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Preface to the March 2023 Issue

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

Initially, the Corporate Law section focuses on the amendments to the independent audit requirements and provides a detailed explanation on the New Decree, which set out the new criteria and thresholds brought to companies that are subject to independent audit.

The Competition Law section of this issue features five articles, analysing recent developments in the field. The section highlights recent notable decisions of the Board, one of which focuses on the changing market dynamics in the online food delivery sector. In terms of mergers and acquisitions developments, this section analyses the Cinven/IFLG decision which delves deep into the threshold exemption set out by the Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 as well as discussing the Board's approach towards undertakings who generate turnover outside Turkey but whose activities fall under the sectors defined in the newly published communiqué. Furthermore, the section features a deep dive into the ancillary restraints in merger control cases. The last article examines the Board`s Hepsiburada decision that includes different approaches from Board members on the hindrance of on-site inspections, and addresses the issue whether the deletion of WhatsApp messages would constitute hindrance of on-site inspections, in accordance with the Board's precedents on the matter.

Moving on, the Data Protection Law section provides an overview of 2022 in light of the Data Protection Board's foremost decisions rendered throughout the year on the topics of processing of personal data; unconsented access to a former employee's e-mail account, as well as a special focus on the Data Protection Act guidelines on various issues such as cookies and banking practices, and other important developments. The Internet Law section provides insight on the Constitutional Court's recent decision on the freedom of expression.

White Collar Irregularities section takes this issue into a different direction by including an in-depth analysis on the US Department of Justice's recent practices and publications pertaining to corporate compliance regulations for multinational corporations. Lastly, the Intellectual Property Law section scrutinizes in detail the new obligations brought by the latest regulation for e-commerce intermediary service providers, aimed to ensure a simplified and free-of-charge communication with the e-commerce intermediary service providers.

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

March 2023

Corporate Law

Amendments to the Independent Audit Requirement Criteria for Turkish Companies

I. Introduction

The Turkish Commercial Code No. 6102 ("***TCC***") and the Decree on the Determination of the Companies Subject to Independent Audit set forth the general rules and principles in relation to independent audit. Companies are required to have an independent audit conducted, if they are among the sectors specified under the decree, or if they exceed the thresholds stipulated therein.

In addition to specifically listing some sectors for the companies subject to the independent audit requirement (*e.g.*, banks and financing companies, insurance companies), the decree also groups other companies into three subcategories and also provides that companies which exceed the threshold values of at least two of the three criteria consecutively for two financial years shall become subject to the independent audit requirement. The Decree on the Determination of the Companies Subject to Independent Audit No. 6434 ("***New Decree***") published in the Official Gazette dated November 30, 2022 and numbered 32029 abolished the previous Decree on the Determination of the Companies Subject to Independent Audit No. 2018/11597 ("***Abolished Decree***") and amended the thresholds of the criteria for determining the companies subject to independent audit.

In this article, our aim is to explain the new criteria determined by the New Decree while determining whether a company is subject to an independent audit.

II. Amendment in the Thresholds

The companies which will be subject to independent audit are set out under Article 3 of the New Decree. Accordingly (i) the companies listed in Annex I of New Decree (regardless of total assets, annual net sales revenue or number of employees) and (ii) the companies exceeding the thresholds for at least two of three criteria stated in New Decree for two consecutive accounting periods, shall be subject to independent audit.

The companies listed in Annex I are as follows: (a) those entities which are regulated and supervised by the Capital Markets Board, such as investment enterprises, collective investment enterprises, portfolio management companies, mortgage financing companies, leasing companies, central settlement enterprises, global custody enterprises, data storage companies, rating enterprises; (b) entities which are regulated and supervised by the Banking Regulation and Supervision Agency such as banks, rating enterprises, financial holding companies, financial leasing companies, factoring companies, financing companies, asset management companies, saving finance companies; (c) insurance, reassurance and retirement companies; (d) authorized enterprises, precious metal intermediary companies, companies engaged in the manufacturing or trade of precious metals, which are authorized to operate in Istanbul Borsa exchange markets; (e) licensed warehouse enterprises established in accordance with the Agricultural Products Licensed Warehousing Law and public warehouses established in accordance with the Law on Public Warehouses; (f) media service providers which have one or more of the following rights and licenses: the right to broadcast terrestrial national television, satellite television broadcasting

license, or multiple cable television broadcasting license.

Before explaining the amendments made to the thresholds, it is important to note that the New Decree, as well as the Abolished Decree, groups those companies which do not fall under Annex I into three subcategories and determines different thresholds for each category. The subcategories are: (1) the companies whose capital market instruments are not traded on a stock exchange or other organized markets, but are deemed to be publicly traded within the scope of the Capital Markets Law No. 6362, (2) the companies listed in Annex II (*i.e.*, companies subject to independent audit under the regulations of the Energy Market Regulatory Authority, companies that publish daily newspapers nationwide, companies subject to the regulation and supervision of the Information Technologies and Communications Authority, companies whose shares are at least 25% directly or indirectly owned by public institutions, unions, associations, foundations, cooperative and their parent entities) and (3) other companies which do not fall within the scope of subcategories (1) and (2) above.

1. Subcategory (1)

For companies whose capital market instruments are not traded on a stock exchange or other organized market but deemed to be publicly traded within the scope of the Capital Markets Law No. 6362, the thresholds were amended as follows: (i) The threshold value of the total assets was increased from TL 15 million to TL 30 million, (ii) the threshold value of annual net sales revenue was increased from TL 20 million to TL 40 million, and (iii) the threshold of the number of employees was kept the same at 50 employees.

2. Subcategory (2)

For the companies listed in Annex II, the thresholds were amended as follows: (i) The threshold value of the total assets was increased from TL 30 million to TL 60 million, (ii) the threshold value of annual net sales revenue was increased from TL 40 million to TL 80 million, and (iii) the threshold of the number of employees was reduced from 125 to 100 employees.

3. Subcategory (3)

For those companies that do not fall within the scope of subcategories (1) and (2), the thresholds were amended as follows: (i) The threshold value of the total assets was increased from TL 35 million to TL 75 million, (ii) the threshold value of the annual net sales revenue was increased from TL 70 million to TL 150 million and (iii) the threshold of number of employees was reduced from 175 to 150 employees.

In addition to amending the thresholds, the New Decree has added savings finance companies into the list of companies in Annex I, as well as to the companies subject to the regulation and supervision of the Banking Regulation and Supervision Authority in accordance with Banking Law No. 5411.

Lastly, Article 4 sets out which companies fall outside the scope of the New Decree. Accordingly, those savings finance companies that were decided to be liquidated by the Banking Regulation and Supervision Agency in accordance with the provisional Article 7/4 of the Financial Leasing, Factoring, Financing and Savings Finance Companies Law No. 6361 and whose liquidation processes have been carried out by the liquidation commissions

appointed by the Savings Deposit Insurance Fund, were exempted from independent audit.

III. Conclusion

The New Decree entered into force on January 1, 2023 and simultaneously abolished the (previous) Decree on the Determination of the Companies Subject to Independent Audit No. 2018/11597. Accordingly from this date onwards, the criteria determined under New Decree must be taken into consideration when determining whether a company is subject to independent audit requirements.

Banking and Finance Law

Turkey: Draft Regulation for Amending the Regulation on Bank Cards and Credit Cards

I. Introduction

According to Article 3 of the Law No. 5464 on Bank Cards and Credit Cards Law ("***Law***"), card system organizations are defined as entities "*which establish a bank card or credit card system and grant authorization to issue cards or enter into merchant agreements according to the said system*" and in accordance with Article 4 of the Law, organizations intending to establish a card system, issue cards, enter into agreements with merchants and engage exchange information activities are required to obtain a license from the Banking Regulation and Supervision Agency ("***BRSA***").

The BRSA has announced a Draft Regulation on Amending the Regulation on Bank Cards and Credit Cards in October 2022 ("***Draft Regulation***") for public consultation. In this article, we will be briefly summarizing the provisions planned to be introduced with the Draft Regulation.

II. New Provisions Introduced by the Draft Regulation

A "card scheme" definition is planned to be added to the Regulation on Bank Cards and Credit Cards ("***Regulation***"), where card scheme shall mean the entire rules, practices, guides and standards that enable carrying out card payment transactions, including the management and decision bodies responsible for the execution of this operation, and the organizational structure; regardless of the infrastructure and payment system that supports operation of a card system organization.

The Draft Regulation introduces a new clause *(as paragraph 6 to Article 21 of the Regulation)*, providing that a card issuing organization (card issuer), which could be a bank or other institution authorized to issue debit/bank card or credit card in Turkey, shall not issue a card under a sole card scheme if that card system organization does not have license/operation permit in Turkey. However, the card scheme of such a card system organization, may be defined to a card, provided that another card scheme (belonging to a card system organization having license/operation permit in Turkey) is also defined to this card. The new provision also regulates that in case a card scheme brand is included on the card, it is mandatory to include all card scheme brands for which the card is defined. Carrying out a transaction through the POS machine of an organization that has obtained an operating license as a member merchant agreement in Turkey is considered as domestic use of the card.

Another new clause introduced by the Draft Regulation *(as paragraph 7 to Article 21 of the Regulation)* provides that the card issuing organizations will be obliged to present the customer the option to select from which card system organization the card will be issued from, including the card scheme brands of card system organizations headquartered abroad that have opened branches or representative offices in Turkey. They will abide by the customer's preference and provide clear and objective information about the functions, costs, customer rights and security features of all card scheme options, including the domestic and international use of the card at the time the customer is applying for the card. When exercising their right to choose their card scheme, the customer cannot be forced to choose more than one card scheme brand at the same time, and before granting a card, if the customer prefers to use more than one card scheme at the same time, it should also be ensured that the customer can determine which scheme will be applied to their card, primarily.

However, it should be noted that as per the Draft Regulation, cards issued by card issuing organizations before the effective date of the new proposed article, will be exempt from the provisions of the sixth and seventh paragraphs of Article 21 of the Regulation. If the said cards are renewed after the effective date of this article, this exemption will not apply.

III. Conclusion

The Draft Regulation has not yet been published, and may be subject to further changes in line with the comments to be received by the relevant parties. If the Draft Regulation enters into force as is, it is expected that some other relevant legislation may also need to be amended in order to ensure smooth operation of the technical requirements set out under the Draft Regulation.

Capital Markets Law

Fundamental Obligations of Unlisted Public Companies

Under Turkish law certain companies are considered to be public companies, despite the fact that their shares are not listed or traded in any stock exchange. Accordingly, as per Article 16/1 of the Capital Market Law numbered 6362 ("***Capital Market Law***") the shares of joint-stock companies having more than five hundred shareholders are deemed to be publicly held. Similarly, per Article 16/3 of the Capital Market Law, shares of joint-stock companies (i) held by cooperatives which have more than five hundred shareholders, or cooperative unions where the number of shareholders in shareholding cooperatives exceed five hundred (on a solo basis or in the aggregate) or cooperative central unions having control management, and (ii) which have a minimum annual revenue of TL 50 million are also deemed to be publicly held.

