain the relevant advantage/points/gift may be considered within the scope of the processing of the personal data of the parties to the agreement, provided that it is directly related to the establishment and performance of the agreement. However, in the event that the processing of personal data belonging to the parties of the agreement, is not directly related to the performance of the agreement, the data controller should evaluate in each case whether it can rely on another legal reason.

In the Loyalty Programs Guideline, the DPA also refers to profiling activities. It states that data processing activities carried out for profiling cannot be deemed mandatory for the performance of the agreement and that data controllers cannot rely on the legal reason of "performance of the agreement" for such processing.

d. Explicit Consent

In the Loyalty Programs Guideline, it is stated that where the personal data is being processed based on explicit consent, it is necessary to inform the data subject in accordance with the legislation, to obtain their explicit consent, and to carry out the clarification processes, separately. It is further underlined that the explicit consent wording should not be included within the loyalty program agreement provisions.

Explicit consent within the framework of the law means that the person gives his/her consent to the processing of his/her data, voluntarily or upon request from the other party. With the explicit consent declaration, the person actually informs the data controller about the legal value he/she attributes to their personal data. The explicit consent statement will also enable the data subject to determine the limits, scope and mode of execution of the data that he/she allows to be processed.

The Loyalty Programs Guideline emphasizes that explicit consent has to be (i) related to a specific subject, (ii) based on sufficient information, and (iii) given freely. Also, it is added that general consent should not be preferred for such data processing that would fall within the scope of explicit consent.

The Loyalty Programs Guideline further states that if an explicit consent is not granted, then, although the goods/services may still be provided, additional benefits may not. If the explicit consent is a pre-condition of the goods/services offered within the scope of the loyalty program then in order to claim that the explicit consent given in this context is valid (*i.e.*, based on free will), the data controller must ensure that the advantage provided with the loyalty program is reasonable and that the data subject does not suffer a significant disadvantage, or their free will is not harmed.

e. Commercial Electronic Messages

The Loyalty Programs Guideline states that it is well-known that the contact information (which is, by nature, among the personal data processed for loyalty programs) is processed for sending commercial messages to individuals as part of the marketing strategies of the companies, and therefore, the individual's consent must be obtained for commercial electronic messages and processing personal data, in the context of the relevant provisions under the Regulation on Commercial Electronic Messages.

In addition, the Loyalty Programs Guideline underlines that the processing of personal data for identifying the customer for loyalty programs, and the "purpose of processing" in order to send commercial electronic messages are two separate things. In this context, the data controller should carefully evaluate whether the contact information of the loyalty program member can be used to send commercial electronic messages.

f. Loyalty Programs and Obligation to Inform

The Loyalty Programs Guideline remarks that the informatory texts should not be included under the terms of the loyalty program agreement, that they should be clear and understandable, and that the explanations regarding the transfer of personal data should be made clearly and in a way that leaves no doubt. If a partner program is in question and one of the program partners intends to process the personal data of loyalty program members for the purposes of sending messages advertising on their behalf, it is necessary to have this clearly set out and duly obtain the relevant consent.

II. The Guideline on the Use of Cookies

1. Introduction

The DPA has published the final version of Guidelines on the Use of Cookies ("Cookie Guidelines) on June 20, 2022. The Cookie Guidelines aim to provide a guidance for and practical advice for all data controllers who operate a website. The Cookie Guidelines cover the processing of personal data through cookies, and notes that those cookies that are not used for processing personal data are not in the scope of the Cookie Guidelines applicable to desktop and mobile websites or web applications. The Guidelines do not provide any reference for similar technologies, such as tracking pixels, user device/browser fingerprinting, local storage or web beacons.

