ISSN 2147 – 558X

ELİG
GÜRKAYNAK
Attorneys at Law

LEGAL INSIGHTS QUARTERLY

December 2022 – February 2023

© 2022 ELIG Gürkaynak Attorneys-at-Law. All rights reserved.

LEGAL INSIGHTS QUARTERLY

December 2022 – February 2023

This collection of essays, provided by ELIG Gürkaynak Attorneys-at-Law, is intended only for informational purposes. It should not be construed as legal advice. We would be pleased to provide additional information or advice if desired.

Aralık/December, Istanbul

Yayın Türü / Type of Publication
Yerel Süreli / Local Periodical

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

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

ISSN 2147 – 558X

Preface to the December 2022 Issue

The December 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 characteristics of the share certificates issued by joint-stock companies are discussed under the Corporate Law section. Moving on, acquisition and transfer of shares subject to permission of the banking regulation and supervision agency in Turkey are discussed under the Banking and Finance Law section. Subsequently, the Draft Communiqué on the Principles Regarding Companies Whose Shares Will Be Traded in the Venture Capital Market, which establishes rules and guidelines for how non-public companies may issue shares for trading on the venture capital market without making them available to the public, is analysed under the Capital Markets Law section.

The Competition Law section of this issue features six articles, analysing recent developments of the field. The section initially delves deep into the hindrance of the on-site inspection through the Sahibinden stay of execution decision, evaluating the recent dynamics on-site inspections. Moving on, the section focuses on Turkish Competition Board's overlap analysis alongside a reverse triangular merger evaluation through two recent merger and acquisition decisions. The section further discusses numerous vertical restraints and resale price maintenance concerns in light of the Board's recent Digiturk and Vestel decisions, where the prominence of territorial restrictions and online sales were evaluated respectively. Lastly, the section highlights the increasing amount of settlement decisions and applications by taking Arnica and Hayırlı El Kozmetik cases under the spotlight.

Subsequently, Data Protection Law section discusses the recent Regulation on Collection, Storage and Sharing of Insurance Data regulating the principles and procedures related to, *inter alia*, collection and storage of insurance data. Moreover, Telecommunications Law section analyses the recent amendments to the Turkish Criminal Code, the Press Law, the Law on the Regulation of Broadcasts via the Internet and the Prevention of Crimes Committed through Such Broadcast, and the Electronic Communications Law focusing on the definition of, alongside rules and procedures introduced for over-the-top services.

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

December 2022

Corporate Law

Share Certificates Issued by Joint-stock Companies

I. Introduction

In terms of Turkish corporate law perspective, share certificates issued by joint-stock companies are legal instruments evidencing ownership of the shares. The Turkish Commercial Code numbered 6102 ("***TCC***") includes several provisions as to types, issuance procedure and mandatory content of share certificates. In this article, we will focus on fundamental features of share certificates.

II. Types of Share Certificates

To begin with, according to Article 484 of the TCC, there are mainly two types of share certificates, which are as follows: (a) registered share certificates and (b) bearer share certificates.

In joint-stock companies, preferred type of share certificates must be stated by founders in articles of association during the incorporation process per Article 339 of the TCC. However, shareholders may change the type of share certificates by taking a general assembly decision to amend articles of association at a general assembly meeting held post incorporation. This resolution must be registered with the trade registry.

III. Issuance Process of Share Certificates

The competent organ to issue registered and bearer share certificates in joint-stock companies is "board of directors". Board of directors must handle this process in compliance with relevant provisions of the TCC and the articles of association of the joint-stock company.

Pursuant to Article 484 of the TCC, bearer share certificates cannot be issued unless nominal value of the shares is fully paid by the shareholders to the company. This is a pre-condition for validity of bearer share certificates. However, the TCC allows issuance of temporary share certificates during this period. In such a case, temporary share certificates become subject to the provisions of registered share certificates.

Pursuant to Article 486/2 of the TCC, upon payment of nominal value of the shares by the shareholders, board of directors of a joint-stock company must have issued bearer share certificates within 3 (three) months. Accordingly, the board of directors must adopt a decision first and subsequently register it with the trade registry and announce it on the Turkish Trade Registry Gazette. If the company is subject to the requirement concerning opening a website provided that it exceeds the criteria and thresholds of an independent audit, this resolution must be also announced on its website. If there are temporary share certificates, these must be cancelled simultaneously with issuance of the bearer share certificates.

Owners of the bearer share certificates as well as their shareholding ratio and details in the company are notified to the Central Registry Agency of Turkey before delivery of the share certificates to the shareholders.

Unlike the procedure required for bearer share certificates, registered share certificates may be freely issued and distributed to the shareholders before payment of nominal value of the shares entirely. Although there is not a certain time period requirement in terms of issuance of registered share certificates, in the event of request of minority shareholders, the board of directors shall

process this request, issue the registered share certificates, and distribute them to all shareholders as a necessity of equal approach principle.

IV. Mandatory Content of Share Certificates

According to Article 487 of the TCC, regardless of its type, each share certificate shall include the following information: (i) title of the company, (ii) share capital amount of the company, (iii) date of incorporation of the company, (iv) the amount of share capital on the date of incorporation, (v) issuance number of the share certificate, (vi) registration date of the relevant corporate event which forms the basis for issuance of the share certificate (*e.g.* registration date of company incorporation or share capital increase), (vii) type of the share certificate, (viii) nominal value of the share certificate and (ix) number of the shares represented by the share certificate. Per Article 487/2 of the TCC, the registered share certificates shall also include (i) name and surname/full title of the relevant shareholder, (ii) address/headquarters of the shareholder and (iii) paid portion of nominal value of the shares. Registered share certificates are also recorded in the share ledger of the company.

In order to prevent forgery on share certificates, relevant security measures must be taken by the board of directors considering their legal instrument characteristics.

The TCC also states that share certificates shall be signed by at least two of the authorized signatories of the company. However, it is widely accepted in doctrine and practice that the share certificate may be signed by this signatory and bear one signature considering that allowed joint-stock companies are allowed to have one authorized signatory

V. Worn Share Certificates

Pursuant to Article 488 of the TCC, in case a share certificate or temporary share certificate is worn out or discomposed in a manner where it is not available for circulation, or the content or differential features and qualities of it cannot be understood in a way that leaves no doubt, the holder of the certificate has a right to request for a new share certificate or for a new temporary share certificate from the company by bearing all costs thereof.

Banking and Finance Law

Acquisition and Transfer of Shares Subject to Permission of the Banking Regulation and Supervision Agency in Turkey

The Banking Regulation and Supervision Agency ("***BRSA***") is the competent authority for monitoring establishment process and day-to-day activities of banks in Turkey. The Banking Law numbered 5411 ("***Banking Law***") sets forth certain circumstances related to acquisitions and transfers of shares in banks which are subject to the BRSA's permission. In this article, we will briefly examine these circumstances.

In accordance with provisions of the Turkish Commercial Code, unless special laws provide otherwise the general rule allows shares of joint-stock companies to be acquired or transferred without being subject to any restriction and/or permission. However, in some cases and especially in regulated sectors, a permission from certain public institutions may be required for acquisitions and

transfers of shares. Banking is one of the regulated sectors under Turkish law practice.

Accordingly, in terms of the banking law perspective, the acquisitions and transfers that require permission of the BRSA are as follows:

- According to Article 18/1 of the Banking Law, any acquisition, which results in (i) any person to become direct or indirect shareholder of a bank with the shareholding ratio of at least 10% or (ii) any existing shareholder of a bank directly or indirectly reaches or falls below 10%, 20%, 33%, 50% of the share capital, requires permission of the BRSA. In accordance with Article 11/A of the Regulation on Transactions Subject to Permission and Indirect Shareholding of Banks ("***Regulation***"), if shares of the bank are publicly traded, this provision still applies.

- As per Article 18/6 of the Banking Law and Article 11/7 of the Regulation, any direct or indirect change with the ratio of 10%, 20%, 33% or 50% in shareholding structures of the legal entities, that own 10% or more of the share capital of a bank, shall be subject to permission of the BRSA.

- Per Article 11A/4 of the Regulation, if shares of such a legal entity are publicly traded, the shares of the legal entity will be acquired through stock exchange and parent entity of the legal entity will change as a result of this acquisition, this transaction shall be also subject to permission of the BRSA.

- The permission might be given on the condition that the person who acquires the shares bears the qualifications required for the founders of the bank.

- In accordance with Article 18/2 of the Banking Law as well as Articles 11/3 and 11A/2 of the Regulation, transfer of privileged shares granting the right of nomination of a member to the board of directors or audit committee, issuance and removal of privileged shares, establishment of usufruct right regardless of the shareholding ratio shall be subject to the permission of the BRSA.

Even if shares of a bank are acquired from the execution office in line with the provisions of the Execution and Bankruptcy Law numbered 2004, it should be still checked and analyzed whether the transaction shall require the permission of the BRSA in accordance with Article 18 of the Banking Law and other related provisions of the Regulation.

Pursuant to Article 18/4 of the Banking Law, transactions resulting in decrease of number of shareholders in a bank under 5 (five) and acquisitions and transfers of shares falling under the foregoing thresholds but realized without permission of the BRSA, shall not be recorded in the share ledger. Furthermore, any records made in the share ledger in breach of this requirement shall be null and void.

In the event that any acquisition and transfer is realized without obtaining permission of the BRSA, the shareholding rights arising from the shares in question, except for the dividend right, shall be undertaken and disposed by the Savings Deposit Insurance Fund. Accordingly, the

board of directors shall take necessary and sufficient precautions to detect whether attendants of the general assembly meetings have obtained necessary permission from the BRSA. Otherwise, implementation of administrative fines against those who dispose the shareholding rights as if they have obtained permission of the BRSA, cancellation of the general assembly resolution and liability of the board of directors may come into question.

Since the main purpose of the banking legislation is to ensure trust and stability in financial markets, the founders and shareholders of banks are expected and required to bear certain qualifications. Therefore, the legislator has stipulated a supervision mechanism by authorizing the BRSA.

It is also important to note that the Regulation elaborates on specific acquisition and transfer circumstances that require permission of the BRSA, which go beyond Article 18 of the Banking Law. The Regulation also clearly gives wide coverage to application procedure and supportive corporate documentation thereof. Therefore, provisions of the Banking Law and the Regulation should always be taken into consideration and evaluated together.

Capital Markets Law

New Draft Communiqué from the Capital Markets Board Regarding Venture Capital Market

I. Introduction

On September 20, 2022, the Capital Markets Board of Turkey ("***the Board***") has announced the Draft Communiqué on the Principles Regarding Companies Whose Shares Will Be Traded in the Venture Capital Market ("***Draft Communiqué***") for preliminary review and comments of the public.

The Draft Communiqué regulates procedures and principles in relation to issuance of shares by non-public companies for the purpose of trading in venture capital market without offering to public Under the Draft Communiqué, the companies whose shares become traded in the venture capital market are considered public companies and are subject to the capital market legislation.

In the Draft Communiqué, the general principles are set under a two-pillar structure consisting of the preparatory procedures for the entry into the market and fundamental restrictions applicable post listing in the Venture Capital Market ("***VCM***"), which is yet to be established under Borsa İstanbul A.Ş.

II. General Principles and Provisions

1. Preparatory Procedures and Application

It is stipulated that the companies can only be listed in the VCM after obtaining a Board-approved offering circular, the format and content of which is to be determined by the Board.

Accordingly, following preliminary procedures are stipulated, prior to applying for the Board's approval on the offering circular:

- The board of directors of the company should resolve on draft preparatory amendments to the articles of association in order to comply with the Board regulations as well as the general principles and aims of the capital markets

legislation, and submit the resolution for the Board's approval, along with the other supportive corporate documents and information listed in the Draft Communiqué.

- The proposed amendments of the board of directors should be approved at the first general assembly meeting to be held within 6 (six) months following the approval of the Board.

- The general assembly should also resolve on the capital increase and the restriction or prohibition on the purchase of new shares. Provided that the company is adopted the registered capital system, capital increase and the restrictions/prohibitions can be resolved by the board of directors as long as the proper authorization is granted under the articles of association.

Upon the completion of the foregoing procedures, the company should apply for the Board's approval of its offering circular along with other supportive documents.

The Draft Communiqué also stipulates certain thresholds as to the total assets, net sales revenues, and registered share capital of the companies whose shares will be listed under the VCM. Accordingly, the company's financial tables belonging to the previous financial year and that have been prepared in line with the Board's regulations and approved through an independent special audit should reflect such thresholds.