The Capital Market Law and its secondary legislation sets forth certain obligations for unlisted public companies, main ones include the (i) obligation to pay dividends in full and in cash, (ii) obligation to disclose material events to the public, (iii) obligations regarding the preparation, independent auditing and public disclosure of financial statements and annual reports, (iv) obligation to obtain the Capital Markets Board's approval for amendments in the articles of association, (v) prohibition of disguised transfer of profits, (vi) obligation to make tender offer, (vii)

significant transactions and the exit rights and (viii) obligations of companies with privileges regarding voting rights and representation in the board of directors.

I. Obligation to Pay Dividends in Full and in Cash

The principles regarding the distribution of dividends and dividend advances, protection of dividends and determination of dividend policy of unlisted public companies are mainly regulated by Dividend Communiqué (II-19.1) ("***Communiqué No. II-19.1***").

As per Article 7 of the Communiqué No. II-19.1, for unlisted public companies, the dividend distribution rate cannot be less than 20% (twenty percent) of the net distributable profit for the period, including donations, determined in accordance with the provisions of the Communiqué. It is mandatory to distribute dividends in full and in cash. However, the entities may refrain from distributing dividends for the relevant accounting period if the amount of dividend to be distributed is less than 5% (five percent) of the share capital according to the last annual financial statements to be submitted to the general assembly, or if the net distributable profit for the period according to the said financial statements is below TL 662,585 (*approximate amount for the year 2023*). In such a case there is also the obligation to issue a public disclosure regarding this exceptional situation and its reason.

Pursuant to Article 4 of the Communiqué No. II-19.1, companies shall distribute their profits within the framework of their profit distribution policies. In addition, Article 5 stipulates that dividends shall be distributed equally to all shareholders existing as of the date of distribution, pro rata their shareholding, regardless of the shares' issue and acquisition dates, unless the privileges defined in the articles of association stipulate otherwise. Dividends may be paid in equal or different installment amounts, provided that this is resolved at the general assembly meeting where the distribution decision has been taken.

It is also important to note that unless the entity duly sets aside the mandatory legal reserves and the dividend determined for the shareholders in the articles of association or the dividend distribution policy, it may not resolve to allocate other legal reserves, to transfer its profits to the following year or to distribute dividends to the holders of usufruct shares, board members, employees of the company and third parties other than shareholders.

On a relevant note, as per Article 6 of the Communiqué No. II-19.1, in order for unlisted publicly companies to make donations, there should be a specific provision in the articles of association to that effect. If not, the limit of donations to be made is determined by the general assembly. Accordingly, the Capital Markets Board of Türkiye ("***Board***") is authorized to set an upper limit on the amount of donations.

II. Obligation to Disclose Material Events to the Public

The principles regarding the public disclosure of material events of unlisted public companies are regulated by the Communiqué on Material Events Disclosure Regarding Non-Publicly Traded Corporations (II-15.2) ("***Communiqué No. II-15.2***"). Accordingly, it is obligatory for unlisted public companies to inform the Board within 5 (five) business days from the date

of the emergence or learning of the special circumstances specified in the Communiqué, or any changes to these special circumstances. The Board is also authorized to request information from relevant company or other persons obliged to make a public disclosure by means of electronic media or other media organs.

III. Obligations regarding the Preparation and Public Disclosure of Financial Statements and Annual Reports and Independent Audit

Unlisted public companies shall prepare their annual financial reports in accordance with the Communiqué on Principles of Financial Reporting in Capital Markets numbered II-14.1 ("***Communiqué No. II-14.1***"). It is obligatory for the board of directors to resolve on the acceptance of the financial statements and annual reports as a separate item in the agenda.

These companies shall also submit their annual financial reports and independent audit reports, if any, to the Board at least 3 (three) weeks before the date of the general assembly meeting where these reports will be discussed, but in any case, by the end of the third month following the end of the relevant accounting period. In addition, pursuant to the relevant provisions of the TCC, if these companies are obliged to have a website, they must announce their financial reports on their websites after they are publicly disclosed, in a manner that is easily accessible by users of the financial reports and make this information publicly available on the said websites for at least 5 (five) years.

IV. Obligation to Obtain the Board's Approval for Amendments to the Articles of Association

Pursuant to Article 33/2 of the Capital Markets Law, unlisted public companies are required to obtain prior approval of the Board for making any amendment to their articles of association.

V. Prohibition of Disguised Profit Transfers

Pursuant to Article 21 of the Capital Markets Law, unlisted public companies, as well as their subsidiaries and affiliate entities, are prohibited from transferring profits or other assets by reducing them or preventing their increase, by entering into agreements or commercial practices involving different prices, fees, charges or conditions or by engaging in transactions such as generating transaction volume with real persons or legal entities with whom they are directly or indirectly related in terms of management, audit or capital, contrary to arm's length principles, market practices, prudence and integrity in commercial life, as such actions would constitute disguised profit transfer.

As per the same article, it would also constitute disguised profit transfer if unlisted public companies and their subsidiaries and affiliates increase the profits or assets of real or legal persons they are related by failing to act as a prudent and honest merchant within the framework of their articles of association or bylaws or in accordance with market practices in order to maintain or increase their profits or assets. Accordingly, unlisted public companies are not allowed to make such transactions.

VI. Obligation to Make Tender Offer

As per the Article 26 of the Capital Markets Law, in unlisted public companies, the shareholders gaining management control or voting rights must make an offer to other shareholders to purchase their shares. Holding directly or indirectly more than 50% (fifty percent) of the voting rights of the corporation alone or together with persons acting in concert, or holding privileged shares which gives the right to elect the absolute majority of the members of the board of directors or the right to nominate the same number of directors in the general assembly shall be deemed as gaining control of management.

Within 6 (six) business days following the acquisition of the shares that provide management control, an application must be made to the Board to make a tender offer. It is obligatory to start the actual tender offer process within 2 (two) months following the date of the tender offer obligation.

In the tender offer applications to be made to the Board, the relevant information form must be prepared. The Board approves the information form if it is determined that the information contained in the information form is reliable, understandable and complete according to the standards set by the Board. Pursuant to Article 13 of the Communiqué on Tender Offers No II-26.1, the actual tender offer process starts within a maximum of 6 (six) business days following the approval of the information form by the Board. The tender offer period cannot be less than 10 (ten) business days and more than 20 (twenty) business days.

VII. Significant Transactions and the Exit Right

Considering the provisions of Articles 4 and 5 of the Communiqué on Significant Transactions and Exit Right No. II-23.3 and implementations of the Board, the following transactions of unlisted public companies are generally deemed significant transactions:

i. Becoming a party to merger or spin-off transactions, making a decision to change company type or go into liquidation,

ii. Transferring or leasing all or a significant portion of its assets or establishing rights in rem over all or a significant portion of its assets,

iii. Changing its field of activity completely or significantly,

iv. Providing for privileges or changing the scope or subject matter of existing privileges,

v. Acquiring or leasing significant assets from related parties,

vi. Fulfillment of the cash capital contribution obligation arising from the share capital increases they plan to make by offsetting the debts arising from the transfer of assets other than cash to the shareholding,

vii. Acquiring the funds which exceed above the existing share capital as a result of the planned share capital increase and using such funds for partial or full payment of debts to related parties defined in the relevant regulations of the Board and arising from asset transfers to the company other than cash.

Shareholders or their representatives who attend the general assembly meetings regarding certain significant transactions, but cast negative votes and have their dissenting opinions recorded in the minutes of the general assembly meeting have the right to leave the company by selling their shares to the company. In terms of such significant transactions, it is obligatory to make a tender offer by the real or legal persons who will benefit from these transactions.

VIII. Obligations of Companies Granting Privileges regarding Voting Rights and Representation in the Board of Directors

The procedures and principles regarding the abolition of privileges regarding voting rights and representation in the board of directors in unlisted public companies that have incurred a loss for 5 (five) consecutive years according to their financial statements are regulated by the Communiqué on Principles Regarding the Abolition of Privileges regarding Voting Rights and Representation in the Board of Directors ("***Communiqué No. II-28.1***").

Pursuant to Article 4 of the Communiqué No. II-28.1, without prejudice to the circumstances reasonably necessitated by their activities, privileges regarding voting rights and representation in the board of directors are abolished by Board resolution in unlisted public companies that have incurred a loss for 5 (five) consecutive years according to their financial statements prepared in accordance with the legislation.

According to Article 6 of the Communiqué No. II-28.1, unlisted public companies that have incurred a loss for the period for 5 (five) consecutive years shall submit their explanations, if any, regarding the reasonable and compulsory circumstances of their activities that caused a loss for the period in all or any of the 5 (five) accounting periods in question, within 20 business days following the date of unlisted public disclosure of the financial statements for the fifth accounting period.

In addition, Article 7 stipulates that as of the date of the Board decision regarding the removal of privileges regarding voting rights and representation in the board of directors, such privileges can no longer be used and within maximum 2 (two) months following the notification of the relevant Board decision, the relevant company is obliged to apply to the Board to make the necessary amendments to the articles of association and to include the amendments to the articles of association as approved by the Board in the agenda of the general assembly at the next meeting.

Competition / Antitrust Law

Undertakings Generating Turnover Outside of Turkey in the Sensitive Sectors Defined in the Secondary Legislation Will Fall into the Lower Jurisdictional Threshold Regime If They Have Any Commercial Activity or Users in Turkey in Any Market[1]

I. Introduction

On March 4, 2022, the Turkish Competition Authority ("***Authority***")

[1] This Article was first published on Mondaq https://www.mondaq.com/turkey/antitrust-eu-competition-/1276454/the-competition-board-clarified-that-undertakings-generated-turnover-abroad-in-the-sectors-regarded-sensitive-and-thus-exempted-will-be-considered-within-the-scope-of-threshold-exemption-if-they-have-any-activity-in-turkey

published the Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board ("***Amendment Communiqué***") that became effective as of May 4, 2022 and introduced a sectoral jurisdictional turnover threshold exception for the mandatory merger control filing requirement. In the absence of any precedent of the Turkish Competition Board ("***Board***"), the Amendment Communiqué had initially raised certain questions regarding the application of the sectoral threshold exception. One of the questions was as to whether the exceptional thresholds should apply, if a target company does not operate in the "exempted sectors" in Turkey but it does operate in the "exempted sectors" anywhere in the world. The Board clarified this particular point with its recent *Berkshire/Alleghany*[2] decision, which was published on January 24, 2023, on the Authority's official website, and confirmed that a target company does not need to operate in the "exempted sectors" in Turkey for the sectoral threshold exception to apply, so long it generated turnover abroad in the "exempted sectors" and has any activity in Turkey.

II. New Thresholds and Sectoral Threshold Exception

The Amendment Communiqué led to significant changes in terms of the notifiability analyses under Turkish merger control regime due the sectoral jurisdictional turnover threshold exception along with the increased jurisdictional turnover thresholds. In this respect, a transaction is subject to a mandatory merger control filing in Turkey, if one of the jurisdictional turnover thresholds set forth below is satisfied[3]:

a. The aggregate Turkish turnover of the transaction parties exceeding TL 750 million (approximately EUR 43.2 million and USD 45.3 million) and the Turkish turnover of at least two of the transaction parties each exceeding TL 250 million (approximately EUR 14.4 million and USD 15.1 million), or

b. The Turkish turnover of the transferred assets or businesses in acquisitions exceeding TL 250 million (approximately EUR 14.4 million and USD 15.1 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 172.8 million and USD 181.3 million), or (ii) the Turkish turnover of any of the parties in mergers exceeding TL 250 million (approximately EUR 14.4 million and USD 15.1 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 172.8 million and USD 181.3 million).