2. Important Issues Clarified with the Cookie Guidelines

a. Cookies in General and Types of Cookies

As per the Cookie Guidelines, a cookie is a type of text file placed on the user's device by the website operators and is transferred as part of the HTTP (Hyper Text Transfer Protocol) query. Cookies are classified according to the (i) duration of use, (ii) their purpose and (iii) their parties. With regard to their duration, cookies are classified as session or persistent cookies. As for their purpose, cookies are classified as strictly necessary cookies, functional cookies, performance - analytic cookies and ad/marketing cookies. Lastly, in terms of their parties, cookies are classified as first party cookies and third party cookies.

b. Rules about Cookies

Within the scope of Law No. 6698 on the Protection of Personal Data ("Law No. 6698"), data controllers are advised to consider the following criteria when processing personal data through cookies:

- Criterion A: The use of cookies for the sole purpose of transmission of a communication over an electronic communication network,

- Criterion B: The use of cookies that are strictly necessary for providing the information society services that are explicitly requested by the subscriber or user.

As for cases that do not fall under the scope of these two criteria, the below conditions will be applicable for the use of the cookies. The conditions for processing of personal data regarding the cookies within the Scope of the Law No. 6698 are as follows:

- Explicit consent, or

- As a result of the assessment made by the data controller regarding the data processing activity through cookies, other data processing conditions set forth in Articles 5 and 6 of the Law should also be taken into consideration.

Explicit consent needs to be obtained through an active affirmative action, by specifically and separately informing the data subject on processing of personal data. Non-specific statements or consents that are not based on an active action by a data subject cannot be considered as valid explicit consent. Accordingly, merely visiting a website cannot be considered as giving explicit consent for cookie practices. It is important that an explicit consent is specific, informed and freely given. In this regard, besides the elements of explicit consent set forth under the Law, explicit consent must be obtained as an applicable legal ground for processing, before implementation of cookies.

The Cookie Guidelines list each cookie type and assesses them based on the above criteria.

With respect to cookie walls and whether the data subject can be said to give explicit consent freely, it may be the case that a cookie wall prevents the data subject from making a genuine choice while giving their consent. In cases where consent for cookie practices is imposed on data subjects as a prerequisite for the services, by placing a cookie wall for access to the website, it may be possible that the cookie wall impairs the free will of the data subject, and in such case, the explicit consent obtained will not be a lawful or valid consent. However, provided that each event is evaluated individually, it may be possible to offer certain fair alternatives other than the cookie wall, so that the data subjects can receive the service.

In addition, in cases where third-party cookies are placed on the website, both the website owner and the third party are obliged to ensure that users are clearly informed about cookies and to obtain their consent accordingly. In cases where websites that carry out activities in Turkey use cookies through certain companies located abroad, and transfer data abroad through such cookies, such data transfer activity must be carried out in compliance with the conditions set forth under Article 9 of Law No. 6698. The Cookie Guidelines also provide information regarding the fulfilment of the notice requirement in line with the Law No. 6698.

c. *Relationship between the Electronic Communications Law No. 5809 and the Law No. 6698*

Although processing of personal data and duty for confidentiality is addressed under Article 51 of the Law No. 5809, its third paragraph indicates that only those companies that provide electronic communication services and/or provide electronic communication networks and operate the infrastructure thereof (operators and sub-operators) are included in this scope, whereas other data controllers (*e.g.*, those operating web pages including kvkk.gov.tr, the DPA's website) are not. In this respect, within the scope of the third paragraph of Article 51 of the Law No. 5809, it is assessed that data controllers who are deemed operators for the "provision of communication" can process data through cookies without explicit consent, as per "Criteria A". However, the purpose of storing or accessing information on the terminal devices of subscribers/users in Article 51 is not specific to the use of cookies.

d. *Illustrative Examples*

The Cookie Guidelines also provide illustrative examples of "good practices" and "bad practices" for data controllers to obtain explicit consent when processing personal data through the use of cookies.

The Cookie Guidelines prefer using an advisory language and illustrative examples, by carefully denoting after each example that the specific illustration is "prepared as an example and that it is recommended to consider the specific circumstances for each and every case." Certainly this does not mean that the DPA will not check whether its suggestions in the Guidelines were taken into consideration or not.

That being said, an exemplary cookie banner is displayed in Annex-2 of the Guidelines. In this illustration, the Cookie Banner visibly displays "Accept All", "Reject All", and "Preferences" buttons. Similarly, the exemplary practice in the "Privacy Preferences Tool" also displays the "Accept All", "Reject All", and "Preferences" buttons.