The principles governing financial tables which are required to be included within the offering circular are also stipulated in detail in accordance with the sale term of the shares which will be determined based on the offering date of the shares.

As it is stipulated under multiple provisions of the Draft Communiqué, it is crucial to note that shares of the companies listed under the VCM are prohibited from external sales and accordingly, solely the shares issued via capital increase are allowed to be traded in the VCM.

It is also significant to note that, companies whose offering circulars are not approved by the Board or companies who fail to apply to the Board within the term specified under the Draft Communiqué are deemed outside the scope of the Capital Markets Law forthwith. Accordingly, shares of such companies are deemed to be unlisted from the VCM.

2. Principles Governing the Term Succeeding Sale of the Company's Shares

Restrictions and liabilities stipulated for the companies during the post-listing term are as follows:

- The shares of companies issued in line with the Draft Communiqué cannot be sold by public listing within two years following their initial listing.

- The companies must apply for the Board's approval of the offering circular prepared for the public offering of the shares via capital increase, in order for the shares to be traded under other markets of the stock exchange for up to five years.

- The company shares which were not traded under the VCM previously, cannot be deemed publicly-traded within two years following their

initial offering under different stock markets.

III. Public Disclosure and Announcement Requirement

The companies whose shares will be traded under the VCM are required to publish the general information of the company by completing the form issued by the Public Disclosure Platform ("***PDP***") and update the information within five days following any changes at the latest.

Additionally, a public announcement requirement is set forth for cases where (i) a real or legal persons' or their affiliates' shares directly reach or fall below 5%, 25% or 50% of shares representing the share capital or voting rights of the listed company or (ii) the management control of the listed company is directly or indirectly transferred through an agreement or by any other means.

The public disclosure and announcement requirement on the listed companies also include the following content:

- General Assembly resolutions regarding profit distribution,
- Agenda and minutes of General Assembly meetings and the reasoning behind the failure to convene in such a case,
- Resolutions of the authorized body regarding capital increase, decrease, merger, demerger or change of legal form, and realization of the foregoing,
- Change of the company's actual scope of activity, termination or cease of activities or manufacturing partially or entirely, and other occurrences that may result in similar circumstances,
- Termination lawsuit filed against the company, the occurrence of a cause for termination stipulated under the articles of association, or resolution of the general assembly regarding termination of the company, any kind of execution procedure initiated against the company for the amounts exceeding 10% or more of the fixed assets under the latest financial tables of the company, bankruptcy lawsuit filed against the company or the occurrence of any other causes of termination of the company,
- Asset transfer or acquisition exceeding 10% of the total assets stipulated under the latest financial tables of the company.

As per the reference made under the related provisions of the Draft Communiqué, the format and procedural aspects of the announcements will be subject to the relevant articles under Section Five titled "Form, Content and Characteristics of the Announcements" of the Communiqué on Special Circumstances dated January 23, 2014 and numbered 29975 to the extent applicable.

IV. Other Restrictions and Exemptions

The Draft Communiqué also stipulates that the listed companies under the VCM will be deemed outside the scope of application of the Capital Markets Law upon their (i) acquisition or (ii) devolvement by means of merger or (iii) demerger without any additional transaction. Shares of the acquiring company cannot be traded under the VCM within the first two years following the registration of the merger. In parallel to the foregoing, company shares are prohibited from being traded under the

VCM within the first two years following partial demerger by means of joint model.

The companies subject to the Draft Communiqué are exempt from the scope of application of the Communiqué on Corporate Governance dated June 22, 2013 and numbered 28871.

Competition / Antitrust Law

Contemporary Dynamics of Dawn Raiding Powers of the Turkish Competition Authority: Current Status of a Debate on Concealment of Evidence[1]

I. Introduction

This case summary includes an analysis of the Ankara 2nd Administrative Court's ("***the Court of First Instance***") Sahibinden stay of execution ("***SoE***") decision (E. 2022/254, 15.04.2022) in which the Court of First Instance stays of execution of the Board's decision concerning imposition of an administrative monetary fine on Sahibinden for hindering and complicating the on-site inspection as per Article 16 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***"), based on the grounds that the deleted WhatsApp messages did not contain business related issues and were still accessible from the other employees' WhatsApp group (21-27/354-174, 27.05.2021).

II. The Board's Assessment on the WhatsApp deletion during on-site inspection

The Turkish Competition Authority ("***TCA***") raided Sahibiden's premises on April 9, 2021 within the scope of an ongoing investigation initiated by the Board to determine whether no-poaching/non-solicitation gentlemen's agreement exists in labor markets and Sahibinden was one of parties to the relevant investigation.

The case handlers found out that some of the employees deleted certain WhatsApp correspondences after the commencement of the on-site inspection. In order to understand whether the relevant deletion process was carried out during the on-site inspection, the TCA's Information Technologies Department's opinion was requested. The relevant department checked the log records and confirmed that the relevant items were deleted post beginning of the on-site inspection. Accordingly, the Board imposed a fixed administrative monetary fine of 0.5% of Sahibinden's annual gross revenue for hindering and complicating the on-site inspection as per Article 16(d) of the Law No. 4054.

The Board recently adopted a similar approach in its other decisions concerning hindering and complicating the on-site inspection. There are many recent examples where the Board imposed an administrative fine of 0.5% of annual gross revenue of the relevant undertakings due to the deletion of correspondences despite information of the employees in relation to the fact that deletion of information during an on-site inspection constitutes hindering or complicating the on-site inspection and leads to the imposition of an administrative fine (*Eti Gıda*, 29.04.2021, 21-24/278-123; *Pasifik Tüketim*, 29.04.2021, 21-24/279-124; *Medicana*, 17.6.2021, 21-31/400-202; *Procter and Gamble*, 8.7.2021, 21-34/452-227; *İstanbul Gübre*, 12.08.2021, 21-

[1] This article first appeared on Mondaq (https://www.mondaq.com/turkey/antitrust-eu-competition-/1243048/contemporary-dynamics-of-dawn-raiding-powers-of-the-turkish-competition-authority-current-status-of-a-debate-on-concealment-of-evidence)

38/544-265). In a recent decision, on March 3, 2022, the Board imposed an administrative monetary fine on Kınık Maden Suları A.Ş. due to the deletion of e-mail and WhatsApp correspondences after the employees were informed that they should not do so during the on-site inspection (03.03.2022, 22-11/161-65). In this decision, the Board concluded that recovering deleted data does not change the conclusion that deletion process during the on-site inspection constitutes hindering or complicating the on-site inspection. The Board confirmed this approach in its another recent decision (*D-Market*, 22-03/35-16, 13.01.2022) by stating that the ability of the case handlers to access the deleted data from different devices does not change the fact that the deletion during the on-site inspection causes hindering or complicating the on-site inspection.

III. Sahibinden SoE decision on the deletion process

Sahibinden requested stay of execution and annulment of the Board's fining decision. The Court of First Instance concluded that (i) Sahibinden internally conveyed an e-mail message to its employees on the date of the on-site inspection at 11:36 to inform that the employees should not delete e-mail messages and mobile conversations, and should provide all documents that the TCA requested during the on-site inspection, (ii) the case handlers can access the deleted conversations from the other employees' mobile devices, (iii) the deleted messages belonged to the employee's personal mobile devices and (iv) the deleted messages did not include business related matters.

Based on these findings, the Court of First Instance decided that the relevant act does not lead to an administrative monetary fine and the Board's fining decision is unlawful. The Court of First Instance also held that it is clear that if the administrative act subject to the case is applied, Sahibinden will be affected in a way that is difficult or impossible to repair. Consequently, the Court of First Instance decided to stay of execution of the Board's fining decision on April 15, 2022.

Subsequently, the TCA objected the Sahibinden SoE decision before the Regional Administrative Court and Ankara Regional Administrative Court 8th Administrative Chamber rejected the TCA's objection against the Sahibinden SoE decision on May 18, 2022. This decision is final and cannot be appealed against. Therefore, the execution of the Sahibinden SoE decision will be stayed.

IV. Conclusion

As seen from the precedents on concealment of evidence during on-site inspections, the Board adopts an aggressive approach and opts to rule that deletion of any kind of correspondences during the dawn raid constitutes hindering or complicating the on-site inspection and leads to the imposition of a fixed fine pursuant to Article 16(d) of the Law No. 4054 without considering specifics of the case (i.e. whether the deleted data concerns private content). However, in the Sahibinden SoE decision, Ankara 2nd Administrative Court did not approve the Board's strict approach and took into account the content of the deleted data and the fact that the deleted data could be accessed from other devices to conclude that the relevant act of deletion should not constitute an infringement. This shows that the Board and the administrative courts do not adopt the same approach when analyzing concealment of evidence during on-site inspections. Moreover, it seems that the evaluation of the administrative

court on the matter is not as strict as the Board's approach in terms of imposing fixed administrative monetary fine due to hindering or complicating the on-site inspection.

The Turkish Competition Board's US Ecology Decision – The Approach Towards Reverse Triangular Mergers

I. Introduction

On March 24, 2022, the Turkish Competition Board's ("***Board***") rendered its decision[2] concerning the acquisition of sole control over US Ecology, Inc. ("***US Ecology***") by Republic Services, Inc. ("***Republic Services***") ("***Transaction***").

The Board unconditionally approved the Transaction pursuant to Article 7 of Law No. 4054 on Protection of Competition ("***Law No. 4054***") and the relevant provisions of Communiqué No. 2010/4 on the Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***"). The reasoned decision of the Board provides significant remarks in terms of its consistent approach to *"reverse triangular merger"* which is a transaction structure in which a target merges with a subsidiary of the acquiring company. The Board maintained its consistent approach by referring to some of its relatively recent decision [3] and indicated that reverse triangular mergers constitute acquisitions and they should not be identified as mergers.

II. Scope of the Transaction and Activities of the Parties

The Board's decision explained that Bronco Acquisition Corp. ("***Bronco***"), which is a wholly owned subsidiary of Republic Services and a special purpose vehicle (***"SPV"***) established solely for the purpose of this Transaction, will be merged with and be fully incorporated into US Ecology for the purpose of the Transaction. Accordingly, as a result of the Transaction, US Ecology will be the surviving entity and become a wholly owned subsidiary of Republic Services.

According to the Board's decision, Republic Services provides services in the area of recycling, non-hazardous solid waste disposal services, power generation from solid waste gas and other renewable energy. Further, the Board stated that Republic Services does not have any assets or activities in Turkey. As for US Ecology, the Board indicated that (i) US Ecology operates in the fields of maintenance, disposal, useful reuse, recycling of hazardous and non-hazardous, radioactive and other special wastes and (ii) US Ecology is active in the fields of emergency response, bioremediation and waste management services along Baku-Tbilisi-Ceyhan pipeline and relevant harbors through NRC Environmental Protection Waste Management Services, Inc. (*"**NRC Turkey**"*)[4], CRN Maritime, Inc. (*"**CRN Turkey**"*) and NRC International Services Ltd. Istanbul Main Branch (*"**NRC Branch**"*)[5] that are active

[2] Turkish Competition Board's *US Ecology, Inc./Republic Services, Inc.* Decision dated 24.03.2022 and numbered 22-14/216-93.

[3] Turkish Competition Board's *Woodward/ Hexcel* Decision dated 05.03.2020 and numbered 20-13/172-91, *Thermo Fisher Scientific/PPD* Decision dated 30.09.2021 and numbered 21-46/659-328.

[4] NRC Turkey is a fully owned subsidiary of NRC International Holding Company, which is indirectly controlled by US Ecology. NRC Turkey is solely controlled by US Ecology.

[5] NRC Branch is a branch of the indirectly fully-owned subsidiary of US Ecology (NRC

in Turkey. The Board stated that US Ecology has sole control over NRC Turkey, CRN Turkey and NRC Branch.

III. Conclusion

The Board determined there were no horizontal overlaps or vertical relationships between the activities of US Ecology and Republic Services in Turkey since Republic Services is not active in Turkey while the Board assessed that both Parties provide services in the waste management market on a global scale. Taking into account the negligible market share of US Ecology in Turkey, the Board concluded that the Transaction does not significantly impede effective competition. Accordingly, the Board unconditionally approved the Transaction.

This decision further sheds light on a point which is critical in terms of the notifiability analyses of the concentrations (in particular, the distinction between mergers and acquisitions and the application of the jurisdictional turnover thresholds based on the transaction type/structure[6]) and bolsters the Board's case law[7] by reiterating that a reverse triangular merger would constitute an acquisition, rather than a merger under Turkish merger control regime.