The Amendment Communiqué has also introduced a sectoral jurisdictional turnover threshold exception that "*the TL 250 million Turkish turnover thresholds*" will not be sought for transactions concerning the acquisition of undertakings that are active in "digital platforms, software or gaming software, financial technologies, biotechnology,

[2] The Board's *Berkshire/Alleghany* decision, dated 15.09.2022 and numbered 22-42/625-261.

[3] All currency conversions are based on the Turkish Central Bank's applicable average buying exchange rates for the financial year 2022.

pharmacology, agricultural chemical, and health technologies sectors" ("***Exempted Sectors***") or their assets related to these sectors, if they (i) operate in the Turkish geographical market or (ii) conduct research and development activities in the Turkish geographical market or (iii) provide services to Turkish users.

Due to the wording of the relevant provision "being active in the Exempted Sectors" should be assessed without any territorial restrictions. The Board confirmed this point in its recent *Berkshire/Alleghany* decision.

III. The Board's Precedent Regarding the Exempted Sectors

Taking into account the entry into force of this sector specific exception (*i.e.,* May 4, 2022) and the fact that the Authority publishes the Board's reasoned decisions regarding the merger control filings in around three-to-six months after its short-form decisions, the Board's decisions where it discussed the scope of the relevant sectors that are exempted from the use of local turnover thresholds are still limited at this stage. That being said, in the eight-month enforcement period of the Board regarding the Exempted Sectors, the target companies were active in Exempted Sectors in Turkey and generated turnover (even if limited) in Turkey from such activities.[4] Furthermore, the Board also confirmed with its decisional practice that the extent of the activities in the Exempted Sectors in Turkey is irrelevant for the application of the sectoral jurisdictional turnover threshold exception. By way of an example, in *Cinven/IFGL*[5]*,* where the target is active in life insurance sector and provides the life insurance services to its customers in Turkey by using digital platforms the Board concluded that the target's activities fall into the Exempted Sectors even if its "digital platform" activity is only provided to very limited number of customers (approximately 230 registered users in Turkey).

That being said - based on the publicly available reasoned decisions of the Board - until *Berkshire/Alleghany*, the issue as to how the Board would interpret the sectoral exception if the activity in exempted sector is not carried out in Turkey had not come before the Board. Therefore, *Berkshire/Alleghany* is the very first decision of the Board which clarifies this point.

IV. The Board's Remarks in Berkshire/Alleghany

The transaction concerns the acquisition of sole control over Alleghany Corporation ("***Alleghany***") by Berkshire Hathaway Inc. ("***Berkshire***"). The Board noted that Alleghany manages investments in property and casualty reinsurance and insurance businesses and supports its subsidiaries active in these fields. Further, it is stated that Alleghany does not have any subsidiaries or affiliated entities in Turkey, however it is active in Turkey

[4] The Board's *TIBCO-Citrix/Elliot-Vista* decision (12.05.2022, 22-21/344-149), *Airties/Providence* decision (02.06.2022, 22-25/403-167), *Cinven/IFGL* decision (18.05.2022, 22-23/372-157), *Astorg/Corden* decision (02.06.2022, 22-25/398-164), *Affidea/GBL* decision (16.06.2022, 22-27/431-176), *Covetrus/Clayton-TPG* decision (07.07.2022, 22-32/512-209), *Mandiant/Google* decision (09.06.2022, 22-26/425-174), *Klaravik/Castik* decision (08.09.2022, 22-41/582-242), *Oplog/Espro Investment* decision (08.08.2022, 22-35/543-219).

[5] The Board's *Cinven/IFGL* decision (18.05.2022, 22-23/372-157).

through its subsidiaries in non-life reinsurance and manufacturing of trailers.

Although Alleghany is mainly active in the reinsurance sector, similar to its approach in *Cinven/IFGL,* the Board did not consider the fact that the main activity of Alleghany was not in the Exempted Sectors as a relevant parameter for the application of the sectoral jurisdictional turnover threshold exception. The importance of this decision is that the Board confirmed that a target company does not need to operate in the Exempted Sectors in Turkey in order for the sectoral threshold exception to be applied, as long as it generates turnover abroad in the Exempted Sectors and has any activity in Turkey.

The Board decided that Alleghany is active in "financial technologies sector", since it develops software and sells them to third parties through its operational application established to manage the systems of reinsurance companies and through a business unit namely DragonX operating only in the United States by offering excess casualty coverage customized by class. Additionally, the Board noted that the condition of having activity in Turkish geographic market is also met as Alleghany generates turnover in Turkey, without making any reference to whether this turnover generated in the Exempted Sectors. Thus, the Board concluded that "*the TL 250 million Turkish turnover thresholds*" will not be sought for the transaction.

Based on the reasoned decision, Board did not consider whether or not Alleghany operates in Turkey in the field of "financial technologies" and deemed the fact that any activity of Alleghany in Turkey and operating abroad in the Exempted Sectors are sufficient for the application of the sectoral jurisdictional turnover threshold exception. *Berkshire/Alleghany* clarifies that the sectoral exception would be applicable even in cases where a target does not conduct any Turkey-related activities concerning the relevant sectors that are exempted from the use of local turnover thresholds and only conducts activities in these sectors outside of Turkey.

V. Conclusion

Berkshire/Alleghany clearly demonstrates that for the acquisitions of undertakings that operate abroad in "digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemical, and health technologies sectors or their assets related to these sectors" and that have any activities in Turkey, "*the TL 250 million Turkish turnover thresholds*" will not be sought even if such acquired undertakings are not active in the aforementioned exempted sectors in Turkey. Accordingly, for the sector-specific jurisdictional turnover threshold exception to be applicable, first of all, a target should have at least global activities in one of the exempted sectors. Furthermore, the target should also (i) be active in the Turkish geographical market (*i.e.,* generate turnover in Turkey), or (ii) conduct research and development activities in Turkey or (iii) provide services to users in Turkey. These three latter conditions are not cumulative, and the activities of the target would be deemed to fall within the scope of the exception even if the target only satisfies one of these three conditions. The mere fact that a target has only de minimis Turkish turnover, or limited number of customers in Turkey, or no assets and/or subsidiaries/affiliated entities incorporated in Turkey is irrelevant on this front.

The Most Recent Yemek Sepeti Decision of the Turkish Competition Board Demonstrates the Significant Change in the Market Dynamics for Online Food Order Platform Services

I. Introduction

On October 28, 2022, the Turkish Competition Authority ("***Authority***") published the Turkish Competition Board's ("***Board***") Yemek Sepeti Decision ("***Decision***") on its website, where the Board had examined the allegation that Yemek Sepeti Elektronik İletişim Perakende Gıda Lojistik A.Ş. ("***Yemek Sepeti***") had abused its dominant position by way of exclusionary practices. The Decision was rendered following a preliminary investigation, which was launched upon a complaint by Getir Perakende Lojistik Anonim Şirketi ("***Getir***"), a competitor of Yemek Sepeti. The Board assessed the allegations that Yemek Sepeti had abused its dominant position in the market for online food order/delivery platform services by way of creating *de facto* exclusivity and engaging in most favoured customer ("***MFC***") practices, thus hindering the activities of its competitors in the online food order/delivery platform services market. The Board ultimately decided not to launch a full-fledged investigation against Yemek Sepeti on the grounds that the allegations against Yemek Sepeti were unfounded.

The Decision is noteworthy as it emphasizes that the market dynamics in terms of the market power of Yemek Sepeti and its competitors have changed since the landmark Yemek Sepeti decision of the Board in 2016 ("***2016 Decision***")[6] which was the first decision of the Board where online MFC practices were found to be abuse of dominant position. The Decision states that Yemek Sepeti now faces competitive pressure from two of its competitors in particular, namely Getir and Trendyol.

II. Relevant Market and Dominant Position Analysis

The Board has lseft the exact product market definition open as such an assessment would not have an effect on the outcome of the Decision. That said, the Board provided valuable insight as to its view on the market segmentations. The Board remarked that food delivery services for orders provided through phone, web-sites or mobile applications by restaurants, or third party web-sites and platform services displaying restaurant and menu information, are not within the same relevant product market segment as the services provided by online food order/delivery platforms.

The Board did not proceed with a conclusive analysis in terms of dominant position, either. That said, the Board emphasized the entry of new players into the market within the last two or three years, such as Getir, Trendyol Yemek and Fuudy and made an analysis based on their market shares. The Board also examined certain parameters other than the market shares that may be useful to assess the market power of Yemek Sepeti such as active user numbers, the number of the contracted restaurants and the number of contracted restaurant chains.

Against the foregoing, the Board remarked that new entrants such as Getir, Trendyol Yemek and Fuudy have become permanent players in the market. Furthermore, the Board indicated that Yemek Sepeti have

[6] Decision of the Board dated 09.06.2016 and numbered 16-20/347-156.

not been exposed to competitive pressure between 2015 and 2020 and maintained or even increased its high market share. However, the Board remarked that from 2019 onwards, the market structure of the 2015-2020 period has changed by means of the new entries into the market. Accordingly, the Board emphasized that the players who could survive in the market and increase their market shares are now able to compete with Yemek Sepeti.

III. The Board's Assessment on MFC Practices and De Facto Exclusivity

In terms of the allegation that Yemek Sepeti has engaged in MFC practices and *de facto* exclusivity, the Board specifically assessed whether Yemek Sepeti had penalized the associated restaurants that work with competing platforms or offer competing platforms more favourable conditions by (i) lowering the visibility of the restaurants on the search results page or dropped the restaurants to lower levels on the list, (ii) refusing the access of restaurants to advertisement fields (banners) or accepting to deal on the condition of imposing high prices and (iii) decreasing the ratings of the restaurants or not displaying their high ratings on the platform page.

1. Allegation on Customer Comments and Ratings

As for the allegation that Yemek Sepeti has favoured the chain restaurants that did not work with competing platforms or offer competing platforms more favourable conditions, the Board assessed whether Yemek Sepeti used customer comments and ratings as a deterrent. According to the Board, during the on-site inspections no documents were found that would indicate Yemek Sepeti had incentivized exclusivity or MFC practices through restaurant ratings and customer comments. Additionally, the Information Technologies Department of the Competition Authority, as indicated in its report assessing the algorithms and codes used by Yemek Sepeti, found that customers could only rate and comment on the restaurants if the order is valid and not cancelled and customer comments are keyword filtered before going live and this filter aimed to eliminate profanity, meaningless expressions and political comments. Additionally, the Board's assessment regarding the approval and filtering process of customer comments demonstrated that the criteria for publishing comments on the platform apply to all users and restaurants indiscriminately.