On the other hand, bad examples do not display "Accept All", "Reject All", and "Preferences" buttons in an equally visible manner, but only display "I accept", or "Accept All" buttons.

Although the rules and criteria the DPA included must be complied with, the data controllers do not have to identically replicate the methods suggested by the DPA.

Internet Law

Draft Bill Amending Certain Laws including the Press Law and Internet Law

On May 27, 2022, the proposed Draft Bill Amending the Press Law and Further Laws ("*Proposal*")[33] was published on the Grand National Assembly of Turkey's (TBMM) website, which comprises highly significant amendments on various laws including the Turkish Criminal Code and Internet Law. The Digital Media Commission and the Justice Commission provided their reports on the Proposal,[34] stating that the Justice Commission intended to make certain additions and amendments to the draft regarding terminology, phrases, legal language and technique, in order to prevent any confusion and to clarify the language of the Proposal.

Although the Proposal is included in the current agenda of the General Assembly of the TBMM, according to some news sources, discussions on the Proposal have been postponed to the new legislative period (*i.e.* October, 2022). Once the Proposal is discussed and accepted by the TBMM, it will be sent to the President for review. Unless the President objects to the publication of the law and returns it to the TBMM, the President will then publish the law in the Official Gazette within fifteen (15) days. The Proposal is anticipated to be published within the fourth quarter of 2022.

The Proposal includes significant amendments in terms of the (i) Press Law (*e.g.*, including online news websites within the scope of the Press Law along with the publication and dissemination of printed works), (ii) Turkish Criminal Code (by introducing a new offence entitled "Public Dissemination of Misleading Information"), (iii) Electronic Communications Law (by introducing the concept of Over the Top – OTT – services for the first time) and finally (iv) the Law No. 5651 (also known as the Internet Law), by introducing several significant obligations and liabilities on social network providers.

Below is an overview of the most crucial amendments that would have an impact on social network providers:

1. Representative: According to the Proposal, real person representatives of foreign social network providers ("*SNPs*") with more than 10 million daily accesses, must be Turkish citizens and residing in

[33] https://www2.tbmm.gov.tr/d27/2/2-4471.pdf (Last accessed on July 7, 2022).
[34] https://www5.tbmm.gov.tr/sirasayi/donem27/yil01/ss340.pdf (Last accessed on July 7, 2022).

Turkey. Therefore, in terms of real person representatives, the obligation to reside in Turkey has been introduced.

In terms of legal entity representatives, the Proposal requires the legal entity representatives in Turkey to be established by the relevant SNP as a branch office, incorporated in form of a stock corporation.

These representatives of the SNPs should have full technical, administrative, legal and financial authority and responsibility.

Proposal states that SNPs which have already appointed a representative should comply with the new requirements within six (6) months following the publication of the law. Otherwise the authority will directly implement the advertisement ban and bandwidth throttling, without the interim steps of giving notice or imposing an administrative fine for non-compliance.

2. Reporting Obligations: Proposal states that SNPs should include information on title tags, algorithms regarding the contents that are promoted or whose access is reduced , advertisement and transparency policies in their reports. SNPs should also include within the report the measures they have taken to ensure equality and impartiality among the users, to enable users to update their preferences regarding the contents suggested to them and the measures put in place to allow for limiting data privacy options. SNPs should provide any further information that may be requested by the Information Technologies and Communication Authority ("ICTA"). SNPs are required to implement the necessary measures in their own systems, and put in place mechanisms and practices in cooperation with ICTA in order to prevent contents and title tags pertaining to offences under the Law No. 5651.

Additionally, SNPs should establish and publish an advertisement records archive, which contains information on advertisement content, advertisers, advertisement period, number of targeted persons or groups, etc. on its website, and include such information in the reports.