The Turkish Competition Board Assessed Prior Overlaps between the Parties: Acquisition of Sole Control over OCTAL by Alpek Polyester

The Turkish Competition Board (the ***"Board"***) published its reasoned decision[8] concerning the acquisition of sole control over the entire issued share capital of OCTAL Holdings UK Ltd., which holds the OCTAL business group ("***OCTAL***") by Alpek Polyester, S.A. de C.V. ("***Alpek Polyester***") which is ultimately solely controlled by Alfa, S.A.B. de C.V. ("***Alfa***"). The Board unconditionally approved the relevant 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 Communiqué No. 2010/4 on the Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***").

In its review, the Board held that the turnover figures of the Parties exceed the turnover thresholds stipulated in Article 7 of Communiqué No. 2010/4 and thus the Board decided that the notified transaction is subject to the approval of the Board.

International Services), which is ultimately controlled by US Ecology.

[6] The jurisdictional turnover threshold tests provided under Article 7(b) Communiqué No. 2010/4 are two separate tests; Article 7(b)(i) is applicable only in case of acquisition transactions (as well as joint ventures) while Article 7(b)(ii) is applicable only in case of merger transactions.

[7] Turkish Competition Board's *Take-Two/Zynga* Decision dated 24.03.2022 and numbered 22-14/215-92, *American Securities/Ferro* Decision dated 24.02.2022 and numbered 22-10/144-59, *Troy Corporation/Arxada* Decision dated 02.12.2021 and numbered 21-58/824-404, *Rexnord/Regal Beloit* Decision dated 15.04.2021 and numbered 21-22/260-113, *UTC/Rockwell* Decision dated 18.01.2018 and numbered 18-03/26-14, *Albemarle/Rockwood* Decision dated 16.10.2014 and numbered 14-40/734-326, *Warnaco/PVH* Decision dated 06.12.2012 and numbered 12-62/1621-595, *Fresenius/Fenwal* Decision dated 27.09.2012 and numbered 12-46/1391-464, *Ecolab/Nalco* Decision dated 22.09.2011 and numbered 11-48/1211-424.

[8] Turkish Competition Board's *OCTAL/Alpek Polyester* Decision dated 31.03.2022 and numbered 22-15/250-109.

Before delving into its substantial analysis, the Board provided insight on the global and Turkish activities of the transaction parties. First, regarding the activities of the target, OCTAL, the Board stated that OCTAL was a holding company active in the manufacturing of PET resin, PET sheet and PET packaging, with a 100% subsidiary of a (closed) joint-stock company established in Oman and controls the OCTAL business via OCTAL Holding SAOC. The Board also highlighted that OCTAL's main manufacturing facility was in Salalah, Oman and it carried out the vast majority of OCTAL's production for onward sales globally. OCTAL also had minor manufacturing operations at sites in Saudi Arabia and the US.

In relation to the acquirer, the Board stated that Alpek Polyester was wholly owned by Alpek, S.A.B. de C.V. ("***Alpek***"), which was a publicly traded company listed on the Mexican Stock Exchange, and its majority shareholding and sole control belonged to Mexico based Alfa. In other words, Alfa owned all of Alpek Polyester through Alpek and held the sole control over Alpek Polyester. The Board stated that main businesses of Alpek were carried under two divisions, which are as follows: (i) the "Polyester" division, active in the manufacturing of purified terephthalic acid ("***PTA***"), polyethylene terephthalate ("***PET***") resin and polyester fibres, and (ii) the "Plastics and Chemicals" division, active in the manufacture of products including polypropylene, expandable polystyrene, caprolactam and other specialty and industrial chemicals. The Board stated that Alpek Polyester produced PET resin for customers around the world with twelve manufacturing facilities located in Mexico, the USA, Canada, Argentina, Brazil and the United Kingdom.

The Board then evaluated the activities of the parties in Turkey. The Board stated that Alfa did not have any subsidiaries or affiliated entities incorporated in Turkey and carried out its activities in Turkey through Alpek's (including Alpek Polyester's) and Sigma's (company with a minimal amount of dry meat and ham sales) sales in Turkey. Alpek Polyester was engaged in the sales of Expanded Polystyrene ("***EPS***"), which is a distinct product and does not relate to an upstream or downstream market of PET sheet or PET resin. Alpek polyester did not sell PTA in Turkey, apart from negligible amount of sales of PET resin only once in 2020. OCTAL, on the other hand, carried out activities related to sale of PET sheet and PET resin in Turkey. OCTAL did not have subsidiaries established in Turkey or any subsidiaries, nor did it have any manufacturing facilities.

The Board examined the value and volume-based market shares of Alpek Polyester and OCTAL regarding PET resin sales in Turkey, in the last four years (i.e., 2018, 2019, 2020 and 2021). Based on the sales data of the parties, the Board concluded that there was a horizontal overlap between the activities of Alpek Polyester and OCTAL in Turkey, in the year 2020 due to the PET resin sales of Alpek Polyester in 2020.

Even though there were no overlaps between the activities of the Parties in 2021 and 2022 *–the year preceding the proposed transaction–*, the Board examined the limited overlap in the year 2020 and concluded that there would be no competitive concerns given that PET resin sales were at a negligible level. Accordingly, the Board further evaluated that the horizontal overlap in 2020 would not cause any competitive concerns considering (i) the absence of PET resin

sales of the undertaking in Turkey in years 2018, 2019, 2021 and 2022 (as of the date of application), (ii) the limited market share of OCTAL in the market for PET resin and (iii) the presence of other key global players in the market.

As PET sheet is made of PET resin, the Board stated that there is a potential vertical relationship between PET resin sold by Alpek Polyester and PET sheet sold by OCTAL in Turkey. However, considering the facts that OCTAL did not have production activities in Turkey and OCTAL did not supply PET resin from Alpek Polyester, the Board concluded that the potential vertical relationship would not cause any competitive concerns in Turkey.

Against this background, the Board decided that the proposed transaction would not cause creation of a dominant position or the strengthening of an existing dominant position and would not result in a significant lessening in effective competition.

The Board's decision is significant as it reveals the Board's approach towards the evaluation of horizontal and vertical overlaps between the activities of the parties. This decision also serves as a recent precedent of the Board where it assessed an activity overlap which existed in only one year within the past four years.

With the relevant assessment, the Board ultimately granted an unconditional approval to the transaction stating that the proposed transaction fell within the scope of Article 7 of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board and the transaction would not significantly impede effective competition.

The Turkish Competition Board's Digiturk Decision: Embodiment of a Settled Approach to Territorial Restrictions and a Spectrum of By-Object Restriction, Soft Enforcement and Scrutiny Regarding Resale Price Maintenance

I. Introduction

The Turkish Competition Board (the "***Board***") resolved its investigation which was initiated further to complaints of commercial users of broadcasting services offered through Digiturk platform by Krea İçerik Hizmetleri ve Prodüksiyon A.Ş. ("***Digiturk***") with its decision dated 13.01.2022 and numbered 22-03/48-19 (the "***Decision***"). The initial complaints were primarily related to (i) the excessive pricing of broadcasting services with unjustifiable price increases against the inflation rate and the general economic conditions in Turkey, (ii) discrimination among the commercial users network in terms of fees charged to users in same position and (iii) forcing commercial users to engage with distributors as a result of the territorial exclusivity established by Digiturk.. However, the Board kept the scope of the investigation wide and looked into Digiturk's distribution system as a whole and considered additional potential competition law infringements, such as resale price maintenance ("***RPM***").

In terms of the assessment of abuse of dominant position, while the Board concluded that Digiturk was in a dominant position in the market for "provision of broadcasting services of Turkish Super League and Turkish 1st League", it found that there is no indication of (i) excessive pricing and (ii) discrimination among buyers. Therefore, the Board decided that

Digiturk did not abuse its dominant position.

The Board's assessment under Article 4 of Law No. 4054 on Protection of Competition ("***Law No. 4054***") focused on the allegations on (i) RPM and (ii) territorial exclusivity.

The Decision followed the Board's typical precedent with regards to vertical restraints, offering a settled and clear approach towards the imposition of territorial exclusivity. In terms of assessment on RPM, the Decision offered a walkthrough and overview of the Board's precedents on RPM practices along with the significant precedents in USA and the EU, While the Decision followed the precedents where it adopted a rule of reason analysis, rather than a restriction by object approach, it did not make a decisive conclusion on whether RPM practices should be treated as restrictions by object or an effects-based analysis should be carried out on each case.

The Board concluded that RPM restrictions were absent due to lack of any sanction mechanisms or suggestions on this front.

However, the Board decided that Digiturk's distribution system included passive sales restrictions which violated Article 4 of the Law No. 4054 due to the elimination of intra-brand competition and imposed a monetary fine of TL 7,068,133.04 on Digiturk. The Board also required Digiturk to include a clear provision in its dealership agreements that there is no passive sale ban.

In terms of the 48 Digiturk dealerships, subject to the investigation, although the Board found that they were dominant within their designated territories, it did not further scrutinize the dealerships in the absence of any findings pertaining to any agreement and/or concerted practice between these undertakings.

II. Relevant Product Market and Geographic Scope

The broadcasting rights at discussion are granted by the Turkish Football Federation ("***TFF***") through public tender. Digiturk holds exclusive rights for 5 years to live broadcasting of Turkish Super League and Turkish 1st League since the 2017-2018 season and offers these broadcasting services to distinct individual and commercial consumer groups. While the packages for individual consumers are directly marketed by Digiturk, commercial packages are marketed by Digiturk's dealers. The investigation concerned the distribution of commercial packages.

Although the packages offered by Digiturk to both individual and commercial users include broadcasting rights of sports competitions other than Turkish Super League and Turkish 1st League, as the consumers' demand towards these packages mostly derives from broadcast of competitions within Turkish Super League and Turkish 1st League, the Board considered relevant product market as "Pay TV broadcasting of Turkish Super League and Turkish 1st League competitions". The Board dismissed Digiturk's defenses for a wider relevant "Pay TV Broadcasting" market on the grounds of exclusivity with regards to Turkish Super League and Turkish 1st League held by Digiturk, pointing out that there are not any alternative suppliers for the provision of this service. While the Board defined the relevant geographic scope for the product market as "Turkey", it also pointed out that each of the 48 dealerships of Digiturk are the only

authorized sellers within their designated territories.

III. Digiturk's Distribution System

The Board pointed out that the distribution system of Digiturk has a completely "unique" structure with "value-based pricing", which is extremely rare in goods and services markets. In this system, when determining the price of the service to be offered to its target customers through its resellers, Digiturk does not take into consideration the marginal cost or average cost of that service as a criterion, but the profit that the customer expects to derive from the direct commercialization of the product. The Board emphasized that the pricing system, in which the customer is considered as a "commercial partner" in a sense, is not considered as a violation of the provisions of Law No. 4054 on its own.

The distribution system is as follows: The dealer conducts sales up to the amount determined in the tender for the relevant province, the part exceeding a certain percentage of this amount remains as profit to the dealer. When this part is exceeded, the excess amount is shared between the dealer and Digiturk. If the sales amount of the dealer does not reach the amount determined in the tender, the difference remains as a loss to the dealer.

Within the system that regulates the pricing of the 2018-2019 football season, when the dealer wants to give a discount to a customer, it opens a record called "exemption" on the platform called "IRIS" and managed by Digiturk, and enters the price requested into this system. If this amount is later approved by Digiturk, the dealer can sell to the customer over the relevant amount. If Digiturk does not approve the amount requested by the dealer and the dealer still applies the discounted price to its customer, the difference is requested from the dealer by Digiturk.

In the 2019-2020 football season, which started during the investigation phase, Digiturk made a number of changes in its pricing policy: "exception" application was removed and Digiturk has developed a process where Digiturk is no longer aware of the prices to be applied by the dealer to the customer. In addition, Digiturk imposed a rule where more than a certain percentage of the recommended price cannot be collected from the customer, which resembles a maximum increase rate. As a result, Digiturk's control over the prices that the dealer will apply to the customer has been removed and dealers have been theoretically given more freedom in terms of pricing than before.

The Board emphasized the importance of the status of the dealers in terms of deciding whether RPM were in force and assessing resellers' legal positions. In the light of its examination of the system, the Board concluded that the members of the distribution system should be generally considered as "dealers" rather than Digiturk's "agents". This is because (i) if the authorized dealer cannot provide the performance it predicted before the negotiation in its own exclusive region, it may incur losses to the extent of the commercial risk it undertakes and (ii) the authorized dealers have the freedom to determine the sale prices out of the designated pricing list prepared by Digiturk.