In terms of the assessment regarding customer ratings, the Board found that restaurant ratings indeed reflected the arithmetic mean of the ratings and were not artificially altered. Moreover, the Board found internal correspondences of Yemek Sepeti employees supporting the Board's findings against the allegation. In that sense, the Board found that a correspondence seized within the scope of the on-site inspection showed that Yemek Sepeti employees were approached with an offer to artificially increase the customer ratings by a restaurant and turned that offer down, noting that such an increase would be noticed by Yemek Sepeti.

Lastly, in order to determine whether the alleged conduct has actually been implemented, the Authority requested information from the complainant to identify the restaurants that have been exposed to the alleged conduct. Upon the identification of these restaurants, the Authority questioned whether these restaurants have been penalized by Yemek

Sepeti through customer ratings, if they have worked with or offered more favourable terms to the competing platforms. The Board found that the identified restaurants have been multi-sourcing online food order/delivery platform services from Yemek Sepeti and Getir. Moreover, these restaurants denied the allegation against Yemek Sepeti. Accordingly, the Board concluded that the allegations regarding customer comments and ratings were unfounded.

2. Allegation on Refusal of Access to Banners

Similar to its assessment regarding the allegations on customer ratings, the Board also requested information from the restaurants that were identified as the targets exposed to Yemek Sepeti's alleged abusive conducts in refusing access to banners, on whether they have actually been exposed to such treatment. The restaurants denied these allegations against Yemek Sepeti as well.

Additionally, the Board also examined the concern expressed by the complainant that Yemek Sepeti might have increased the banner prices for a chain restaurant after it had become aware that the same chain was working with Getir. In that context, the Board examined the number of chain restaurant branches that Getir and Yemek Sepeti are working with as of March 2022. The Board found that Getir collaborated with a higher number of branches compared to Yemek Sepeti. In light of its assessment, The Board concluded that there was no indication that practices of Yemek Sepeti had foreclosed the market to Getir by way of preventing Getir from working with chain restaurants.

3. Allegation on Decreasing the Restaurant Ratings

Lastly, in terms of the allegation concerning restaurant visibility and listing, the algorithms and codes of Yemek Sepeti were examined by the Information Technologies Department of the Authority. According to the Information Technologies Department's report, there was no indication of a manipulation that would boost a particular restaurant name, search term or restaurant. Furthermore, the Board also inquired the restaurants that were identified as the targets of the alleged conduct on whether Yemek Sepeti had penalized them for working with other platforms by means of hindering orders for technical or system-related causes or dropping them to lower levels on the listing results. All of the mentioned restaurants responded negatively. Against the foregoing, the Board concluded that the allegation regarding restaurant visibility and listing was unfounded as well.

IV. The Board's Assessments on Hindering Competitors' Activities

Lastly, the Board assessed whether the complainant's allegation that some of the special offers/discount campaigns of Yemek Sepeti have hindered its competitors' activities. Within the scope of its assessment, the Board focused on whether the number and volume of orders that Getir received as well as the number of associated restaurants and active users of Getir have been negatively affected by the special offers/discount campaigns of Yemek Sepeti.

In that context, the Board found that the number and volume of orders that Getir received as well as number of the Getir associated restaurants and active users of Getir increased within the period that

Yemek Sepeti campaigns were live. Furthermore, the Board remarked that no information and documents were found supporting the allegation, in light of the inspections conducted during the preliminary investigation phase. Consequently, the Board concluded that the special offers/discount campaigns of Yemek Sepeti had not aimed at excluding competitors or give rise to such an effect.

V. Concluding Remarks on Changing Market Dynamics

Yemek Sepeti Decision emphasized that market dynamics in the online food order/delivery platform services market have significantly changed. In the 2016 Decision, where the Board concluded that Yemek Sepeti had abused its dominant position by way of MFC practices, the Board remarked that Yemek Sepeti held a market power allowing Yemek Sepeti to act independently of its competitors. Additionally, the Board noted that considering the first-mover advantage of Yemek Sepeti, new entrants to the market must incur significant costs to promote their services and include restaurant chains into their platform.

On the contrary, according to the most recent Yemek Sepeti Decision, it seems that the market power attributed to Yemek Sepeti in the 2016 Decision has been diminished by way of the new entries into the market. Indeed, Yemek Sepeti Decision underscores that after the period between 2015 and 2020, where Yemek Sepeti had not been exposed to an effective competitive constraint, new-entrants such as Getir, Trendyol Yemek and Fuudy entered into the market and from 2019 onwards, the market power of Yemek Sepeti has been restrained.

The Extent of Activity in Exempted Sectors is Irrelevant When Assessing the Scope of Threshold Exemption

I. Introduction

In order to incorporate the changes brought about by digital technologies into modern competition law, the Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 ("***Amendment Communiqué***"), which came into effect on May 4, 2022 introduced some significant changes to Turkey's merger control regime regulated under Communiqué No. 2010/4 on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board ("***Communiqué No. 2010/4***"). Two of the most significant developments that the Amendment Communiqué introduced, inter alia, were (i) the increase in applicable turnover thresholds for concentrations that require mandatory merger control filing before the Authority, and (ii) the introduction of threshold exemptions for undertakings active in certain markets and sectors.

This article examines one of the first decisions that shed some light on how the Board interprets the threshold exemption under the amended Communiqué No. 2010/4. The decision concerns the acquisition of sole control over International Financial Group Limited ("***IFGL***") by Cinven Capital Management (SFF) General Partner Limited ("***Cinven***") (the "***Transaction***").[7]

II. Background and Scope of the Amendment Communiqué

Per the Amendment Communiqué, transactions are required to be notified in

[7] The Board's Cinven/IFGL decision dated 18.05.2022 and numbered 22-23/372-157.

Turkey if one of the following increased turnover thresholds are met:

- the aggregate Turkish turnover of the transaction parties exceeding TL 750 million (approximately EUR 43.2 million or USD 45.3 million) and the Turkish turnover of at least two of the transaction parties each exceeding TL 250 million (approximately EUR 14.4 million or USD 15.1 million), or;
- (i) the Turkish turnover of the transferred assets or businesses in acquisitions exceeding TL 250 million (approximately EUR 14.4 million or USD 15.1 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 172.8 million or USD 181.3 million); or (ii) the Turkish turnover of any of the parties in mergers exceeding TL 250 million (approximately EUR 14.4 million or USD 15.1 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 172.8 million or USD 181.3 million).

In addition to the increased turnover thresholds, the Amendment Communiqué introduced another important change to its merger control regulation in the form of a threshold exemption for undertakings active in certain markets/sectors. Pursuant to the Amendment Communiqué, the "TL 250 million Turkish turnover thresholds" mentioned above will not be sought for transactions which concern the acquisition of undertakings or assets in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies ("***Exempted Sectors***") provided that the target company (i) operates in the Turkish geographical market, (ii) conducts research and development activities in the Turkish geographical market; or (iii) provides services to users in Turkey. In other words, when the acquisition target is an undertaking that falls within the definition and criteria above, the transaction would be notifiable if the aggregate Turkish turnover of the target and the acquirer exceeds TL 750 million or the worldwide turnover of the acquirer exceeds TL 3 billion.

Considering the fact the Authority has not published any guidelines on how to interpret the scope of the exemption and only listed the exempted sectors without any further explanation in the Amendment Communiqué, the Board's decisions will determine the limits of the exemption. Indeed, after almost nine months of enforcement, there now seems to be some clarity as to how the "exemption" is defined, through a number of decisions published by the Board. Nevertheless, the exact meaning and scope of the exemption is still being shaped by new decisions every day.

III. The Board's Analysis within the Scope of the Threshold Exemption in the Cinven/IFGL decision

On May 18, 2022, the Board unconditionally approved the acquisition of sole control over IFGL (and its subsidiaries) by Cinven. According to the decision, Cinven is an undertaking engaged in the provision of investment management and investment advisory services to a number of investment funds, which, through its portfolio companies, is active in a wide range of sub-sectors, mainly business services, consumer, financial services, healthcare, industrial and technology, media and

telecommunications. Cinven controls various portfolio companies and only some of them have local presence or operations in Turkey. One of the companies controlled by Cinven, Viridium, provides life insurance and retirement services to some residents in Turkey. With respect to the activities of IFGL, the decision notes that this undertaking operates in Turkey by providing savings and investment products to individual investors with life insurance covers via a local broker. IFGL does not have any subsidiaries or affiliated entities incorporated in Turkey.

As for IFGL's activities related to the exempted sectors, the Board noted that, as a small part of its services in the life insurance sector in Turkey, IFGL provides its services to the customers having digital access through digital platforms, and, in Turkey there are 230 users having access to and using the relevant digital platform. Even though IFGL's activities through its digital platform are very limited in Turkey, the Board concluded that IFGL is an undertaking subject to the threshold exemption under the Amendment Communiqué.

IV. The Board's Analysis of the Cinven/IFGL Transaction

Before delving into the importance of the decision for interpreting the threshold exemption under the Amendment Communiqué, the analysis of the Board in respect of the transaction is explained shortly below.

Considering the parties' activities in Turkey, the Board assessed that the parties' activities are horizontally overlapping in the life insurance market but they do not have any vertical relationship in Turkey. The overlap was due to one of Cinven's portfolio companies, Viridium, which is active as a life insurance consolidation platform in Germany. However, the Board noted that neither Viridium nor any of the life insurance companies it acquires, employs any new business. In addition, the Board stated that (i) Virium's turnover in Turkey stems only from the payments to existing products that were sold in the past, and (ii) Viridum generates turnover in countries outside of Germany only when policyholders move from Germany to other countries, provided that they meet certain policy requirements.

Within this scope, the Board noted that (i) currently, only a handful of policyholders of Viridium are Turkish residents, (ii) Cinven and IFGL's market shares in 2018, 2019 and 2020 were below a certain level (redacted in the decision), (iii) the parties' market shares did not significantly change in the last years, (iv) the combined market share of the parties based on premium income would be low, and (v) there are strong competitors in the market. Accordingly, the Board decided that the Transaction would not raise competitive concerns in the market, considering the low concentration level in the market and presence of strong competitors in the market.

V. The Board's Other Decisions in relation to the Threshold Exemption

Cinven/IFGL is not the first decision of the Board where it considered that the acquired undertaking is exempt from the "TL 250 million Turkish turnover thresholds" threshold.

The Board's first ever decision on the topic was the *Elliott and Vista/Citrix and*

TIBCO[8] decision where the Board found that the target companies were active in the Exempted Sectors because they developed and supplied software products in Turkey and globally. One of the targets was active in the markets for user virtualisation software, content sharing and collaboration software, and network and information technology software, while the other was an intelligence software company.