3. Information Requests and Audit: The Proposal requires the representative of the SNPs to provide the information which may be requested by the public prosecutor and courts for the identification of the potential perpetrators of the following offences under the Turkish Criminal Code: sexual harassment of children, public dissemination of misleading information, harming the unity and integrity of the state, offences against the Constitution, offences relating to state secrets and spying. If such obligation is not fulfilled, the relevant public prosecutor might apply to the Ankara Criminal Judgeships of Peace to request reducing the internet bandwidth of the relevant SNP at the rate of 90%.

Additionally, the Proposal also authorizes ICTA to request any information including but not limited to information systems, corporate structure, algorithms, data processing mechanisms and commercial approach for compliance with the Law No. 5651, which the SNPs would be required to provide latest within three (3) months of request. The Proposal also entitles ICTA to conduct on-site examinations regarding the SNPs' compliance with Law No. 5651.

4. Increased Sanctions: Proposal authorizes the President of ICTA ("*President*") to ban advertisements for up to six (6) months from advertisers who are Turkish taxpayers, if the content removal/access ban decisions handed down by the President are not enforced by the SNPs, in addition to the administrative sanctions regulated under Articles 8 and

8/A of the Law No. 5651. The President might also apply to the criminal judgeships of peace to request bandwidth throttling at the rate of 50%, or in case the throttling decision is not enforced within thirty (30) days following the notification, to request bandwidth throttling at the rate of 90%.

The Proposal also brings sanctions (*i.e.*, administrative fines ranging from ten thousand Turkish Liras up to one hundred thousand Turkish Liras) for the Turkish taxpayers who do not comply with the advertisement ban decisions.

In addition to the sanctions which are already in force, the Proposal brings yet another administrative fine, which will be calculated at 3% of the entity's global income in the previous year, in case the SNP fails to comply with obligations regarding data localization, providing distinctly separate services for children, user rights, notification of identity for contents that pose a danger to life and property, failure to share information requested by ICTA regarding compliance with the Law No. 5651 and crisis plan.

5. Liability and Notification: Proposal holds the SNPs liable for third party contents which constitute criminal offences, if it is evident that the SNP aims users' access to the relevant contents through title tags or distinguishing (*e.g.*, promoting) methods. Besides, the Proposal requires the SNPs to report the content provider to legal enforcement authorities where the contents may endanger the safety of life and property, and in cases where time is of the essence.

According to the Proposal, some of the provisions related to news websites will enter into force on January 1, 2023 and the other provisions will be effective immediately as of the publication date.

Telecommunications Law

Over The Top (OTT) Service Regulations are on the Way

Draft Bill Amending the Press Law and Further Laws ("the Draft") published on the Grand National Assembly of Turkey's ("Assembly") website on May 27, 2022 plans to bring significant amendments to Press Law No. 5187, the Turkish Criminal Code No. 5237 and Law No. 5271 on Criminal Procedures, and Law No. 5651 on the Regulation of Broadcasts via the Internet and the Prevention of Crimes Committed through Such Broadcast ("The Law No. 5651"). Among the amendments, the definition, rules and procedures for over-the-top ("OTT") service is introduced for the first time.

The Draft outlines OTT service as an (i) electronic communication service, (ii) in audio, written, and visual communication form, and (iii) between persons and provided through publicly available software to members and users who have internet access, (iv) independent from the operators or internet service provided. Turkish legislator has chosen to set out its own definition here, which is quite different from the *"interpersonal communications service"* definition of Directive (EU) 2018/1972 (the European Electronic Communications Code) encompassing OTT services.

The Draft designates the Information Technologies and Communications Authority (ICTA) as the regulatory authority to draft the necessary regulations and take all relevant measures regarding OTT services. The reasoning for this is indicated in the Draft is due to the activities of those OTT services providing auditory, written and visual communication services from abroad, without being subject to any legislation in Turkey and this creating an unfair competition for the operators authorized by ICTA. As a result, the Draft requires OTT service providers to provide their services through a fully authorized representative they establish as a joint-stock or a limited liability company in Turkey, within the scope of the authorization granted by ICTA and to comply with the regulations set by ICTA related to such services. However, the Draft requires ICTA to consider certain criteria while making these regulations, such as whether the services enable its users to communicate through the numbers included in the National Numbering Plan, the number of users in Turkey, or the number of daily access. Similar to social network provider requirements under Law No. 5651, it will be no surprise if a strict set of requirements are imposed on large foreign OTT services.