IV. The Board's Assessment with regards to RPM practices

In light of its assessment on Digiturk's distribution system, the Board concluded that the dealers of Digiturk could alternate

the resale prices of the commercial packages at their own risk of failure to reach profitable turnovers.

The Board considered that rather than determining the resale prices of the dealers, Digiturk's distribution system is an important tool to ensure that the amount that Digiturk will collect from its dealers in the following football seasons does not fall below the value. The Board found that there is no indication that Digiturk inculcates the dealers not to decrease the prices or imposes quota limits to dealers that make discounts. Thus, absent any strict implication of RPM, the Board concluded that there are not any findings pertaining to necessary requirements of an RPM practice.

In its assessment, the Board extensively referred to its previous precedent in terms of RPM practices and concluded that the current distribution system at hand lacked suggestion, sanction and deterrence mechanisms which were found in the previous decisions where the Board opted for imposing monetary fines based on RPM practices.

As also acknowledged in the Decision, the Board's precedent regarding the RPM practices have been somewhat inconsistent and for a period of time, was given the appearance of evolving from restriction by object to a rule of reason approach. The Board's earlier decisions such as Doğuş Otomotiv and Akmaya adopted a restriction by object approach, stating that the purpose of an RPM is sufficient for a determination of violation, even if there are no anti-competitive effects in the market. Although the Board, for a limited period, based its decisions on the rule of reason approach after the first period with the exception of the decisions of Alarko, Anadolu Elektronik and Aral Oyun, in the light of its recent decisions in which RPM is considered as a by-object restriction, one cannot determine that the Board is consistently evolving its assessments through a rule of reason analysis.

While the Board examines the concentration in the market, the structure of the market, the market power and market share of undertakings, the nature of the products, the duration of the breach, the buyer power, the effect of the RPM on the market, and whether practices are beneficial for consumers and therefore tailors its decisions based on the factual background of each specific case, it can be argued that the uncertainty on whether RPM practices are restrictions by object, even treated as a *per se* violation in some cases or can survive a rule of reasons analysis severely endangers undertakings and hampers legal certainty. While the ambiguity on the RPM practices offer flexibility to the enforcement agencies and enable the decision makers to calibrate their jurisdiction specific to each case, it severely endangers the undertakings in terms of allowed and banned practices in their vertical structuring. While the Council of State's recent Henkel decision vastly cleared the ambiguity on the criteria for the presence of RPM practices by openly seeking elements of "coercion or incentive", the nature of RPM practices as "by-object" violations or admissible actions under certain conditions remains to be put forward.

V. The Board's Assessment with regards to Exclusive Territories

The Board found that Digiturk has created a commercial dealership system for commercial users, thus, 48 authorized dealers have been appointed for the 2018-2019 season, each of which is exclusive to the geography to which it is assigned.

While Digiturk argued that there are no restrictions on its dealers preventing the sales to customers within other territorial regions and it handed out a circular to its dealers explicitly explaining the absence of such restriction further to investigation notice, the Board based its decision on the factual grounds that none of the dealers conducted active or passive sales out of their designated territories and concluded exclusive distribution was in force.

In comparison to RPM practices, the boundary of territorial exclusion is clearer and the practice on this front offers a more uniform characteristic in the Board's decisions. Article 4(a) (1) of Block Exemption Communiqué on Vertical Agreements No. 2002/2 ("***Communiqué No. 2002/2***") allows a supplier to prevent a buyer from active sales of contract products or services into an exclusive territory or to customers allocated to a supplier or another buyer, provided that the restriction does not cover resale made by the buyer's customers and the market share of the party benefiting from the clause does not exceed 30%. Other exceptions are as follows:

- preventing a buyer at the wholesale level from selling the products to end-customers;
- in selective distribution systems, preventing authorized distributors from selling products to unauthorized distributors; and
- when the product supplied is combined with other products, preventing a buyer from selling these products to the suppliers' producer competitors.

Provisions extending beyond what is permissible under an appropriately defined exclusive distribution system, like the restriction of passive sales, cannot benefit from a block exemption as also put forward by the Board's recent decisions[9]. Similarly, restrictions of sales not resulting from an active effort, like internet sales, and advertisements or promotions conducted through media with general intent, are considered passive sales methods and these restrictions cannot benefit from block exemption.

In this sense, the Board found that Digiturk's market share was above the threshold designated in Communiqué No. 2002/2 and therefore could not benefit from the block exemption. Accordingly, the Board considered whether the exclusive distribution system could benefit from individual exemption under the Article 5 of the Law No. 4054.

The Board's assessment regarding the cumulative conditions for individual exemption set out under Article 5 of Law No. 4054 is provided below:

- **the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress**

The Board considered factors such as exclusive dealers' ability to closely engage with the commercial customers within its region and effectively and fastly solve the problems that may arise, as well as the ability of exclusive dealers to effectively tackle pirate broadcasting. The Board also considered cost savings in terms of marketing efforts as a result of the

[9] Turkish Competition Board's *DYO* Decision dated 15.04.2021 and numbered 21-22/267-117, *Mey İçki* Decision dated 12.06.2014 and numbered 14-21/410-178, and *Novartis* Decision dated 4.07.2012 and numbered 12-36/1045-332.

exclusive dealerships. Pointing out that the exclusive dealership system is beneficial for dealers to embrace the region and manage the market more optimally, the Board concluded the dealership system met the first criterion.

- **the agreement must allow consumers a fair share of the resulting benefit**

The Board remarked that commercial customers find easier contact as a result of Digiturk's exclusive dealership system and get a faster solution in case of malfunction. However, the dealership system eliminates the opportunity for customers to compare products from different vendors and thus to obtain the same product under more favorable conditions. Moreover, considering the monopoly areas created by the exclusivity system for dealers, the Board evaluated that Digiturk aims to increase the commercial package sales motivation of the dealers, and the consumer does not benefit from this situation. Therefore, it cannot be said that consumers will provide a proportional benefit against the dealership system implemented by Digiturk. Thus, the Board concluded that the second criterion is not met.

- **the agreement should not eliminate competition in a significant part of the relevant market**

The Board concluded that as a result of the restriction of intra-brand competition, effective competition among dealers will disappear, consumer preferences will decrease, and ultimately there will be the possibility of an increase in consumer prices. Moreover, the Board emphasized that there are barriers to entry to the said market, because the market in question has the characteristics of being a market where "competition for the market" takes place rather than "competition within the market" due to the tenders held by TFF. Accordingly, the Board concluded the third criterion is not met.

- **the agreement should not restrict competition more than what is compulsory for achieving the goals set out in the above first two points**

The Board remarked that some efficiency-enhancing effects can be regarded such as the differences in demand and price flexibility between regions, and Digiturk's application of different sales prices to dealers in different regions in order to realize effective distribution. However, the Board also considered that since the inter-brand competition is limited due to Digiturk being the only provider, the negative effects of the decrease in intra-brand competition on competition in the market will be much higher. The Board also pointed out that while it will be easier for dealers, who have monopoly power in their regions, to apply different prices, their motivation to take actions such as technical development, innovation and innovation to increase efficiency and increase consumer welfare in the provision of the services will decrease.

Accordingly, the Board concluded that territorial exclusivity resulting in ban on active and passive sales will completely eliminate intra-brand competition and that the negative effects of the system on competition in the market will be more than necessary. Therefore, the fourth criterion for an individual exemption is not met.

VI. Conclusion

Although the initial complaints also include abuse of dominance allegations, such as excessive pricing and discrimination, the Board briefly dismissed these allegations. Rather, the Board focused on the violations regarding RPM practices and exclusive distribution system. As a result, the Board concluded Digiturk's distribution system cannot benefit from the block exemption under Communiqué No. 2002/2 and also criteria laid out in Article 5 of Law No. 4054 for individual exemption is not met.

Accordingly, the Board decided to implement a monetary fine of TL 7,068,133.04 on Digiturk for the restriction of competition by elimination of intra-brand competition through the ban on passive sales among its dealers. The Board dismissed Digiturk's arguments regarding Digiturk's circular to its dealers explaining that there is no territorial restriction, but it was not considered as a mitigating factor either. But the Board considered the low share of infringing activities in annual gross income as a mitigating factor while rendering its decision.

While the Decision provides valuable takeaways regarding the Board's approach to various matters such as dealership/agency distinction, approach to monopolistic markets in terms of intra-brand competition and valuable considerations regarding the Board's former precedent with regards to RPM cases, however the Decision does not resolve the ambiguity on the latter by way of refraining to provide a conclusive resolution with regards to the nature of the RPM practices.

Recent Signs on the Competition Board's Approach to Internet Sales Restrictions and Resale Price Maintenance Allegations: The Vestel Matter

I. Introduction

The Turkish Competition Board (the "***Board***") has recently decided [10] by majority of votes to not to initiate a full-fledged investigation against Vestel Elektronik Sanayi ve Ticaret A.Ş. ("***Vestel***"), despite the case handlers' calling for a full-fledged investigation in their Preliminary Investigation Report (the "***Report***"). The subject of the case was to investigate whether the market players [11] infringed Article 4 of the Law No. 4054 via internet sales restrictions and/or resale price maintenance ("***RPM***"). In the Report, the case handlers expressed their opinion that the Board should initiate a full-fledged investigation against seven undertakings [12] including Vestel, to determine whether these undertakings infringed Article 4 (which is akin to Article 101 of the Treaty of the Functioning of the European Union) of the Law No. 4054 on the Protection of Competition (the "***Law No. 4054***"). However, the Board announced on September 27, 2022 that it launched a full-fledged investigation against all of the undertakings the case handlers requested a full-fledged investigation for, except

[10] Turkish Competition Board's *Vestel* Decision dated 09.09.2021 and numbered 21-42/617-303.

[11] Vestel, Arçelik Pazarlama A.Ş. ("***Arçelik***"), BSH Ev Aletleri San. ve Tic. A.Ş. ("***BSH***"), LG Electronics Tic. A.Ş. ("***LG***") Samsung Electronics İstanbul Paz. ve Tic. Ltd. Şti. ("***Samsung***").

[12] Arçelik, BSH, LG, Samsung, Gürses Kurumsal Tedarik ve Elektronik Tic. Paz. A.Ş. ("***Gürses***") and SVS Dayanıklı Tük. Mall. Paz. ve Tic. Ltd. Şti. ("***SVS***").

Vestel[13]. In his dissenting opinion, one of the board members stated *inter alia* that he voted against the decision considering that documents similar to those which caused initiation of a full-fledged investigation against other undertakings, were also seized from Vestel. In addition, the relevant board member expressed that considering the oligopolistic structure of the investigated market, the competitive concerns might not be eliminated through the investigation once Vestel –an important player – is excluded from the investigation.

In this short article we will briefly summarize the decision.

II. Details of The Decision

Vestel decision solely contains two of Vestel's internal correspondences which were not communicated, at least on the appearance, to Vestel's resellers. In one of these correspondences, Vestel employees have engaged in an e-mail correspondence in relation to the resale price of Vatan, which is a technology products retailer. In the discussion, one of the Vestel employees stated that *"If we don't take urgent action, our company will take its own action, vatan bilgisayar has started to call the dealers and offer products from the list below, this situation is worse than internet sales."*. The other correspondence is a conversation amongst Vestel employees through Microsoft Teams. Similar to the first correspondence, the discussion concerned a reseller who offered lower prices in 6 Vestel products when compared to prices on Vestel's web page.

The case handlers' opinion and the dissenting opinion are formulated on the basis of these two internal correspondences. However, the dissenting opinion goes further and considers the coordination effects and the market structure in addition to the vertical effects (such as RPM and internet sales). Accordingly, this article discusses vertical and horizontal components of the decision under two separate parts.

In relation to the vertical component, the role of internal correspondences in Article 4 cases should be discussed. Similar to the EU Law, the concept of agreement centers around a concurrence of wills between at least two undertakings[14]. Thus, for the Board to be able to render a violation decision, on account of internal correspondences of a supplier in RPM cases, it must first establish beyond reasonable doubt[15] that these internal correspondences are communicated to the dealers and that the dealers tacitly or explicitly acquiesced the calls coming

[13] The announcement is available only in Turkish at the official webpage of the Turkish Competition Authority: https://www.rekabet.gov.tr/tr/Guncel/arcelik-pazarlama-a-s-bsh-ev-aletleri-sa-b773b1a6881fec11813800505694b4c6 (Accessed on September 22, 2022).

[14] Turkish Competition Board's *THY Azal* Decision dated 14.09.2011 and numbered 11-47/1163-409, row 370; *Ready-mixed concrete* Decision dated 16.10.2012 and numbered 12-50/1445-492, p 31; *Deva* Decision dated 01.07.2021 and numbered 21-33/446-222, para 101.