After the *Elliott and Vista/Citrix and TIBCO* and *Cinven/IFGL* decisions, the Board decided that the threshold exemption applies in some other cases: (i) in *Airties/Providence,*[9] the target was providing software services that enable broadband operators to deliver and manage Wi-Fi networks to residential customers in Turkey, and the Board considered the target to be active in the Exempted Sectors, (ii) in *Astorg/Corden,*[10] the Board decided that the targets' production of active pharmaceutical ingredients and ready-to-use medicines in Turkey on behalf of pharmaceutical companies fell within the scope of the "pharmacology" sector, (iii) in *Mandiant/Google,*[11] the Board concluded that the target's activities in the corporate cyber security consultancy (globally and in Turkey) fell within the "software sector", (iv) in the *Affidea/GBL*[12] decision where the target was a diagnostic imaging company that provides advanced diagnostics, outpatient treatment, and laboratory services for cancer patients in Turkey, the Board stated that the target is active in the "biotechnology" sector, (v) in *Covetrus/Clayton-TPG*[13] the Board considered that the threshold exemption would apply as the target's activities fell under the field of "health technologies" and "pharmacology" as the target was a worldwide provider of animal health technology and services, and active in the wholesale of consumables for animal health and the target's activities in Turkey were only limited to import sales to Turkey, (vi) in *Oplog/Espro Investment*[14] the Board decided that the target's activities fall within the Exempted Sectors due to its operations in the e-commerce logistics market in Turkey, (vii) in *Klaravik/Castik*[15] the Board ruled that the target is active in the "digital platforms sector' since the target was operating an online auction platform for the purchase and sale of second-hand heavy machinery, equipment, vehicles and industrial products and special vehicles and generated minor turnover via its platform in Turkey.

Importantly, in its recent *Berkshire/Alleghany* decision,[16] the Board decided that the threshold exemption applies. The Board first stated that Alleghany is active in the "financial technologies sector" within the scope of the Amendment Communiqué, since it develops software to manage the systems of reinsurance companies and sells them to third parties with an operational platform

[8] The Board's *Elliott and Vista/Citrix and TIBCO* decision dated 12.05.2022 and numbered 22-21/344-149.
[9] The Board's *Airties/Providence* decision dated 2.6.2022 and numbered 22-25/403-167
[10] The Board's *Astorg/Corden* decision dated 2.6.2022 and numbered 22-25/398-164
[11] The Board's *Mandiant/Google* decision dated 9.06.2022 and numbered 22-26/425-174
[12] The Board's *Affidea/GBL* decision dated 16.06.2022 and numbered 22-27/431-176
[13] The Board's Covetrus/Clayton-TPG decision 7.07.2022 and numbered 22-32/512-209
[14] The Board's *Oplog/Espro* Investment decision dated 8.08.2022 and numbered 22-35/543-219
[15] The Board's *Klaravik/Castik* decision dated 8.09.2022 and numbered 22-41/582-242
[16] The Board's *Berkshire/Alleghany* decision dated 15.09.2022 and numbered 22-42/625-261

and through a business unit which offers excess casualty coverage customized by class that is operated only in the United States. The Board further noted that (i) Alleghany has turnover in Turkey and (ii) operates in the Turkish geographical market. However, the Board did not touch upon the issue of whether Alleghany conducts the activities falling under the Exempted Sectors, specifically in Turkey. In this regard, the Board has now clearly accepted that a transaction can be considered to fall under the exemption if the target undertaking operates in one of the Exempted Sectors in a geographic market anywhere in the world, without considering whether the undertaking is active in the Exempted Sectors in Turkey (and/or generates turnover in Turkey from other activities). Indeed, the recent *Berkshire/Alleghany*[17] decision of the Board confirms and goes beyond the broad approach seen in the Cinven/IFGL decision considering that in the former decision, the target had at least a minimal amount of activity in Turkey that fell under the Exempted Sectors.

VI. Assessment of the Cinven/IFGL Decision

Cinven/IFGL is a clear early clue and example of the Board's broad interpretation of the threshold exemption. Indeed, the Board seems to take into account any form of activity that relates to the Exempted Sectors, even if the relevant activities are not the main activity of the relevant undertaking. Accordingly, IFGL's activities are considered to fall within the scope of the Exempted Sectors even though its activities in digital platforms were merely a small part of the main activity of the undertaking. Also, IFGL's digital activities in Turkey were very minimal - the provision of its services to its customers via a digital platform that has only 230 members with access to these digital platforms in Turkey. Therefore, the Cinven/IFGL decision underlines that the Board prefers a broad interpretation of the threshold exemption.

Considering the widespread use of software products and services and the fact that many companies in all sectors utilize some form of digital platform or provide digital access to their users, the effect and meaning of their inclusion in the exemption remains to be seen.

The Board's Hepsiburada Decision - Still Better to Think Twice Before Deleting Data During On-site Inspections

I. Introduction

On October 14, 2022, the Turkish Competition Board ("***Board***") published its *Hepsiburada* decision,[18] in which the Board decided with a majority vote not to impose an administrative monetary fine on D-Market Elektronik Hizmetler ve Tic. A.Ş. ("***Hepsiburada***") for having found no evidence indicating that Hepsiburada hindered or complicated the on-site inspection within the meaning of Article 16 of Law No. 4054 on the Protection of Competition ("***Law No. 4054***"). The Board's *Hepsiburada* decision is followed by the dissenting opinion of two Board members raising arguments in favor of imposing an administrative monetary fine on Hepsiburada.

This case summary analyses the Board's *Hepsiburada* decision together with the

[17] The Board's *Berkshire/Alleghany* decision dated 15.09.2022 and numbered 22-42/625-261

[18] The Board's *Hepsiburada* decision dated 07.10.2021 and numbered 21-48/678-338.

dissenting opinion against the majority vote's conclusion.

II. The Facts: What happened during the on-site inspection at Hepsiburada's premises?

The officials of the Turkish Competition Authority ("***Authority***") conducted an on-site inspection at Hepsiburada's premises on August 19, 2021, within the scope of an ongoing investigation launched against Numil Gıda Ürünleri San. ve Tic. A.Ş. to determine whether its behaviours and actions in the market for infant formula violated Articles 4 and 6 of Law No. 4054. Right after the beginning of the on-site inspection at 10:35 am, the officials of the Authority apprised Hepsiburada employees of not deleting any contents from their computers and mobile phones. However, the officials of the Authority found that an employee deleted various WhatsApp messages by 11:05 am, some of which were later retrieved by the Authority with the help of forensic software.

III. The Ruling: No fine was imposed by the Board

The Board in its *Hepsiburada* decision indicates that certain WhatsApp messages were deleted by an employee after the on-site inspection began and that some of these deleted messages had been retrieved through the use of forensic software later on. However, based on its findings, the Board decided that "*From the information and documents present in the case file, it is concluded that the on-site inspection was not hindered*."[19] While the Board, the decision making body of the Authority, is not bound by the case team's view on the case file, the case team suggested in their report that an administrative monetary fine should be imposed on Hepsiburada for hindrance or complication of the on-site inspection. However, further to its assessment, the Board decided with a majority vote that the deletion of WhatsApp messages during the on-site inspection did not constitute a hindrance or complication of on-site inspection in this case, and therefore, it was concluded that Hepsiburada would not be faced with an administrative monetary fine as per Article 16(d) of the Law No. 4054.

IV. Two Board members disagree

Against the Board's *Hepsiburada* decision, two Board members in their joint dissenting opinion argue that the Board's *Hepsiburada* decision does not provide reasoning with respect to the Board's conclusion.

As for procedural rules, the dissenting opinion refers to Article 52 of Law No. 4054 regulating the basic elements which are required to be addressed under the Board's decisions, and argues that the Board should have included its grounds and the legal basis in its reasoned decision. Moreover, the dissenting opinion bases its arguments on a number of decisions in which the Board did impose an administrative monetary fine on the undertakings due to data deletion during on-site inspections without considering the undertakings' arguments, but by solely taking into account as to whether the relevant data or documents were destroyed before or after the on-site inspection has been commenced.[20]

[19] The Board's *Hepsiburada* decision dated 07.10.2021 and numbered 21-48/678-338, para. 12.

[20] The referred decisions include the Board's *LG/SVS* decision dated 09.09.2021 and numbered 21-42/618-305 and the Board's

Furthermore, the dissenting opinion argues in general that the undertakings' argument(s) related to (i) the retrievability of the deleted data, (ii) whether the employees are well-trained or informed on the general rules and principles to be followed during the Authority's on-site inspection, (iii) whether the deleted data is irrelevant to the subject of the ongoing inspection, (iv) the position or title of the relevant employee(s), or (v) whether the employee(s) act in good faith should be disregarded if the concerned data is deleted once the Authority's dawn raid has commenced. Therefore, the dissenting opinion argues that it should have been deemed sufficient for the Board to conclude that the on-site inspection was hindered solely on the ground that an employee of Hepsiburada had deleted certain WhatsApp messages from his/her mobile phone after the on-site inspection was commenced.

The dissenting opinion supports its arguments by discussing the below four questions in detail:

1. Does the fact that the employees were warned not to delete anything absolve the liability of the undertaking?

According to the dissenting opinion, the fact that the undertaking had informed and warned its employees not to delete any data during the on-site inspections does not absolve the undertaking of its liabilities regarding the hindrance or complication of the on-site inspection by an employee. Furthermore, the fact that the undertaking has previously provided its employees with compliance training regarding dos and don'ts during the Authority's dawn raids, does not discharge its liability in case of data deletion during an on-site inspection.

2. Could the hindrance be ruled out if the significant part of the deleted correspondences consists of internal communication within the relevant undertaking or if the deleted correspondences do not constitute a violation?

The dissenting opinion maintains that both internal and external communications could be equally important for the purposes of revealing a violation, if any.

3. Could the hindering activity be ruled out if the significant part of the deleted conversations is retrieved?

The dissenting opinion discusses that even though the deleted data could be retrieved with the help of certain technological methods and forensic software, it is not always certain whether the deleted items were actually retrieved fully or in their original versions. Moreover, the dissenting opinion argues that successful retrieval of deleted data should not be deemed as justification for deletion as such an approach would be tantamount to rewarding those who could manage to delete data expertly and surreptitiously, and encouraging the undertakings to take the risk of deleting data during on-site inspection. The dissenting opinion, referring to the Board's *Hepsiburada II* decision[21], interprets that the capability of the Authority's officials to retrieve the deleted data aims to ensure the functioning of the on-site inspection and, accordingly, the arguments regarding the retrieval

Europen Industry decision dated 23.09.2021 and numbered 21-44/645-322

[21] The Board's *Hepsiburada II* decision dated 13.01.2022 and numbered 22-03/35-16.

and/or accessibility of the deleted information should have been ignored for the purposes of deciding on the hindrance or complication of an on-site inspection.

4. Could the hindering activity be justified if the person who deleted the conversation acted in good faith?

It is reiterated within the dissenting opinion that no subjective argument that could be raised by the undertaking(s) should be considered when assessing whether the deleting of data after the on-site inspection has begun constitutes a violation within the meaning of Article 16 of Law No. 4054. Therefore, the two Board members argue that even if the employee deleted the relevant correspondence in good faith or with no intent to hinder or complicate the on-site inspection, this should not also be taken into account as a plausible argument to rule out the undertaking's responsibility.

V. Conclusion

Despite the Authority's case team suggesting that an administrative monetary fine should be imposed on Hepsiburada for hindrance or complication of the on-site inspection, the Board did not impose an administrative monetary fine. Even though the dissenting opinion has a straightforward approach which suggests not considering even plausible arguments that might be brought forward by the undertaking(s) without also paying regard to whether the deleted information concerns private content or whether the employee(s) acted in good faith, the Board's *Hepsiburada* decision sets an example in which Board has left its formalistic approach when it comes to assess the hindrance or complication of an on-site inspection. Having said that, it would be still prudent for the undertakings to bear in mind the Board's strict liability approach in terms of the hindrance or complication of an on-site inspection and that the deletion of any kind of information during an on-site inspection might be scrutinized by the officials of the Authority and might lead to administrative monetary fines as per Article 16(d) of the Law No. 4054.