The Draft requires OTT service providers to provide information to ICTA at certain (yet unspecified) periods on the (i) number of active individual and business users in Turkey (ii) number and duration of voice calls, (iii) number of instant messages and (iv) other information ICTA may determine.

If OTT service providers fail to comply with the foregoing requirements, they may be sanctioned with an administrative monetary fine ranging from one million Turkish Liras up to thirty million Turkish Liras. If the OTT service providers do not pay the administrative monetary fines when due, or if they provide an OTT service without authorization, ICTA may decide to throttle the internet traffic bandwidth up to ninety-five percent or impose an access ban to the relevant application or website.

The Draft is setting the foundation but does not provide other practical details *e.g.*, any exemptions, limits or procedures. ICTA is given authority to address these issues, which could lead to a secondary legislation. Although the Draft at this stage does not seem so parallel with Directive (EU) 2018/1972, the secondary legislation might be. The reference to the National Numbering Plan might be a reference for such intention as the Directive (EU) 2018/1972 distinguishes between interpersonal communication services to "number-based" and "number-independent", based on their connection capabilities with publicly assigned numbering resources *i.e.*, the numbering plans.

The government in Turkey has indicated its intention to regulate OTTs at least since 2017.[35] The first significant step in doing so was finally taken in this Draft, which, at first sight, apparently aims to achieve compliance and accountability by mandating a quasi-presence in Turkey, similar to the approach for the social network providers under the Law No. 5651. It is still early to tell, though, how these regulatory steps will shape the OTT and electronic communications markets in Turkey.

[35] Turkey National Broadband Strategy and Action Plan 2017-2020, the Ministry of Transportation, Maritime and Communication, accessible at https://hgm.uab.gov.tr/uploads/pages/ulusal-genisbant-stratejisi/ulusal-genis-bant-stratejisi-ve-eylem-plani-2017-2020-b9d0c25d-328c-4eda-a2aa-d374ffacd91a.pdf, last accessed on July 25, 2022

White Collar Irregularities

Global State of Cryptocurrency Regulations against Anti-Bribery and Anti-Corruption Efforts

Towards the end of June 2022, the European Union ("*EU*") made significant forays into establishing anti-corruption standards within the digital currency sector. On June 29, 2022, the European Council and the European Parliament reached a provisional agreement on the Transfer of Funds Regulation (ToFR)[36] although the agreement needs to be confirmed before it can be formally adopted, as per the legislative procedure followed by the EU. The agreement will require crypto-asset service providers ("*CASPs*"), who are defined as persons whose occupation or business is the provision of one or more crypto-asset services to third parties on a professional basis, to collect and store information about the issuer and the beneficiary of a crypto-asset transfer, and to report transfers between exchanges and "unhosted wallets" if the amount of such transfer exceeds EUR 1,000 (*i.e.,* the "travel rule").[37] An unhosted wallet is a self-custody wallet whereby the users keep their crypto-assets outside of any exchange or third-party control (which can be likened to keeping money in a locked safe rather than depositing it in a bank).

Subsequently on June 30, 2022, the same legislative body of the EU reached another provisional agreement on the Markets in Crypto-Assets ("*MiCA*") Regulation,[38] which is a regulation proposal that requires, among other things, CASPs to adhere by anti-money laundering standards in providing user information to authorities in order to obtain authorization to operate within the EU. In line with these developments, the Financial Action Task Force issued updated Standards on Virtual Assets and CASPs, by placing a specific focus on transparency requirements envisaged in the EU's ToFR and MiCA agreements.[39]

Against the backdrop of the EU's updated standards, the United States Department of Justice ("*DOJ*") announced four cryptocurrency related fraud prosecutions on June 30, 2022, further bringing into attention that prosecutor bodies in the United States are well aware of the regulatory gaps in the digital assets space.