[15] The competent administrative court requires the Board to establish the existence of any violation beyond reasonable doubt. *See:* High State Court 13th Chamber (14.06.2019; E: 2016/3513); Ankara 6th Administrative Court (18.12.2019; E:2019/946, K: 2019/2625, p. 5); Ankara 17th Administrative Court (26.02.2020; E:2019/991, K: 2020/409); Ankara 13th Administrative Court (16.07.2020; E:2019/660, K:2020/1315); Ankara 7th Administrative Court (14.01.2021; E: 2021/60) Stay of Execution decision and Ankara 7th Administrative Court (30.06.2021; E:2021/60, K:2021/1364).

from the supplier [16]. In the Board's precedents, namely, *Betek*[17], *İzmir Hazır Beton*[18], *Anadolu Elektronik*[19] and *Tüketici Elektroniği* [20] decisions and Ankara 9th Administrative Court's *Hicri Ercili* decision[21], internal correspondences were deemed to be not sufficient to establish a violation in and of itself. Accordingly, the Board's decision seems to be in line with the concept of concurrence of wills.

As for the horizontal component, the dissenting opinion points to the oligopolistic nature of the market, implying that the restriction of internet sales may be due to a concerted practice between the investigated firms. It states that it is obvious that suppliers engage in online sales restrictions to prohibit dealers from selling under a certain price and in an oligopolistic market, firms are influenced by each other's decisions and behaviors. The dissenting opinion seems to call for an examination on whether these parallel behaviors (internet sales and RPM) stem out of a concerted practice or a conscious parallelism[22]. It is too early to comment on these opinions as the investigation is currently on-going for six undertakings[23] and the content of the correspondences seized from the undertakings are not yet available to the public.

III. Conclusion

The clock has started for any interested party to launch an appeal against the Vestel decision of the Board. Duru Bulgur decision of the 13th Chamber of Ankara Regional Administrative Court [24] (the "***Court***")[25] constitutes a notable precedent for any consumer wishing to launch an appeal against the Board's *Vestel* decision, as the Court in Duru Bulgur case accepted that the consumers have the right to apply to the Courts to set aside decisions of the Board about not to initiate a full-fledged investigation. Any consumer wishing to bring an action to annul the *Vestel* decision can do so by relying on the Court's judgement in Duru Bulgur. The Court of first instance will then consider whether the evidence at the disposal of the Board, during the preliminary investigation phase, was sufficient to concretely establish that there were no actions, decisions and agreements that violate the Law No. 4054 or not.

The opinion of the case handlers and the dissenting opinion of one of the board members might affect the administrative Court, in case the decision of the Board not to initiate a full-fledged investigation against Vestel is carried to the Court by the consumers harmed by the alleged

[16] High State Court's Henkel Judgement seems to have laid down five criteria in finding an RPM violation. However, discussing these criteria falls out of the scope of this article.
[17] Turkish Competition Board's *Betek* Decision dated 16.12.2021 and numbered 21-61/857-421 para 89.
[18] Turkish Competition Board's *İzmir Hazır Beton* Decision dated 22.08.2017 and numbered 17-27/452-194, para 84.
[19] Turkish Competition Board's *Anadolu Elektronik* Decision dated 23.06.2011 and numbered 11-39/838-262, row 1880.
[20] Turkish Competition Board's *Tüketici Elektroniği* Decision dated 07.11.2016 and numbered 16-37/628-279, para 787.
[21] Ankara 9th Administrative Court (30.05.2022, E:2021/2670, K:2022/1193).
[22] Under the Law No. 4054, conscious parallelism is not forbidden. *See: Retail Markets* Decision (22.05.2018, 18-15/279-138), para 62. The Board stated that "oligopolistic dependency" is not a violation under Law No. 4054.
[23] Arçelik, BSH, LG, Samsung, Gürses and SVS.
[24] 8th Ankara Administrative Court (11.12.2019, E:2019/1829, K: 2019/2624).
[25] 13th Ankara Administrative Court (02.11.2020, E:2020/315, K:2020/1569).

anticompetitive activities of Vestel. Indeed, if an interested party requests the Court to annul the Board's decision, the case may prove yet to be interesting.

A Dive into the Turkish Competition Authority's New Settlement Regulation: Analysis of Arnica and Hayırlı El Kozmetik Decisions

I. Introduction

The newly introduced settlement procedure, allowing undertakings to settle with the Turkish Competition Authority ("***Authority***") through acknowledgment of a competition violation, is a hot topic in Turkey. In two of the most recent investigations related to Arnica Pazarlama A.Ş.'s ("***Arnica***") (the "***Arnica Decision***")[26] and Hayırlı El Kozmetik A.Ş. ("***Hayırlı El Kozmetik***") (the "***Hayırlı El Kozmetik Decision***") [27] which concerned the violation of Article 4 on the Protection of Competition ("***Law No. 4054***") via resale price maintenance practices, the relevant undertakings applied for settlement under the Regulation on the Settlement Procedure ("***Settlement Regulation***").

Within the scope of the Settlement Regulation, both entities benefitted from the maximum discount (25%) applicable to settlement cases. Accordingly, the fine calculated for Arnica was reduced from 3,293,008.20 TL to 2,469,756.14 TL and the fine calculated for Hayırlı El Kozmetik was reduced from 385,178.23 TL to 288,883.67 TL. Moreover, as per the Settlement Regulation, both parties accepted that they had been informed of the allegations and provided with the chance to present their cases during the settlement process; and that they would not have a further right of appeal against the administrative fine imposed or the points raised within scope of the settlement.

Currently, the Hayırlı El Kozmetik Decision is only available in short form. The short form decision indicates that the undertaking's practices lasted for more than 5 years and besides market power and the gravity of the damages, aggravating factors were taken into consideration of the fine. Once the reasoned decision is published, the details of the case will be revealed. On the other hand, the reasoned Arnica Decision has already been published on the Authority's official website. Accordingly, the details of the Arnica Decision are provided below.

II. Details of the Arnica Decision

On September 29, 2020, a complaint was brought to the Authority's attention, where it was alleged that Arnica sales representative had called the complainant (who was one of Arnica's authorized sellers, engaged in the sale of Arnica products via online marketplaces and e-commerce websites) and stated that the prices of the products sold by the complainant are low and needed to be increased. It was claimed that the complainant had to increase its prices involuntarily, contemplating the possible risk that Arnica would refrain from supplying it with products unless it did so, and indeed, Arnica sales representative sent an updated price list to the complainant and subsequently warned the complainant for not updating its prices.

[26] Turkish Competition Board's *Arnica* Decision dated 30.09.2021 and numbered 21-46/671-335.

[27] Turkish Competition Board's *Hayırlı El Kozmetik* Decision dated 21.07.2022 and numbered 22-33/523-210.

After the complaint was submitted to the Authority, the Board decided to initiate a preliminary investigation against Arnica. Within the scope of the preliminary investigation, the Authority carried out an on-site inspection at the premises of Arnica and requested the entity to provide certain information. Consequently, the Board decided to initiate a full-fledged investigation against Arnica to find out whether Article 4 of Law No. 4054 has been violated. Following the Board's decision, Arnica received the Investigation Notice officially on March 15, 2021, and submitted its first written defense on April 14, 2021.

After the submission of the first written defense, Arnica made an application on June 10, 2021 to benefit from both the commitment and the settlement mechanisms. The Board rejected Arnica's application for the commitment mechanism since the relevant competition law concerns were deemed obvious and hard-core violations. On the other hand, the Board accepted Arnica's settlement application.

The negotiations for the settlement began on July 5, 2021. After the completion of settlement negotiations, an interim order for settlement was issued on September 9, 2021 and Arnica submitted the final agreed settlement text. As a result, in its final decision the Board ruled that (i) Arnica violated Article 4 of Law No. 4054 by way of determining the resale price, (ii) an administrative fine should be imposed on Arnica pursuant to Article 16 of Law No. 4054 and Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuses of Dominance ("***Regulation on Fines***"), (iii) the administrative fine should be discounted by 25% pursuant to the Settlement Regulation, and (iv) the investigation carried out against Arnica should be concluded with the settlement procedure.

In its decision, the Board evaluated Arnica's 2017 Dealership Agreement, as well as its practices on the field. Accordingly, it assessed its resale price maintenance related practices and online sales restriction related practices, in detail. Similar to the Groupe SEB decision [28] ("***Groupe SEB***"), the Board analyzed how the restriction of internet sales may amount to a resale price maintenance violation.

In relation to the assessment of the Dealership Agreement*, inter alia,* the Board:

- Highlighted that essentially four clauses regulated dealer prices.
- Evaluated that the relevant clauses (i) provided that dealers were expected to comply with a minimum price, (ii) enabled Arnica to demand compensation from dealers who sell below the determined price level, and (iii) imposed an additional obligation on the dealers, preventing them from selling products to real persons or legal entities who (would) sell below the minimum price set by Arnica, which was also backed up with a compensation demand in case of non-compliance of the dealers.
- Further noted that one of the provisions of the relevant agreement also obliged the dealers to regularly report their product sales and stock quantities to Arnica, which enabled

[28] Turkish Competition Board's *Groupe SEB* Decision dated 04.03.2021 and numbered 21-11/154-63.

close monitoring of dealer practices. Overall, the Board assessed that although the relevant clauses were mainly aimed at determining the resale prices of Arnica products, they also constituted intervention in the sales of the dealers (i.e., with respect to customers or geographic region) especially considering that no exclusivity was granted within the scope of the contracted distribution relationship.

After examining the documents seized during the on-site inspections and based on its high number of findings (in total 68 findings were referred to in the Arnica decision), the Board *inter alia* noted that:

- Certain communications verified that Arnica (i) set minimum resale prices for online sales, as well as in brick and mortar stores, and (ii) controlled adherence to minimum resale prices by (a) close monitoring of online or in-store sale prices (via monitoring SMS, mystery shopper practices etc.), (b) through regular reports shared by the dealers on their sales and stock quantities, and (iii) terminated or reduced, or threatened to terminate or reduce the amount of goods supplied to the relevant dealers, and/or discounts applied to the relevant dealers, in case of non-compliance with minimum prices.

- It was also found that some of the communications explicitly showed Arnica employees were constantly exchanging information on the prices applied by the dealers, and they would contact the dealers that "breached" the price and request them to "fix" their prices (i.e., increase their resale prices to the requested levels).

- Such resale price intervention related practices constituted an upward pressure (*i.e.*, aimed to increase resale prices).

- It was also observed that prices applied by non-dealers were also closely monitored via the above methods and this meant that besides the relevant reseller, the relevant dealer which supplied the product to the relevant reseller was identified and warned off from offering prices below the minimum prices recommended by Arnica.

- Moreover, it was observed that Arnica controlled the purchase quantities and restricted supplies in order to get ahead of a decrease in sales prices.

- Overall, it was observed that these practices concerned all sales channels.

- Besides, some correspondences also showed that Arnica restricted online sales and engaged in practices that amounted to hardcore restrictions. Moreover, certain exchanges also indicated that Arnica aimed to prevent wholesalers from selling to certain resellers. However, all in all, it was evaluated that such practices mainly concerned intervention to resale prices. In this regard, taking into account the Board's assessment in the Groupe SEB decision, whereby resale price intervention and online sales restriction were evaluated as a single violation, and considering that Arnica's sales restrictions were closely related with its general strategy to set resale

prices, the Board concluded that Arnica engaged in one vertical violation.

In line with its evaluation, the Board concluded that as (i) Arnica's actions were shaped by its strategy to determine the resale price of authorized dealers and (ii) these actions were considered to be continuous, they must be evaluated as a whole. Accordingly, the actions in question were deemed to constitute a single violation. Against this background, the Board found that Arnica's actions constituted a violation of Article 4 of Law No. 4054 and imposed an administrative monetary fine of 3,293,008.20 TL. In the calculation of the administrative fine, the Board:

- Considered such practices as "other violations" under the relevant Regulation on Fines and set a fine between 0.5% and 3%,
- Took into account the dynamics of the relevant market and Arnica's market share,
- Evaluated that the violation lasted for more than 5 years since the first document showing a violation was dated December 25, 2015 and the last document showing a violation was dated January 18, 2021 and accordingly, increased the base fine by 100%.
- Noted that there were no aggravating factors but mitigating factors should be taken into consideration (since Arnica went beyond its legal requirements and assisted the Authority with access to documents which showed a violation and therefore, the base fine was decreased by 50%.