Is The Turkish Competition Board Significantly Changing Its Approach Towards Ancillary Restraints That Would Affect the Consequences of Its Clearance Decisions?

I. Introduction

The Turkish Competition Board ("***Board***") recently cleared a transaction concerning the acquisition of joint control over Checklas Otomotiv A.Ş. ("***Checklas***") by LG Lastik Girişim A.Ş. ("***LG Lastik***") and an individual, Eren Kaya ("***Transaction***").[22] While the Board found that the Transaction did not result in significant lessening of effective competition in the relevant markets, it evaluated in detail the non-compete obligation imposed on the sellers within the scope of ancillary restraints and made the clearance, at least on its face, conditional upon relaxing the scope and duration of the non-compete obligation.

The decision is of significance as it is the third decision within a one-year period, where the Board preferred a specific language that, at least on its face, made the clearance conditional upon relaxing the non-compete obligation. This could be an indication that the Board is establishing a practice towards how it will deal with

[22] The Board's *LG Lastik/Checklas* decision dated 14.04.2022 and numbered 22-17/286-130.

ancillary restraints in the future. Indeed, in its previous decisions dealing with excessive ancillary restraints, the Board was unconditionally clearing the transactions and using a different wording that essentially made the qualification of ancillary restraint (and not the clearance) conditional upon relaxing the non-compete obligations.

Conditionally clearing the transaction is different from conditionally qualifying a restriction as ancillary restraint, in terms of their respective consequences. The former may result in serious complications when not complied with the conditions, such as invalidity of the transaction.

This article first explains the concept of ancillary restraints within the scope of the Turkish merger control regime and then summarizes the Transaction. Lastly, the possible outcomes of the Board's recent approach towards excessive ancillary restraints will be discussed.

II. Ancillary Restraints under the Turkish Merger Control Regime

Ancillary restraints are clauses that, among others, restrict the parties of a transaction from carrying out certain activities and generally take the form of a non-compete obligation that protects the acquirer(s)' interests. Ancillary restraints may also be in the form of no-poaching agreements[23] and non-compete obligations imposed on the target's employees.[24] As such, in their essence, ancillary restraints are those that would generally fall within the scope of Article 4 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***") that prohibits anti-competitive agreements, had they not been imposed within the scope of a transaction. That said, for a restriction to qualify as an ancillary restraint, it should be directly related to the transaction and objectively necessary to implement the transaction with a view to fully achieve the expected efficiencies from such a transaction.

Ancillary restraints are addressed in paragraphs 45 to 58 of the Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions ("***Ancillary Restraints Guidelines***") and in Article 13(5) of the Communiqué No: 2010/4 Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board ("***Communiqué No: 2010/4***").

Accordingly, paragraph 48 of the Ancillary Restraints Guidelines states that restrictive obligations should be *directly related* and *necessary* to the transaction to qualify as an ancillary restraint. Paragraphs 50 and 51 further deal with what constitutes "directly related" and "necessary". To fulfill the criterion of being "directly related to the transaction", an ancillary restraint has to be economically closely related to the transaction and should serve the purpose of a smooth transition into the contemplated new structure of the target. On the other hand, to fulfill the criterion of "necessity", the restraint should be obligatory for the concentration to take place, or there should be a significant increase in uncertainty and costs of the transaction in default of the concerned restraint. In establishing whether a restraint is necessary, the duration and scope of the restraint shall be taken into consideration, in addition to its nature.

[23] *See e.g.*, The Board's *Ren/Bimed* decision dated 16.12.2021 and numbered 21-61/868-BD.
[24] *See e.g.*, The Board's *LeasePlan/LPD* decision dated 03.12.2014 and numbered 14-47/862-392.

Paragraph 53 of the Ancillary Restraints Guidelines states that a non-compete clause may qualify as an ancillary restraint, if its duration, geographical area of implementation, subject matter and the persons to whom it would apply is not excessive when compared against what is reasonably necessary.

Restrictive clauses imposed on the parties within the scope of a transaction should, as a general rule, be restricted to three years, according to paragraph 54 of the Ancillary Restraints Guidelines. However, paragraph 54 of the Ancillary Restraints Guidelines also states that durations longer than three years could also be considered an ancillary restraint if the target has a high level of know-how and customer loyalty. Indeed, a number of Board decisions found that five year-long non-compete obligations may constitute acceptable ancillary restrictions, considering the know-how level and/or the customer loyalty of the target.[25]

Non-compete agreements must typically be restricted to the goods and services that make up the economic unit's operational area prior to the acquisition, as stated in paragraph 55 of the Ancillary Restraints Guidelines. Finally, in terms of the geographical scope of restrictive clauses, paragraph 56 of the Ancillary Restraints Guidelines provides that the restriction should be limited to the geographical area in which the seller offered the relevant products or services pre-transaction.

III. Background of the LG Lastik/Checklas Decision

The Transaction concerns the acquisition of joint control over Checklas by LG Lastik and Eren Kaya. Pre-transaction, the shares in Checklas were owned by the following three individuals: Yücel Kaya, Hanife Betül Kürkçü and Eren Kaya. Post-transaction, the shares in Checklas were to be owned by LG Lastik and Eren Kaya. Yücel Kaya and Hanife Betül Kürkçü sold their entire shares in Checklas to LG Lastik, whereas Eren Kaya retained a certain part of his shares in Checklas and sold the remaining to LG Lastik. As such, Yücel Kaya, Hanife Betül Kürkçü and Eren Kaya were the sellers in the Transaction. That said, from a competition law perspective, LG Lastik and Eren Kaya were considered acquirers since they are the ones that will acquire joint control over Checklas post-transaction.

In reviewing the pre-transaction control structure of Checklas, the Board found that Checklas was controlled by shifting alliances considering that Checklas' decision making process lacked a consistent majority and such majority may shift among its minority shareholders.

All in all, the Board established that Checklas will be jointly controlled by LG Lastik and Eren Kaya, given that both shareholders reserved equal voting rights, allowing them to exercise decisive influence related to strategic decisions of Cheklas.

In terms of its substantive analysis of the Transaction, the Board stated that both LG Lastik, through one of its subsidiaries, and Checklas were active in the market for (i)

[25] *See e.g.*, The Board's *Ren/Bimed* decision dated 16.12.2021 and numbered 21-61/868-BD; *LeasePlan/LPD* decision dated 03.12.2014 and numbered 14-47/862-392; *UCZ/Park Holding* decision dated 26.03.2014 and numbered 14-12/221-97; *TPack/South East* decision dated 23.12.2010 and numbered 10-80/1685-639; *Stryker/Boston Scientific* decision dated 2.12.2010 and numbered 10-75/1530-586; *Corio Yatırım* decision dated 25.12.2008 and numbered 08-75/1188-457.

tire renewal and (ii) supply of tires for corporate customers. Based on the negligible combined market shares of the parties, the Board stated that the transaction would not result in any horizontal competition law concerns. Although there could be certain vertical links between the parties post-transaction, the Board stated that such vertical links would not raise any substantive competition concerns.

IV. Ancillary Restraints in LG Lastik/Checklas and the Board's Conditional Clearance

The Board found that Article 9 of the Share Purchase Agreement signed between LG Lastik and Yücel Kaya and Hanife Betül Kürkçü titled "Prohibition of Competition" included a non-compete obligation imposed on Yücel Kaya and Hanife Betül Kürkçü. As explained in detail above, a non-compete obligation may be considered an ancillary restraint, if the scope of the non-compete obligation in terms of its duration, subject, geographical area and the persons involved do not exceed the level reasonably required for the implementation of the transaction. Additionally, non-compete obligations not exceeding three years in terms of duration are generally found reasonable but if the customer loyalty lasts longer and if it is necessary due to the nature of the transferred know-how, it is also possible for a non-compete obligation exceeding three years to be considered as an ancillary restraint.[26]

The parties in *LG Lastik/Checklas* argued that the non-compete obligation was imposed on the sellers on the basis of the following reasons (i) the tire market in which the transaction parties operated was not large, (ii) the parties transferring their shares had established a personal relationship with their customer network thanks to the know-how of the company, (iii) they were likely to use the know-how in their favor within a competing undertaking, which may result in a decrease in the target entity`s number of customers.

Despite the Board's precedent that prohibiting competition for five years may be considered ancillary restraint[27] under the above circumstances, in the case at hand, the Board found that the duration of the non-compete obligation exceeded the reasonable duration and level, in a way that was not compatible with the provisions of the Ancillary Restraints Guidelines. For this reason, the Board considered it appropriate to reduce the duration of the non-compete obligation to three years.

The relevant non-compete clause in the SPA further stipulated that the prohibition of competition shall also apply to second-degree relatives of the sellers. According to the Ancillary Restraint Guidelines, the scope of the non-compete obligation on a person should not be unreasonable. The Board stated that such non-compete obligations imposed on relatives who are not direct parties to the contract are unreasonable,[28] and that such a restriction imposed on third parties was not necessary for the implementation of the transaction and the full benefit of the expected efficiencies from the concentration, and that it also restricted the freedom of

[26] *See also*, The Board's *USK Kimya* decision dated 18.02.2021 and numbered 21-08/120-52.

[27] The Board's *UCZ/Park Holding* decision dated 26.03.2014 and numbered 14-12/221-97.

[28] The Board's *Nestle Waters* decision dated 24.8.2006 and numbered 06-59/774-227.

commercial enterprise of the persons affected.

Finally, the Board stated that the non-compete obligation did not include a provision regarding geographical limits. It was stated that Cheklas had five branches in Istanbul and a total of sixty-one contracted service points and that this non-compete obligation extended to national borders of the Republic of Turkey. The Board found that since it could be assumed that Cheklas operated throughout the country, it was reasonable that the obligation not to compete would cover the whole of the Republic of Turkey.

Ultimately, the Board cleared the transaction on the condition that the duration of the non-compete obligation be reduced to three years, and that the second-degree relatives of the sellers be excluded from the scope of the obligation.

V. Why Does the Conditional Approval Wording of the Board Matter?

The legislative framework of the Turkish merger control regime does not provide for a conditional clearance mechanism, where the Board would unilaterally impose conditions for the transaction to be allowed to go through. In fact, in accordance with Article 14 of the Communiqué No: 2010/4 it is the parties' right to submit commitments to do away with any competition problems that may stem out of the transaction, which would then be laid down within the clearance decision as conditions or obligations imposed by the Board. In other words, in the absence of any commitments submitted by the parties, the Communiqué No: 2010/4 does not allow the Board to conditionally clear the transaction. As such, in the absence of commitments submitted by the parties, the Board may unconditionally clear the transaction or it may reject the transaction if it finds that the transaction would result in significant impediment of the effective competition, but it may not unilaterally impose conditions and conditionally clear the transaction in accordance with the Communiqué No: 2010/4.