In Turkey, on April 16, 2021, the Central Bank of the Republic of Turkey proscribed the use of cryptocurrencies for exchange of goods and services by enacting the Regulation Prohibiting the Use of Crypto Assets for Payments. Later on May 1, 2021, in line with the then published FATF Standards, the Amendment Regulation on the Prevention of Laundering of Proceeds of Crime and the Financing of Terrorism added "CASPS" within the scope of "mandated parties" that are under the obligation to report to the Turkish Financial Crimes Investigation Board ("*MASAK*"). Within this context, on May

[36] *See: full text of TOFR here* https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52021PC0422&from=EN (Last accessed on July 24, 2022)

[37] *See:* https://www.consilium.europa.eu/en/press/press-releases/2022/06/29/anti-money-laundering-provisional-agreement-reached-on-transparency-of-crypto-asset-transfers/ (Last accessed on July 24, 2022)

[38] *See: full text of MiCA here* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0593 (Last accessed on July 24, 2022)

[39] *See:* full text of FATF's updated Standards on CASPs here https://www.fatf-gafi.org/publications/fatfrecommendations/documents/targeted-update-virtual-assets-vasps.html (Last accessed on July 24, 2022)

4, 2021, MASAK published the Guidelines for CASPs.[40]

With such framework in place, enforcement actions and fraud scandals (*e.g.*, Thodex) have followed the regulatory attempts in Turkey. The first administrative monetary fine imposed by MASAK against a CASP for failing to comply with reporting obligations was reported by the press on December 25, 2021. Later in February, 2022, MASAK followed a similar course of action with four other CASPs.[41]

As measures come into place to regulate the digital assets, knowledge and awareness of cryptocurrency regulations, blockchain and its applications are also likely to become vital for anti-bribery and anti-corruption professionals in the coming years. Indeed, Kroll, an American risk consulting firm, highlights in its 2022 Anti-Bribery and Corruption Benchmarking Report ("*Kroll Report*") that "an understanding of the blockchain technology and cryptocurrency might be key to companies' preparedness to respond to challenges posed by new worldwide bribery and corruption risks deriving from crypto activities."[42]

For instance, Kroll Report emphasizes that the traceability features of private and secured blockchain platforms may be leveraged for accounting and auditing purposes, and that knowledge of blockchain principles could yield to traceability of wrongdoing, In this context, Kroll has surveyed 700 anti-bribery and anti-corruption professionals across fourteen countries (Australia, Hong Kong SAR, Greater China, Singapore, France, Germany, Italy, the United Kingdom, Brazil, Mexico, Saudi Arabia, the United Arab Emirates, Canada and the United States). As part of the survey, Kroll aimed to gauge whether anti-bribery and anti-corruption professionals were aware that blockchain could be used as part of their compliance programs and whether they were using blockchain. The Kroll Report found that 52% of compliance professionals surveyed used blockchain as part of their anti-bribery and anti-corruption programs. Out of the 48% who were not using blockchain, 31% were not planning to use it at any time, %7 were unsure about using it, and 10% did not know that it could be used as part of their organizations' anti-bribery and anti-corruption program. Kroll Report also brought to attention that out of all the regions surveyed, survey participants, United Arab Emirates and Kingdom of Saudi Arabia were most engaged with blockchain in their anti-bribery and anti-corruption programs.

All in all, a highly-dynamic legislative and enforcement scene against the crypto-asset sector can be anticipated in contrast with a culture which adopts the perspective of "using knowledge crypto-currency as a *kryptonite* against corrupt acts", as indicated in the Kroll Report. It is likely that the recently agreed upon MiCA and ToFR, as well as the updated FATF standards, will also necessitate updated domestic laws in order to level the playing field and to have control over positive as well as negative developments in the digital assets environment.