Notwithstanding the above, as a result of the successful settlement process the Board decided to apply a 25% discount, which is the maximum allowed under the Settlement Regulation, over the administrative fine determined to be imposed on Arnica.

III. Conclusion

Under the new settlement mechanism, undertakings concede to the violation that has occurred, accept the sanctions, and reach a settlement with the Authority. The new mechanism enables the Board, *ex officio* or upon the parties' request, to initiate the settlement procedure. As also observed by the emerging case law of the Board, undertakings are increasingly applying to settle the matters with the Authority. Settlement mechanism is mainly preferred in order to avoid high penalties in case of a violation. Another reason parties choose to settle may be to avoid the high costs, longevity, and stress of the investigation processes since a settlement decision concludes the investigation process. Both undertakings, which were found to have violated Article 4 of Law No. 4054 via resale price maintenance practices, successfully went through the settlement process in line with the new Settlement Regulation of the Turkish Competition Authority. In both Arnica and Hayırlı El Kozmetik Decisions, both undertakings received the same amount of discount and fines imposed on both entities were decreased by 25% as per the Board's discretion. Accordingly, both Arnica and Hayırlı El Kozmetik benefitted from the highest amount of discount that can be granted. We are yet to see if the Turkish Competition Authority will continue to adopt a similar approach in similar resale price maintenance cases.

Employment Law

The Local Court Adjudicates on Unlawfulness of Termination of an Employment Agreement with Just Cause due to an Employee's Refusal to Get Vaccinated against COVID-19 and Provide Negative PCR Test Result

From the very beginning of COVID-19 pandemic and since the development of vaccines against COVID-19, the most discussed topics related to the outbreak included the questions of whether or not employers may require employees to provide proof of a negative COVID-19 test ("***PCR Test***") or to obtain a COVID-19 vaccination prior to entering the workplace. In this regard, whether or not employers can terminate an employee's employment agreement merely due to the employee's refusal to get vaccinated against COVID-19 and provide their employer with a negative PCR test result ("***Noncompliant Behaviour***") with a just cause is a longstanding debate.

Bursa 4th Labour Court ("***Court***") has become one of the first Turkish courts to render a decision on this matter with its decision numbered 2022/87 E. 2022/324 K. and dated June 16, 2022 ("***Decision***"), ruling that an employee's mere refusal to obtain a COVID-19 vaccination and to provide their employer with a negative PCR test result cannot constitute a just cause for termination of their employment agreement.[29]

To elaborate;

- An employee ("***Employee***"), whose employment agreement was terminated with a just cause by their employer ("***Employer***") based on the grounds that the Employee did not get vaccinated against COVID-19 and denied to get tested for COVID-19 too, had initiated a lawsuit against the Employer ("***Lawsuit***") with the request for the Employer's payment of severance and notice pay to the Employee.

- In the Lawsuit, the Employee asserted that there was no just cause and accordingly, the Employer did not have the right to execute immediate termination with "just cause".

- The defendant Employer, on the other hand, responded to the plaintiff Employee's claims by asserting that it was mandatory for the Employee to provide their PCR Test results but they had insistently failed to do so for three (3) consecutive weeks; therefore, the Employer was entitled to proceed with immediate termination with "just cause" as per Article 25/II-h of the Turkish Labour Code numbered 4857, which regulates "employers failure to fulfil their duties although being reminded thereof" as a just cause.

In its evaluations within the scope of the Lawsuit, the Court took note of the announcement dated September 3, 2021 ("***Announcement***") of the Ministry of Labour and Social Security of Turkey ("***Ministry***") wherein it was recalled that employers are obliged to inform all their employees about the protective and preventive measures against the health and safety risks that may be encountered in the workplace with respect to COVID-19 and wherein employers are requested to inform

[29] Bursa 4th Labour Court's decision numbered 2022/87 E. 2022/324 K. and dated June 16, 2022.

their non-vaccinated employees in respect thereof, in writing.[30] It was also stipulated in the Announcement that employers may request PCR tests once a week from their employees who are not vaccinated against COVID-19 as of September 6, 2021 and that test results shall be recorded for necessary procedures.[31]

The Court stated that despite the measures notified within the Announcement issued by the Ministry, an employee's refusal to get vaccinated against COVID-19 and to provide their employer with a negative PCR Test result could not be made subject to termination of the respective employee's employment agreement with "just cause". Accordingly, the Court accepted the plaintiff Employee's lawsuit, setting forth that "*the facts that the plaintiff had not obtained Covid vaccination or that they had failed to provide the PCR test will not give the employer the right to terminate the employee's employment agreement with just cause*."

That being said, in the Decision, the Court did *not* establish that an employer cannot terminate the employment agreement of an employee – *who does not obtain COVID-19 vaccination and does not present negative PCR Test result to their employer* – under any circumstances whatsoever. To the contrary, the Court explained that, possibly, there might be certain cases wherein it is possible to discuss that the relevant employment agreement could deemed to be terminated based on a "valid reason". The Court indicated that even if "*employee, by not getting vaccinated against Covid-19 and providing a PCR test, causes other employees to get sick, thus leads to a glitch in the operation of the workplace*"; this would not constitute a "just cause" for termination and in such a case, the employee's behaviour would, at most, be made subject to the discussion that it constitutes a "valid reason".

Consequently, it can be derived from the Decision that employers are not entitled to execute immediate termination with "just cause" in cases where an employee refuses to obtain COVID-19 vaccination and fails to provide proof of a negative COVID-19 test. Nevertheless, there is a possibility, depending on the circumstances surrounding each case, that the respective employee's such behaviour could constitute a "valid reason" for termination of their employment agreement by their employer. In other words, while the Decision establishes that an employee's employment agreement cannot be terminated with "just cause" merely due to the reason that they are not getting vaccinated against COVID-19 and not providing their PCR Test results to their employer; it also implies that a case-by-case analysis should be made (by assessing the circumstances, evidence and dynamics surrounding each specific case) while determining the existence of a "valid reason", in case an employee is engaged in Noncompliant Behaviour.

[30] Ministry of Labour and Social Security, "Is Yerlerinde Covid-19 Tedbirleri" <https://www.csgb.gov.tr/duyurular/is-yerlerinde-covid-19-tedbirleri/>, accessed on October 24, 2022.
[31] *Ibid*.

Litigation

Ambiguity between the Precedents of High Court of Appeals as to Evidentiary Capacity of Text Messages and E-mail Messages

I. Introduction

Under Turkish Law, a *prima facie* evidence is a document which is issued or conveyed by the counterparty or their representative and which addresses the legal transaction, but it is not sufficient to prove that legal transaction on its own. As per Article 202 of the Turkish Code of Procedure ("***TCP***"), if either party submits *prima facie* evidence, the transaction addressed by the *prima facie* evidence, which is subjected to the requirement of proof by deed, can be supported by witness statements.

Based on the foregoing, very recently, the High Court of Appeals rendered a decision wherein the text messages between the parties are evaluated as *prima facie* evidence and can be supported by witness statements.

II. Background of the dispute

The dispute arises from the unpaid balance regarding the sales of an immovable. Allegedly, the plaintiff sold an immovable to the defendant and transferred the subject matter immovable legally to the defendant, even though the defendant did not pay the total amount. Further to the foregoing, the plaintiff initiated an execution proceeding against the defendant, yet the defendant objected to the execution proceeding arguing that there is no such debt. Accordingly, the plaintiff filed the relevant lawsuit for the annulment of the objection. In the lawsuit, the plaintiff argued that it transferred the immovable with an unpaid balance based on the trust over the defendant, but the unpaid balance has never been paid to the plaintiff.

The court rejected the case and the decision was reversed by the High Court of Appeals. In the decision of the High Court of Appeals, it was decided that the text messages that the plaintiff relied on constituted *prima facie* evidence and the Court can hear witnesses for these issues. However, even though the Court decided to comply with the decision of the High Court of Appeals, the Court once again rejected the case.

Further to the later rejection, the High Court of Appeals reiterated that text messages constitute *prima facie* evidence and the Court can hear witness statements; therefore, based on the witness statements supporting the allegations of the plaintiff, the lawsuit should be accepted rather than rejected.

III. Evaluation of the High Court of Appeals

Under Turkish procedural law, "document" and "deed" are evaluated under different concepts. To elaborate; a deed shows evidentiary capacity of an evidence. A deed has the capacity to prove an event and thus deemed as material evidence. A document on the other hand constitutes the type of document that can be generally considered as evidence by to courts, its wit does not hold evidentiary capacity.

As per the relevant High Court decision, it can be rather straightforwardly interpreted that text messages are considered to qualify as *prima facie* evidence within the meaning of Article 199 of TCP. In other words, the High Court of Appeals qualified text messages as document and specifically

indicated that these cannot be considered as deed.

However, within the scope of another decision, the High Court of Appeals ruled that e-mail messages sent by the parties shall be regarded as document in accordance with Article 199 of the TCP but did not provide any further explanation about whether they have the capacity of *prima facie* evidence. Accordingly, as observed the courts have clarified the status of text messages, but not of e-mail messages. In this regard, the silence on whether High Court of Appeals finds e-mail messages as *prima facie* evidence may create ambiguity amongst the precedents.

On this note, the decision regarding the e-mail messages may be interpreted in different ways.

One interpretation could be that the High Court of Appeals finds e-mail messages more reliable compared to text messages and accepts e-mail messages' capacity to prove a legal transaction. This would be based on the deduction that the High Court would have specifically indicated that e-mail messages should be seen as *prima face* evidence considering that it was specifically indicated that text messages are *prima facie* evidence in another court decision. Therefore, in a way, one may argue that the High Court specifically points out to *prima face* capacity of evidence when it regards such evidence with such capacity and thus lack of such remark in the relevant decision might be interpreted as if e-mail messages are not deemed as such and ado hold the status of a deed (which has the capacity to prove a legal transaction on its own).

Another interpretation could be that acceptance of evidentiary capacity of text messages should also apply for e-mail messages and these should be also regarded as *prima facie* evidence.

Accordingly, as provided, it is possible for these two precedents to create uncertainty as to analysis on the evidentiary capacity of text messages and e-mail messages.

Data Protection Law

Insurance Data Ecosystem Is Detailed and Clarified with the New Regulation

The Regulation on Collection, Storage and Sharing of Insurance Data ("***Regulation***"), which regulates the procedures and principles regarding all kinds of activities conducted on insurance data including collection, storage, usage as well as the transfer of the insurance data between the insurance, reinsurance and pension companies that engage in insurance activities and other persons and organizations to be determined by the Insurance and Private Pensions Regulation and Supervision Authority ("***Authority***"), was published in the Official Gazette dated October 18, 2022.

Regulation's foundation is laid on Article 31/A (Obligation of Secrecy) and 31/B (Insurance Information and Monitoring Center) of Insurance Law No. 5684 ("***Law***"), which regulates rules and procedures specific to insurance data. Article 31/A attributes obligation of secrecy to institutions and persons authorized by the Law for the insurance related matters, their employees or outsource service providers, persons and entities who perform activities within the scope of the Law and their affiliates and businesses.

Article 31/B regulates the establishment of and fundamental rules and procedures for Insurance Information and Monitoring Center ("***Center***"). The article indicates the purpose of the Center is to collect information basis for risk evaluation including insurance malpractices regarding insured and those who benefit –even indirectly– from insurance contracts and sharing of this information between the insurance, reinsurance and pension companies that engage in insurance activities as well as persons identified by the authorized institution. Those counted in this clause are also obligated to become members of the Center.

The Center has been active since 2003 albeit under different names. It was first built as "TRAMER" with Regulation on Traffic Insurance Information Center, changed to "Insurance Information Center" in 2011 and finally to Information and Monitoring Center with this clause in the Law. The Center acts as a one stop hub for insurance sector data and indicates its mission as storing those data securely, providing reliable and meaningful information and statistics for healthy pricing in the sector, ensuring trust in the insurance system by preventing misuse, assisting for public monitoring and supervision to be effective[32].

The Regulation extends and clarifies data sharing rules and procedures. By doing that, it also defines and clarifies "insurance data" to encompass all data that relate to insurance contracts, its parties i.e., insurer and insured; insured, beneficiaries and other third parties that benefit from the insurance contract and all data that are basis for risk assessment including insurance malpractices.

According to the Regulation, insurance data will be collected by the Center from legal entities and public institutions and organizations, professional organizations having public institution status and their superior organizations, and other information centers established by the relevant legislation, and will be kept in the "general database". These persons are obligated to provide the data requested by the Center. "General database" includes all production, damage, malpractice data obtained from the relevant institutions and all the other data stored by the Center.