Those being said, although the parties did not submit any commitments to the Board within the scope of the *LG Lastik/Checklas*, the literal reading of the wording of the Board in clearing the Transaction indicates that the clearance is conditional on the aforesaid relaxing of the terms of the non-compete obligations. The same wording has also been used in *Vinmar/Arısan*[29] and *Lokman* Hekim/*Adatıp*[30] decisions, both of which were handed down in 2022.[31]

In the previous decisions where the Board dealt with excessive ancillary restraints, the Board unconditionally cleared the transactions and used a different wording that essentially made the qualification of ancillary restraint (and not the clearance) conditional upon relaxing the non-compete obligations.[32]

The difference in the preferred wording in decisions dealing with excessive ancillary restraints is of importance, since the

[29] The Board's *Vinmar/Arısan* decision, dated 24.02.2022 and numbered 22-10/155-63.
[30] The Board's *Lokman Hekim/Adatıp* decision dated 24.03.2022 and numbered 22-14/233-101.
[31] For other decisions using a similar wording in 2011 *See* the Board's *Jantsa/MW Italia* decision dated 21.12.2011 and numbered 11-62/1632-569.
[32] *See e.g.,* The Board's *OTerminals/Ortadoğu Antalya* decision dated 26.11.2020 and numbered 20-51/708-316; *UCZ/Park Holding* decision dated 26.03.2014 and numbered 14-12/221-97.

consequences of each wording significantly differs. Indeed, if the Board clears a transaction subject to certain conditions, which are not fulfilled, the clearance "*will automatically be invalid and the authorization decision will be void*" in accordance with the paragraph 92 of the Guidelines on Remedies that are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions. However, if the Board conditionally considered a restriction as ancillary restraint and the said condition is not fulfilled, in accordance with the Ancillary Restraints Guidelines, such restriction "*that does not carry the characteristics of an ancillary restraint may be assessed within the framework of Article 4, 5 and 6*" of the Law No. 4054. In other words, such restrictions may lead to a preliminary or full-fledged investigation initiated by the Board, which may result, among others, in an administrative monetary fine imposed on the undertaking that did not abide by the Board's conditions. Accordingly, while a conditional clearance may result in a transaction being invalid, a conditional consideration of ancillary restraint of a restriction may result in administrative monetary fine, if the concerned conditions are not fulfilled.

However, as noted above, it is not clear if the Board intentionally preferred the wordings of conditional clearance in *Vinmar/Arısan*, *Lokman Hekim*/*Adatıp* and the recent *LG Lastik/Checklas*, since, at least in accordance with the Communiqué No: 2010/4, the Board is not allowed to conditionally clear a transaction in the absence of commitments submitted to the Board.

VI. Conclusion

Vinmar/Arısan, *Lokman Hekim/Adatıp and LG Lastik/Checklas*, all of which were rendered in 2022, dealt with the issue of ancillary restraints. In accordance with the wording of the concerned decisions, all three transactions were cleared on the condition that the non-compete obligations are eased to a certain extent. Since the Board, in accordance with Communiqué No: 2010/4, does not have the right to conditionally approve the transactions in the absence of commitments submitted by the parties, and the parties have not submitted any commitments in the aforesaid cases, the recent practice of the Board towards ancillary restraints is likely to create confusion.

As the consequences of non-compliance with a conditional clearance decision include serious complications, such as invalidity of the transaction, the undertakings and practitioners will continue to closely monitor the Board's preferred wordings in its decisions dealing with ancillary restraints to have a better understanding of the Board's approach.

Employment Law

Turkey Plans to Eliminate the Age Limit for Retirement

I. Introduction

After years of debate, on December 28, 2022, the President of the Turkish Republic referred to a new regulation about those who were unable to retire due to the age thresholds, and announced that "there will be no age limit to the use of retirement right."[33] Following the

[33] "There will be no age limit to the use of retirement right", Presidency of the Republic of

President's announcement, on January 30, 2023, a legislative proposal ("***Bill***") for amending the Law No. 5510 on Social Security and General Health Insurance Law ("***Law No. 5510***") was submitted before the Grand National Assembly of Turkey.[34] The elimination of the age limit for retirement is expected to affect approximately 2.3 million employees in Turkey.

II. Background

Generally, in order to be eligible for retirement, three essential conditions are sought within the scope of social security systems: (i) age, (ii) number of days that social security/national insurance premiums were paid (*i.e.,* number of days of contributions) and (iii) the duration of the insured period.

In Turkey, these conditions have been the subject of various changes since the beginning. Indeed, in this scope, the age requirement for retirement had been eliminated in Turkey with the amendments made on the Social Insurance Law No. 506 and dated July 17, 1964[35] ("***Law No. 506***"), through the Law No. 3774 and dated February 20, 1992. Nevertheless, the Law No. 4447 and dated August 25, 1999 ("***Law No. 4447***") reintroduced the age requirement for qualifying for retirement, by amending the Law No. 506 where the minimum retirement age was set at *58 for women and 60 for men*.

The Law No. 4447 was published on the Official Gazette of September 8, 1999; and the age requirement for retirement entered into force on the same day. This change in the legal framework created the colloquial term "EYT" *(in Turkish, "Emeklilikte Yaşa Takılanlar" which means, "[those individuals] age-barred from retirement")*, referring to the citizens whose social insurance contributions started before September 8, 1999 but who were precluded from retiring until a certain age due to the requirement introduced with the Law No. 4447.

III. The Bill

In parallel with the President's announcement that "*There will be no age limit to the use of retirement right*" with regard to EYT, Article 1 of the Bill proposes to eliminate the age limit for retirement by adding Provisional Article 95 to the Law No. 5510, which reads "*Persons to whom old-age or retirement pension would be granted according to [the applicable provisions] shall benefit from old-age or retirement pension, provided that they meet the conditions other than age in the said provisions.*"

Moreover, the rationale behind the proposed amendments concerning EYT is explained in the Preamble of the Bill as follows: "*This legislature is aimed to eliminate only the age restriction from the requirements of entitlement to old age or retirement pension, without changing requirements concerning number of days of contributions and/or insurance period conditions per the [applicable provisions] for those;*

- *who started working within the scope of disability, old-age and dependents' insurance before September 8, 1999 (included).*
- *who started to work within the scope of disability, old-age and dependents'*

Turkey, https://www.tccb.gov.tr/en/news/542/142321/-there-will-be-no-age-limit-to-the-use-of-retirement-right- accessed January 31, 2023.

[34] https://www2.tbmm.gov.tr/d27/2/2-4914.pdf accessed January 31, 2023.

[35] The Law No. 506 was almost wholly replaced by the Law No. 5510.

insurance after September 9, 1999 (included); however, the borrowings that they have made (in accordance with the provisions of the relevant legislation allowing them to shift back their insurance start date) have shifted their insurance start date to a date before September 8, 1999."

Those age-barred from retirement had been waiting for a long while for a regulation that would address their concerns and demands on the matter. While the Bill is yet to be enacted (if at all) and the details concerning EYT are yet to be clarified and finalized, it is certain that elimination of the age limit for retirement would have profound effects in Turkey, especially considering the number of employees that would benefit from this amendment and the budget that would be allocated by the state in respect thereof.[36]

Litigation

Unifying Decision of the Court of Cassation regarding Filing a Lawsuit for Undue Receivables

I. Introduction

Before the Grand General Assembly Decision on the Unification of Conflicting Judgments of the Court of Cassation[37] ("***Decision***"), there were conflicting judgments from different chambers of the Court of Cassation on whether lawsuits concerning claims for undue receivables should be rejected on procedural grounds or on merits, as the due date for the receivable subject to the dispute had not yet arrived. While certain chambers were of the opinion that the courts should reject them on procedural grounds, the others argued that they should be examining the merits.

The Decision resolved an essential matter as this affected whether the statutory attorney fees recoverable under the action would be calculated as percentage fees (based on the value of the claim) or fixed amounts, in case of lawsuits filed for undue receivables. Before the Decision, the chambers of the Court of Cassation which rendered their verdict on procedural grounds imposed a fixed attorney fee, whereas the other chambers rendering a verdict on substantial grounds imposed a percentage-based attorney fee and such difference caused an unfair practice.

The Grand General Assembly of the Court of Cassation considered the various opinions of its different chambers at length, in order to unify the conflicting judgments. This article will discuss the Decision and the legal grounds of the Grand General Assembly of the Court of Cassation.

II. Decision

The Decision evaluated and explained in detail the following legal terms: (i) performance, (ii) due date of the

[36] According to Bloomberg, "*The government now estimates it will cost around 250 billion liras (USD 13.4 billion) in the first year*": "*Turkey to Earmark USD 13 Billion For Early Retirement Ballot Pledge*" (December 29, 2022), Bloomberg, <https://www.bloomberg.com/news/articles/2022-12-29/turkey-to-earmark-13-billion-for-early-retirement-ballot-pledge?leadSource=uverify%20wall> accessed January 31, 2023.

[37] Grand General Assembly Decision on the Unification of Conflicting Judgments of the Court of Cassation dated 18.2.2022 and numbered 2019/5 E. and 2022/1 K., published in the Official Gazette dated November 4, 2022 and numbered 32003

performance, (iii) procedural requirements, (iv) legal interest.

According to Turkish law of obligations, the legal term of "performance" means the fulfillment of a debt correctly and completely, with respect to subject, time and place, and extinguishing the debt by satisfying the creditor. The debt should be duly performed in full with respect to the particular parties, place, due date, quantity, and quality. In order for the debtor to satisfy its debt relationship with the creditor, the debtor should pay or perform all of his debt, including his primary and secondary obligations, in line with the fundamental principles of performance.

In terms of due date of the performance, pursuant to Article 90 of Turkish Code of Obligations numbered 6098 ("***TCO***"), a debt becomes due at the time of its inception unless the time of performance is agreed otherwise by the parties, or this is implied in the nature of the legal relationship. In other words, unless it is agreed otherwise or inherent in the nature of the legal relationship, each debt should be performed immediately. The parties are naturally entitled to determine the maturity term for the debt. If this is the case, the debt should be performed when the debt becomes due (in other words, when the term determined for this debt has matured).

In the Decision, the legal term of "procedural requirements" is also explained. In order for a court to examine the merits of the case at hand, first, the procedural requirements must be met. Article 114 of Turkish Code of Civil Procedure ("***TCCP***") lists all the procedural requirements. Legal interest is one of these procedural requirements that must be fulfilled in order for a court to examine the merits of the case. Having a legal standing, or the right to file a lawsuit is not enough as the plaintiff should also have a legal interest, *i.e.*, sufficient benefit in the outcome of the case at the time of bringing the action and also until the date of final verdict. In other words, a legal interest that would only come into being in future is not enough for a plaintiff to file a lawsuit. The court cannot decide to wait for the plaintiff to achieve or attain this sufficient legal interest, if it does not exist at the time of filing date of the lawsuit. Also, the court cannot grant a period of time to the plaintiff to change its current claim into a claim in which the plaintiff has a legal interest. In filing a lawsuit for undue receivables, the plaintiff would thus lack the sufficient legal interest at the time of bringing the claim, which means this lawsuit must be rejected due to the lack of legal interest.