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40 *See:* https://ms.hmb.gov.tr/uploads/sites/12/2021/05/Kripto-Varlik-Hizmet-Saglayicilar-Rehberi.pdf (Last accessed on July 24, 2022)
41 *See:* https://www.diken.com.tr/masaktan-yerli-kripto-para-borsalarina-19-milyon-lira-ceza/ (Last accessed on July 24, 2022)
42 *See:* https://www.kroll.com/-/media/kroll-images/pdfs/2022-anti-bribery-and-corruption-report.pdf for full report (Last accessed on July 24, 2022)

Intellectual Property Law

New Developments Introduced by the Regulation on Collective Management Organizations

I. Introduction

The Regulation on Collective Management Organizations ("**Regulation**") has entered into force through its publication in the Official Gazette dated April 7, 2022 numbered 31802. In addition, through the Presidential Decree numbered 5403 also published on the same date, the "*By-Law on Collective Management Organizations and Federations of Authors of Intellectual and Artistic Works and Related Right Holders" ("**By-Law**")* and "*Type Status of Collective Management Organizations of Authors of Intellectual and Artistic Works and Related Right Holders*" were abolished.

The objectives of the Regulation are (i) to comply with technological developments and reduce paper waste with a more environment-friendly approach, and (ii) to render collective management organizations more transparent and effective. The origins for the Regulation can be attributed to the EU Directive 2014/26/EU on "*Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internal Market*." Also, the Regulation aims to accord with the Copyright Law numbered 5846 ("**Copyright Law**") as well as other legislation and national developments that concern the functioning of collective management organizations.

II. Developments

The new system offered by the Regulation for the collective management organizations introduces certain structural and fundamental developments. These developments can be summarized as below:

i. More than one collective management organization can be established by authors, related right holders and book publishers in order to protect their common interests, to manage and pursue the rights they are granted under the Copyright Law, collect compensation and royalties and distribute them to the right-holders. *(§ 4 of the Regulation)*

ii. The collective management organizations shall have the following authority and duties: (a) conducting its activities in an honest, transparent, collective, and auditable way, (b) equitable management of rights, (c) collection and distribution of the revenues accrued through the rights managed by the collective management organization by fair, transparent and regulated means, (d) developing a database for the rights that it manages, (e) developing a joint-database with other collective management organizations operating in the same field, (f) announcing the fee tariffs with respect to the rights it manages on the ninth month of every year, (g) pursuing any legal action necessary in order to protect the rights, and (h) complying with personal data protection regulations. *(§ 9 of the Regulation)*

iii. Legal persons may also become members of such collective management organizations, provided that they are established per Turkish laws. *(§ 10 of the Regulation))* *iv.* Different types of memberships may be created based on membership term and royalty distribution. However, different membership types should be run fairly and proportionately. It is also regulated that no discrimination can be made based on different membership types, with respect to royalty distribution, social activities, or other similar cases. *(§ 11 of the Regulation)*

v. Termination of membership in various cases such as (a) no longer being eligible for membership, or (b) the authorization certificate becoming void. (*§ 13 of the Regulation*)

vi. The collective management organizations are exclusively authorized to pursue the rights of their members arising from the Copyright Law and those granted under the authorization certificate issued by their members. *(§ 16 of the Regulation)*

vii. A minimum of two collective management organizations can establish a federation, however there cannot be more than one federation. Federations can be established in the (a) science and literature sector, (b) music sector, (c) cinema sector, (d) owners of science and literature works, (e) owners of music works, (f) owners of artworks, (g) owners of cinema works, (h) performers, (i) phonogram producers, (j) radios and televisions, (k) film producers, (l) book producers. *(§ 60 of the Regulation)*

viii. The periods provided for the collective management organizations regarding membership accepting, application evaluation and selecting the president and vice president are increased.

ix. The collective management organizations established before the entry into force of the Regulation shall comply with and bring their by-laws and policies in line with the Regulation by way of a general assembly to be held latest by January 1, 2023. (*Provisional Clause 1 of the Regulation)*

III. Conclusion

The Regulation sets forth the requirements on important topics for collective management organizations such as incorporation, membership, termination of membership, periods for regarding membership accepting, application evaluation and selecting the president and vice president, duties and the scope of authorization, etc. The Regulation also poses great importance on compliance to the EU legislation regarding copyright law, and the recent technological sphere made available for a greener and practical implementation, and pursuit of rights arising from copyright law.

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