Per the Regulation, member institutions are required to make all their policy production through the reference number taken from the Center and include these numbers in the policies. In terms of damage data, member institutions must open files using the reference number provided by the Center for all the notifications conveyed to them. The member institutions are also required to convey all production data based on insurance contracts simultaneously to the Center and convey to the Center all up-to-date unconcluded compensation data till the end of the day and all other damage data simultaneously and update those when necessary. If the damage data is changed due to a judicial decision, such update shall also be made by the member institution. All insurance malpractice data obtained from member institutions, specialized institutions and other sources are stored in the database established by the Center, which is obligated to ensure forming of control points, conduct data input, change and removal and identification of such data.

[32] "About" section of the Insurance Information and Monitoring Center, accessible at https://www.sbm.org.tr/tr/sayfa/sbm-hakkinda-63 (Last accessed on October 26, 2022)

The Regulation identifies rules and procedures for data sharing by identifying separate rules and procedures for malpractice data, data shared with insurance experts, authorized users[33] and others. Insurance data shall be shared with member institutions within the scope of Article 31/B. Data sharing with authorities, institutions and data centers is also possible but only through protocols signed by the Center upon the Authority's approval. Center is allowed to publish the data it obtained publically only if it is anonymized to a point where it is impossible to affiliate the data with any identified or identifiable person. This aligns with the anonymization approach of the Turkish data protection legislation and practice.

Malpractice data can only be shared with and accessed by member institutions, specialized institutions[34] and other persons and institutions identified by the Authority. Experts can access data of tangible assets, past policy and damage data of the parties. These are only available to them until the final expertise report is recorded to Center systems except for changes of the report or drafting of a supplementary report. Experts can also access the expertise reports they drafted through the general database. The content of the data accessible by the authorized users are defined by the Center upon the approval of the Authority provided that the access is limited to their work items. Their access can be limited, removed or suspended under specific situations and subject to certain rules and procedures. Center provides the policy and damage data that are related to insurance contracts and considered acceptable by the Authority following the required confirmation of identity or proving of right ownership. Other data requests that related to data in the general database are resolved by the Center Administration Committee provided that the content of such data is defined by the Authority.

Article 15 of the Regulation with the title of "Use of Insurance Data" section also lists the purposes for which the insurance data can be used. The insurance data can be used for the following purposes: i) to contribute to public monitoring, supervision and economic security in the insurance sector and to the planning of healthcare services financing, ii) to follow insurance practices, to ensure unity of practice in insurance branches, iii) to follow up on mandatory insurances, iv) to contribute to the prevention of insurance malpractices, v) to work towards increasing insurance rates, vi) to produce reliable statistics on the insurance sector and vii) to calculate insurance score.

It should be noted that while identifying the purposes, the Regulation chose the wording *"planning of healthcare services financing"*. The Personal Data Protection Law No. 6698 makes processing of health data possible without obtaining an explicit consent, only under very limited circumstances. The rule is *"Personal data concerning health and sexual life may only be processed, without seeking explicit consent of the data subject,* ***by the persons subject to secrecy obligation*** *or competent*

[33] Those who were provided limited Access to the data included in general database such as member institutions and authorized persons of specialized institutions, insurance agencies, insurance and reinsurance agencies, insurance experts and other persons and institutions depending on the relevancy.

[34] Insurance, Reinsurance and Pension Companies Union of Türkiye, its sub affiliates, Pension Monitoring Center, Turkish Catastrophe Insurance Institution (DASK), Agriculture Insurance Pool and institutions and authorities acting in the field of insurance and private pension.

public institutions and organizations, for the purposes of protection of public health, operation of preventive medicine, medical diagnosis, treatment and nursing services, ***planning and management of healthcare services as well as their financing****."* It has been long discussed in practice that whether processing health data within insurance activities would be considered within this exemption, however the outcome was often negative although it is obvious that conducting health insurance services would be impossible without processing health data. Some might think that obtaining explicit consent may be standardized for insurance activities and this might be handled simply by requesting additional consent document before starting the insurance services. However, this is contentious as well since by its nature, explicit consent requires free will and therefore making explicit consent a precondition of providing a service makes the explicit consent invalid. The Data Protection Board, with its decision No. 2020/667 [35] has resolved this conundrum by confirming that health data in the insurance policy cannot be processed based on the foregoing exemption but also decided that as it is not possible to process the data otherwise, obtaining explicit consent beforehand is not a process against the Personal Data Protection Law No. 6698. This may be a relieving action by the Data Protection Board, but it might be thought as a stretched interpretation to make an otherwise legally impossible but mandatory processing legally possible. By this attempt, the Regulation might be trying to fit the processing to a solid legal basis as the Article 31/B of the Law already provides obligation of secrecy and now the Regulation solidifies the purpose of "planning of healthcare services financing." It is still early to see the outcome of this but the Board may also find this comfortable to solve this conundrum in a more structured way.

The Regulation identifies the activities of the Center that are related to insurance data and these include data maturity measurement, drafting reports for the Authority regarding member institutions, specialized institutions and authorized users, drafting private information reports upon the request of member institutions and specialized institutions, studies of information for the relevant parties, testing and evaluating the convenience of technical infrastructure and other activities requested by the Authority within the scope Center's scope of duty and authority.

Member institutions, specialized institutions and authorized users must establish the necessary infrastructure for healthy sharing of data with the Center, adapt to system changes made by the Center and provide all the required information and documents without delay. Member institutions, specialized institutions and authorized users are obliged to share the data in a correct, complete, consistent, and timely manner, and the Authority has the right of recourse to these institutions if it pays compensation due to such obligations not being fulfilled or data transferred are shared with unauthorized third parties.

The Regulation also attempts to assign certain data controller obligations for data included and shared in the general database by stating that it is the member institution, specialized institution and authorized user who conducted the data transaction and other authorities and institutions who is in relation with the data subject, who is

[35] Accessible at: https://kvkk.gov.tr/Icerik/6878/2020-667, last accessed on October 26, 2022.

obligated to provide transparency information and obtaining explicit consents or approvals. However, the Center undertakes the data security and data system failures and deficiencies occurred in the data systems. It is also important to note that the Regulation states that data belonging to parties to insurance malpractices can be recorded to the general database and these data can be shared with the authorities and institutions within the scope of the relevant legislation, without the explicit consent or approval of the data subject.

The Regulation assigns an indefinite confidentiality obligation to all employees of authorities and institutions who were involved in data sharing within the scope of the Regulation. The persons who are in scope of this obligation but do not act within a public duty are also required to provide a confidentiality undertaking. This confidentiality obligation also encompasses those who provide information technology, hardware, network services, data centers and entities who provide services such as direct sales.

A remarkable development in the Regulation is that the data subjects now will be able to request rectification of their data from the Center due to their claim of incomplete or incorrect data. The Center evaluates the request and if required, decides to convey the request to the relevant member institution within ten (10) days. The institution examines the request submitted to it within a definite period of ten (10) days. After the examination, it may decide to accept the request and rectify the data and notify the Center of the correction process or decide to reject the request and forward the rejection decision to the Center with its reasoned explanation. Within ten (10) days after the decision is conveyed to the Center or the deadline passes, the Center informs the data subject about the result of the application. The member institutions that do not comply with the deadlines are reported to the Authority by the Center on a monthly basis. As a result, the Authority may impose all kinds of measures including revoking access of and benefiting from the data.

It is also noted that it is obligatory to act in line with the Personal Data Protection Law No. 6698 and the relevant legislation within the processing activities carried out within the scope of the Regulation.

The Center, upon the Authority's applicable opinion, is required to publish a transition calendar based on the branch or member institution but the transition period cannot pass nine months for Article 6/1 [36] and 7/1 [37] of the Regulation and cannot pass one year for Article 6/2[38] and 7/2 [39] of the Regulation (such one year period might be extended for one more year, at most upon the decision of the Insurance and Private Pensions Regulation and Supervision Board). If a transition calendar is not published, the Regulation

[36] The requirement of member institutions to make all their policy production through the reference number taken from the Center and to include these numbers in the policies.
[37] The requirement of member institutions to open files using the reference number provided by the Center for all the notifications conveyed to them, in terms of damage data.
[38] The requirement of member institutions to convey all production data based on insurance contracts simultaneously to the Center
[39] The requirement of member institutions to convey to the Center all up-to-date unconcluded compensation data till the end of the day and all other damage data simultaneously and update those when necessary. If the damage data is changed due to a judicial decision, such update shall also be made by the member institution.

would be deemed effective as of October 18, 2022.

Internet Law

New Amendments on Turkish Internet Law

Law No. 7418 on Amendment of Press Law and Certain Laws ("***Amendment Law***") is published in Official Gazette of October 18, 2022 and introduced significant amendments on certain laws including the Law on Regulation of Broadcasts via the Internet and Prevention of Crimes Committed through Such Broadcast ("***Law No. 5651***").

I. Article 8 of the Law No. 5651

New crimes are included to Article 8 with the Amendment Law and the contents that constitute a crime against the activities and personnel of the National Intelligence Organization which are included in the Articles 27/1 and 27/2 of the State Intelligence Services and National Intelligence Organization Law (i.e., unauthorized obtaining, provision and theft of information and documentation regarding duties and operations of National Intelligence Agency, forging and destroying them and disclosing the identities, positions, duties and operations of National Intelligence Agency officers and their families), are added to the catalog crimes under the Article 8.

Before the amendment, the crimes which the president of the Information Communication and Technologies Authority ("***ICTA***") might decide on removal of content were limited. With the amendment, the president of the ICTA shall *ex officio* decide for removal of content and/or access blocking for the content constitutes the crimes mentioned in the first paragraph of Article 8.

In cases where removal of content and/or access ban decisions granted by the President of the ICTA are not complied with, the President of the ICTA may decide to prohibit real persons and legal entities that are tax payer residents in Turkey to place new advertisements on the foreign based SNP for up to six months, in this respect, new contracts cannot be executed and money transfer cannot be made regarding such. Along with the advertisement ban decision, the President may apply to criminal judgeship of peace for bandwidth throttling of 50% of the SNP's traffic until the removal of content and/or access ban decision is complied with. In case the removal of content and/or access ban decision is not complied with by the SNP within thirty days as of the date the social network provider is notified of the decision on bandwidth throttling of 50%, the President may apply to criminal judgeship of peace for bandwidth throttling up to 90% of the SNP's traffic.

II. Article 9 of the Law No. 5651

There is also a new amendment in terms of the decisions granted by the Access Providers Union ("***APU***"). With the amendment, objection against the APU's decision accepting the application shall be made to the judgeship who granted the initial access ban decision.

III. Additional Article 4 of the Law No. 5651

Before the enactment of the Amendment Law, real person representative of the social network provider ("***SNP***") which secures more than one million daily access from Turkey should only be a Turkish citizen. However, with the new

amendment, the Turkish citizen representative must also reside in Turkey.

In terms of the SNPs whose daily access is more than ten million, the Amendment Law requires the legal entity representatives of those SNPs to be established by the relevant SNP as a branch office incorporated in form of a stock corporation.

There are also certain amendments in terms of the reports that should be submitted to the ICTA. The reports submitted by SNPs to the ICTA should also include title tags, algorithms of content that have increased visibility or reduced access, information on advertisement policies and transparency policies. SNP is obligated to act within the principle of accountability, to provide transparency in compliance with the law, to provide to the ICTA all the required information and documents regarding compliance with the law when asked by the ICTA. SNP should take the necessary measures, in case of cooperation with the ICTA, for its own system, mechanism and algorithm for prevention of broadcast of contents and title tags concerning crimes within the scope of the Law No. 5651 and should include these measures in its report. Besides, with the new amendment SNP should take the necessary measures for providing the option for the users to update preferences pertaining to the contents it suggests and the option to limit use of their personal data and includes these measures in its report. Amendment Law also brings another obligation in terms of the report. SNP should form an advertisement library which contains information on advertisements such as content, advertiser, advertisement period, target audience, number of persons or groups reached and publishes this on its website and includes this in its report.

There is also a significant amendment in terms of the information requests. The information necessary to reach an offender who created or disseminated the content subject to certain crimes under the Turkish Criminal Code (e.g. sexual harassment of children, spreading misleading information publicly, disruption of the unity and territorial integrity of the state) shall be provided by the SNP's Turkish representative to judicial authorities upon request of public prosecutors during the investigation phase, and of the relevant court hearing the case during the prosecution phase. If this information is not provided, the relevant public prosecutor may apply to Ankara Criminal Judgeship of Peace with the request of bandwidth throttling of ninety percent of the foreign based SNP.

Amendment law requires SNPs to take the necessary measures in providing separated services specific to children.

The ICTA may request all kinds of explanation from the social network provider regarding the SNP's compliance with the Law No. 5651 including but not limited to corporate structure, information systems, algorithms, data processing mechanisms and commercial attitude. SNP is obligated to provide the information and documents requested by the ICTA within three months at the latest. The ICTA may also carry out site visits to ensure the SNP's compliance with the Law No. 5651 at all facilities of the social network provider.

The provisions regarding Law No. 5651 have entered into force at the date of publishing (i.e., October 18, 2022). That said, the SNP who appointed a representative before the publishing date of the Amendment Law has six (6) months to comply with the amendments.

Telecommunications Law

New Regulation on OTT Services and OTT Service Providers

Law No. 7418 on Amendment of Press Law and Certain Laws ("***Amendment Law***")[40] is published in Official Gazette of October 18, 2022 and introduced significant amendments on certain laws such as the Press Law No. 5187, the Turkish Criminal Code No. 5237 and the Law No. 5651 on the Regulation of Broadcasts via the Internet and the Prevention of Crimes Committed through Such Broadcast ("***Law No. 5651***") and the Law No. 5809 Electronic Communications Law ("***Law No. 5809***").

Among the amendments, the definition and rules and procedures for over-the-top ("***OTT***") services and OTT service providers are introduced for the first time. Currently, OTT service providers are able to provide services over the Internet without being subject to any regulations in Turkey, except certain provisions related to content providers and hosting providers under the Law No. 5651. In the reasoning of the Amendment Law, it is stipulated that OTT services which are provided without being subject to any law in Turkey may create unfair competition in relation to operators that have been authorized by the Information and Communication Technologies Authority ("***ICTA***") and that provide similar services. In this context, ICTA is authorized to make necessary regulations and take relevant precautions in terms of OTT services and OTT service providers.

The Amendment Law defines OTT service and OTT service providers. Accordingly, the Amendment Law outlines OTT service as an (i) electronic communication service, (ii) in auditory, 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. Additionally, OTT service provider is defined as the real person or legal entity providing services within the scope of the definition of OTT services.

Furthermore, the Amendment Law authorizes the ICTA to make necessary regulations related to OTT service provision, take any measures including setting forth obligations for operators to ensure prevention of provision of OTT services without fulfillment of obligations foreseen in regulations or authorization. According to the Amendment Law, OTT service providers carry out their activities within the scope of the authorization given by the Authority through their fully authorized representatives having the status of a joint-stock company or a limited liability company established in Turkey.

Additionally, OTT service providers shall be deemed as operators in aspect of the rights and obligations to be determined by the Authority according to the feature of the OTT services provision, among the rights and obligations determined for the operators within the Law No. 5809 and other relevant legislation related to the Authority's field of duty.

Furthermore, the Amendment Law foresees an administrative fine at the amount ranging between one (1) million Turkish Liras and thirty (30) million Turkish Liras, for the OTT service providers who provide OTT services

[40] https://www.resmigazete.gov.tr/eskiler/2022/10/20221018-1.htm (Last accessed on October 24, 2022).

without required authorizations. OTT service providers who do not pay the administrative fine amount in due time and do not comply with the requirements within six (6) months upon the notification, might be subject to bandwidth throttling up to 95% or access ban of the relevant application or website.

It is important to point out that, as currently there is no clarification on how the authorization requirement will be applied to the OTT service providers, it is expected that ICTA will issue secondary legislation and clarify the obligations of the OTT service providers.

The provisions regarding Law No. 5809 have entered into force at the date of publishing (i.e., October 18, 2022).

White Collar Irregularities

2022 FCPA Enforcement Actions and Highlights

So far, 2022 has seen around the same amount of activity in terms of enforcement actions under the Foreign Corrupt Practices Act ("***FCPA***"), compared to 2021. In 2022, the United States Department of Justice[41] ("***DOJ***") took a total of 17 enforcement actions, and the Securities and Exchange Commission[42] ("***SEC***") took a total of 4 enforcement actions. Therefore, it is seen that the DOJ has been a lot more active than the SEC in terms of the number of enforcement actions this year.

According to the FCPA Blog's "2022 FCPA Enforcement Index" for the second year in a row, the enforcement activity has tracked well below the average. In 2022, there have been 4 enforcement actions totaling $865 million in penalties and disgorgement. It is also worthy of note that Russia's invasion of Ukraine which began in February 2022, impacted the ability of U.S. authorities to conduct comprehensive investigations, in terms of their access to documents, witnesses, or Ukrainian and Russian authorities.

I. DOJ and SEC Enforcement Actions - Highlights

In September 2022, Brazilian airline company headquartered in Sao Paolo, Brazil, GOL Linhas Aéreas Inteligentes S.A. ("***GOL***"), has agreed to pay more than $41 million to resolve parallel bribery investigations by criminal and civil authorities in the United States and Brazil for violating the anti-bribery and books and records provisions of the FCPA. The charges arose out of a scheme in which GOL caused multiple bribe payments to be made to various officials in Brazil to secure the passage of two pieces of legislation favorable to GOL. According to the SEC's order, a member of GOL's Board of Directors authorized GOL to enter into fraudulent contracts with, and make payments to, various third-party entities connected to Brazilian officials and attempted to obtain financing from a Brazilian state-owned financial services institution. According to the order, the director bribed Brazilian government officials in exchange for passing of a legislation that would benefit GOL, which,

[41] *See:* https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2022 (last accessed on October 26, 2022).
[42] *See:* https://www.sec.gov/enforce/sec-enforcement-actions-fcpa-cases#targetText=SEC%20Enforcement%20Actions%3A%20FCPA%20Cases&targetText=In%202010%2C%20the%20SEC's%20Enforcement,government%20contracts%20and%20other%20business (last accessed on October 26, 2022).

in particular, would cause a significance reduction in payroll taxes the director's road transportation company would be required to pay, as well as a reduction in aviation fuel tax for the air transport industry. The order finds that, between 2012 and 2013 GOL conspired to offer and pay around $3.8 million in bribes, and GOL maintained its books and records that falsely listed the corrupt payments as legitimate expenses, such as expenses for advertising services. According to the SEC, GOL agreed to pay more than $87 million to settle criminal charges, however as it demonstrated its financial condition and inability to pay the fines in full, both SEC and DOJ waived certain amount of the payment, reducing the fines to $24.5 million and $17 million, respectively. GOL will also pay around $3.4 million in additional penalties or restitution to Brazilian authorities.

In May 2022, the DOJ charged Glencore International A.G. ("***Glencore***") and Glencore Ltd., both part of a multi-national commodity trading and mining firm for fuel oil, headquartered in Switzerland. The companies agreed to pay over $1.1 billion for committing a commodity price manipulation scheme and for violations of the FCPA, as part of coordinated resolutions with criminal and civil authorities in the United States, the United Kingdom, and Brazil. According to the DOJ's press release, for over a decade, Glencore and its subsidiaries were involved in a bribery scheme committed through their intermediaries for providing benefits to foreign officials in different countries. Per the plea agreement, Glencore has agreed to pay $428 million as criminal fine and $272 million for criminal forfeiture and disgorgement, as well as to retain an independent compliance monitor for three years. On the other hand, Glencore also willfully conspired to manipulate fuel oil prices at two of the busiest commercial shipping ports in the U.S. Accordingly, Glencore Ltd. agreed to pay a criminal fine of over $341 million, forfeiture of over $144 million, and retain an independent compliance monitor for three years.

In April 2022, Stericycle Inc. ("***Stericycle***"), an international waste management company based in Lake Forest, Illinois, has agreed to pay more than $84 million to resolve the investigations of the United States and Brazil authorities regarding the allegations of bribery of foreign officials in Brazil, Mexico, and Argentina. According to the SEC's order and the DOJ's press release, Stericycle paid approximately $10.5 million in bribes to foreign officials to obtain and maintain business from government customers in Brazil, Mexico, and Argentina from 2011 to 2016, and Stericycle staff even kept spreadsheets that identified government customers who received bribes. They also produced false and misleading accounting documents and engaged in fake transactions with third parties to generate and conceal the funds used to make the illicit payments.

In June 2022, the SEC announced that Tenaris S.A. ("***Tenaris***"), a global manufacturer and supplier of steel pipe products based in Luxembourg, has agreed to pay more than $78 million to resolve charges related to an alleged bribe scheme involving its Brazilian subsidiary. According to the SEC's order, between 2008 and 2013, in order to increase sales in Brazil, the subsidiary paid approximately $10.4 million in bribes to a government official at the Brazil state-owned entity Petrobras, in connection with a tender process which enabled it to preserve its status as the only domestic supplier. The

bribe payments to government official were sourced initially from a bank account in the name of an offshore company, which was funded by a Tenaris-affiliated company, and fake contracts were executed to conceal the bribery payments. The order finds that Tenaris will periodically report to the SEC its status of remediation and implementation of compliance measures, procedures, practices, internal accounting controls, recordkeeping, and financing reporting processes.

In February 2022, the SEC announced that South Korea's largest telecommunications operator KT Corporation ("***KT Corp.***") agreed to pay $6.3 million to resolve charges for violations of the FCPA (approximately $3.5 million in civil penalties and $2.8 million in disgorgement) as a result of improper payments provided for the benefit of government officials in Korea and Vietnam, without admitting or denying the findings. According to the SEC's order, KT Corp. engaged in multiple schemes to make improper payments and lacked sufficient internal accounting controls over charitable donations, third-party payments, executive bonuses, and gift card purchases for over a decade. KT Corp. employees generated slush funds used for gifts and for illegal political contributions to government officials in Korea who had influence over KT Corp.'s business and made payments to seek business from government customers in Vietnam.

Intellectual Property Law

A Turkish IP Court Implemented the First Ever Preliminary Injunction over an NFT of a legendary Turkish Anatolian Rock Singer Cem Karaca

I. Introduction

The Non-Fungible Token ("***NFT***") concept is still a hot topic in almost every sector and global giants are getting more and more used to the NFTs and t their use in each and every business every day. As a natural outcome of these snowballing reactions of the world's business pioneers, disputes started to arise out of creating and commercializing NFTs. Within this scope, very recently, a Turkish IP Court rendered the first-ever preliminary injunction decision on an NFT, which is about a portrait of a legendary Anatolian rock singer Cem Karaca.

II. The summary of the dispute

In the lawsuit initiated by Emrah Karaca, the son and the heir of the Anatolian rock singer Cem Karaca, against an artist who is the creator of the subject matter NFT of Cem Karaca, the Court rendered the first-ever preliminary injunction decision. Despite the lawsuit still being under evaluation of the IP Court as to its merits, the Court deemed it fit to prohibit the sale of the subject-matter NFT of Cem Karaca.

The plaintiff argued in the lawsuit that the portrait of Cem Karaca is being illegally used by the defendant in both physical and NFT forms as well as other forms to be determined by the Court. Further to this allegation, a preliminary injunction is requested to be issued without serving the case papers regarding the determination of the evidence process to the defendant since the defendant can remove the subject-

matter content if he were to be informed of that process. The plaintiff requested certain URL addresses to be access banned and prevention of the subject-matter NFT of Cem Karaca on Opensea platform.

The Court appointed an expert panel for determination of evidence and the panel opined that the defendant commercialized the portrait of Cem Karaca in NFT form and in printed form and that this constitutes a violation of personal rights.

In conclusion the Court accepted the preliminary injunction request of the plaintiff in return for deposit of collateral amounting TL3.000 and that scope ruled for (i) access ban the URL addresses wherein the portrait of Cem Karaca is being used without consent and (ii) prevention of the sales of the NFT of Cem Karaca on OpenSea.

The defendant objected against the decision, which is then rejected.

III. The effects of the decision on Turkish IP Law

It is not a new practice for Turkish courts to implement preliminary injunction decisions to stop the commercialization of the subject matter goods or services, of course, if the other requirements for a preliminary injunction request are also met.

However, the decision poses importance for providing a glimpse of the Court's understanding regarding the concept of "use" in IP law in the context of all these world-changing technological developments, such as NFTs, by accepting a use in the form of NFT as a use that can be recognized under the current context and umbrella of intellectual property laws.

Another important aspect of the decision is that a Turkish court acknowledged the concept of NFT and recognized that NFTs could be subject to a preliminary injunction.

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

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

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

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

For further information, please visit www.elig.com

ELİG
GÜRKAYNAK
Attorneys at Law

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