In light of the foregoing, there must already exist sufficient legal interest to protect in a lawsuit, in order for the court to render a verdict based on the merits of the case. Where this legal interest is absent, the court does not go into the substantive analysis and examine the merits of the lawsuit, due to the fact that legal interest is one of the procedural requirements for initiating a lawsuit. Since the creditor will not be able to demand the debtor to perform his obligations before the due date of the debt, it is safe to say that there would be no sufficient legal interest in initiating a lawsuit for collecting undue receivables. The debtor may demand the performance of the obligation and initiate a lawsuit against the debtor in case the debtor fails to perform, provided that the obligation has become due. As a result, since legal interest is one of the strict procedural requirements regulated under the TCCP, the court will reject the lawsuit filed for undue receivables on procedural grounds.

III. Conclusion

There were conflicting judgments among various chambers of the Court of Cassation as to whether the courts should reject the lawsuit filed for undue receivables on procedural grounds or examine the merits first, before rejecting the lawsuit. The Decision resolved the conflicts between the various chambers of the Court of Cassation and determined that the lawsuits filed for undue receivables must be rejected on procedural grounds.

Data Protection Law

The Year Gone: The Turkish Data Protection Board Decisions and Highlights of Personal Data Law in 2022

In 2022, there were certain significant developments and key changes regarding the regulation and practice of data protection law in Turkey. Some important guidelines and decisions were published by the Turkish Personal Data Protection Board and the Constitutional Court handed down a milestone decision regarding the protection of personal data. Below is an overview on the important points of the relevant developments.

I. Data Protection Board Decisions which stood out in 2022

There was less activity in 2022 compared to 2021 in terms of the number of decisions issued by the Turkish Personal Data Protection Board ("***The Board***"). Nonetheless, there are significant ones among them.

1. The Board's Decision on the Processing of Personal Data by Car Rental Software Developer and Seller Firms and Creation of a Blacklist Where Such Data Is Shared Among Car Rental Companies[38]

The decision is significant because the Board has provided a "joint controller" analysis for the first time and held that the provider of a computer software system would be liable to fulfill the obligations of a data controller. In addition, the Board has discussed "profiling" on the basis of the data subject`s right to object to a decision which was made about the person himself/herself by analyzing the data processed solely through automated systems.

The decision concerns processing of data subjects' personal data by software developers and vendors of programs for car rentals and sharing of such data within car rental agencies to create a "blacklist."

In the decision, several car rental agencies used a cloud-based database operated by the software company on a Software-as-a-Service (SaaS) basis. The car rental companies were able to put comments about their customers on this database whereby such comments became visible to all car rental agencies that used the software. This tool was used as a "blacklist" by car rental agencies.

The software developer company argued that it was not the data controller, since it merely provided the tool that car rental companies used to put in data. However, the Board concluded that the software company is one of the joint controllers.

The Board laid out the following important points regarding "joint controllership":

[38] https://kvkk.gov.tr/Icerik/7288/2021-1303 (Last accessed on January 30, 2023)

- Existence of a joint purpose and joint determination of the main tools of processing of personal data results in joint controller status.
- Joint controller status is not affected even if one of the joint controllers cannot access the data that is being processed.
- The fact that software developer companies are not able to access the data entered by car rental agencies, does not mean that they cannot be data controllers. So much so, that when a car rental agency puts in the data of a customer in the collective cloud that is operated by the software developer company and is on the database of the software developer company, these software companies are said to use data for their own purpose even when they are not able to access it.
- The obligations of joint controllers do not have to be shared equally.
- To delineate each of the joint controller's obligations, an agreement for liabilities must be executed between joint controllers, otherwise each data controller is liable pro rata their fault in the violations that occur. A mere disclaimer in the service contract is not sufficient.
- When allocating liability and fault among the joint controllers, a case by case review is necessary and a determination of control is necessary by taking certain elements into account, such as who are the first and end-users of processed data, who made the data entry and for what purpose, who decides on alteration, erasure or transfer of data, which activities do the data controllers other than the collector conduct.

All in all, the Board concluded that even when personal data is obtained by a different data controller at the first stage, all parties that act on such data like data controllers (even by providing the cloud service where such data is stored) at later stages of its life cycle, will be treated as data controllers.

Additionally, the Board emphasized the following points about "profiling":

- "Profiling" is defined as the analysis of an individual's behavior by processing of personal data through automated means in order to make predictions about the individual's future behavior.
- Profiling is reasonable to a level, where the fundamental rights and securities of individuals are not threatened. Such levels must be determined on a case by case basis.
- A profile might cause discrimination or an unfavorable result by placing the data subject into a single category and limiting the data subject's options to what is recommended and accordingly might prevent the data subject from availing themselves of a service in full or in part.
- Data controllers may use profiling and automated decision-making as long as they act within the scope of general principles and have a legal basis.

The Board also states what criteria the data controllers should take into account while determining legitimate interest legal basis, with a disclaimer that the Board may include other criteria on a case-by-case basis:

- The benefit to be obtained (as a result of data processing) should be able to compete with, *i.e.*, balanced against the fundamental rights and freedoms of data subjects.
- The processing must be requisite to achieve the relevant benefit.
- There must be a clear and specific legitimate interest at that particular time.
- That if it is possible to identify a legitimate interest that can be balanced against the data subject's fundamental rights and freedoms, such legitimate interest should give rise to a benefit, which would be impossible to obtain via another method or way, without processing personal data.
- The benefit of the legitimate interest must affect multiple people, must not be a mere profit or economic benefit purpose, must have criteria such as transparency, accountability, facilitating business processes or operations.
- Must avoid all foreseeable, clear and imminent dangers to prevent any harm to the data subject's fundamental rights and freedoms, especially, the protection of their personal rights.
- The personal data must be ensured to be processed lawfully and limited to the purpose in a data registry system and all technical and administrative measures must be taken to prevent any damage or violations.
- The general principles for processing of personal data must be complied with.
- A balancing test must be made by comparing fundamental rights and freedoms of the data subject and legitimate interest of the data controller.

The Board stated that car rental agencies' comments on their customers may be considered as a "legitimate interest" ground for processing personal data for some limited purposes (such as when data is shared within its own branches, agencies and agents), however creation of a blacklist through the use of such comments and promoting that blacklist as a marketing strategy to car rental agencies cannot be deemed a legitimate interest.

The Board concluded that the software company was a data controller and it had failed to meet the conditions set out in the Law No. 6698 on Data Protection ("***DPL***") and decided to instruct the data controllers to erase the data processed in this regard.

2. The Board's Decision on Processing of "Hand Geometry" Information to Access the Building without Explicit Consent[39]

The decision is regarding the processing of a data subject's "hand geometry" data in order to grant access to the building of a business, without obtaining their explicit consent. The Board concluded that hand geometry should be classified as biometric data and a type of data that is within the special categories of personal data by referring to Council of State 15th Chamber decision 2014/4562, Article 4 GDPR, European Court of Human Rights S. and Marper v. the United Kingdom and Turkish Constitutional Court decision with individual application no. 2018/11988. The Board concluded that the data was collected and stored although the relevant

[39] https://www.kvkk.gov.tr/Icerik/7399/2022-662 (Last accessed on January 30, 2023)

processing conditions under Article 6 of the DPL did not exist. The Board required the data controller to destroy the data and notify any third parties to whom data has been transferred of the destruction of data.

3. The Board's Decision on the Turkiye Liaison Office of a Foreign Data Controller Requesting Special Categories of Data from the Employee Candidates[40]

The decision is regarding the collection of special categories of personal data by the Turkish liaison office of a data controller that is located abroad, concerning complaints from the data subject employee that sensitive data was collected without explicit consent, that it was disproportionate to collect copies of the employees` family member IDs, that the data controller failed to meet the conditions under the Board decision numbered 2018/10 and had failed to respond to the data subject enquiries in time, and that there was concern that the personal data might be transferred abroad.

In its analysis the Board emphasized that the actual data controller is the foreign entity located abroad and not the liaison office; and that the employer is deemed to be the "foreign investor" defined under Law No. 4875 on Foreign Direct Investments as per the employment laws. Accordingly, a transfer of personal data from the liaison office to the data controller company abroad would not be unlawful, since the company located abroad is the actual data controller.

The Board also noted that it is impossible for the data subject not to realize that the information obtained from them will be used abroad. Accordingly, in cases where there is no option other than obtaining explicit consent to fulfill a contract, asking consent from the parties when executing the contract will not harm the legal elements of explicit consent, since the data subject is already aware of the future movements of their personal data when executing the contract.

The Board instructed the data controller to process the applications with maximum diligence and attention and required the data controller to convey documents to the data subject, proving that the data subjects' personal data have been destroyed.

4. The Board's Decision on Unconsented Access of An Ex Employee's Business E-Mail Account by the Data Controller Employer[41]

The decision concerns an employer processing a former employee's personal data by accessing his corporate e-mail account and obtaining his personal e-mails and records as evidence to use in a legal proceeding.

Although the Board's view is in parallel with the general practice in internal audits and its previous approach, this is the first time that the Board has provided this much detail and opinion concerning internal audits. In its decision, the Board referred to the Constitutional Court judgment dated September 17, 2020 application number

[40] https://kvkk.gov.tr/Icerik/7294/2022-172 (Last accessed on January 30, 2023)

[41] https://www.kvkk.gov.tr/Icerik/7269/2021-1187 (Last accessed on January 30, 2023)

2016/13010,[42] Constitutional Court judgment dated January 12, 2021 with application number 2018/31036[43] and European Court of Human Rights' Barbulescu v. Romania decision.[44]

By referring to these decisions, the Board focused its decision on the lack of transparency towards the data subject and has not specifically indicated a requirement for explicit consent; except for a general reference to obligation to comply with the processing conditions (legal grounds) under Article 5 of DPL.

The Board emphasized the following points:

- Employees have a legitimate interest that their fundamental rights and freedoms will be protected in the work place,
- Employers may have a legitimate interest in monitoring employee communications, however such legitimate interest must be proportional to the degree of interference with the employee's fundamental rights and freedoms,
- Employees must be informed about whether their correspondence may be monitored by employers,
- The scope of monitoring, degree of interference on the employee's privacy, and differentiation of the concepts of monitoring the flow of communication from monitoring the content of the communication must be clearly made and more serious reasons must be sought for monitoring contents,
- A clear reasoning must be provided for monitoring content of communication,
- Circumstances must be assessed to evaluate where there are less intrusive methods and measures than accessing the content of the employee's communications,
- The results of the monitoring activities, whether these results are being used appropriately for the purpose of the collection must be assessed,
- When the employer's monitoring activities are intrusive, there must be protective measures in place for the employee, and in cases where the employee has not been informed of the monitoring in advance, the employer should not be able to access the content of the communication.
- The data to be processed or used must be limited to the purpose sought.

The Board decided that (i) data contained within the corporate e-mail account of the employer is personal data, (ii) the processing was not based on any of the processing conditions, (iii) the data controller has not fulfilled its obligation to inform pursuant to Article 10 of DPL or Article 4 of the Communique, (iv) the Board will initiate an *ex officio* review regarding the allegation of the relevant activities must comply with Article 9 of DPL since data is retained by Microsoft having servers abroad, (v) that the data subject has not made the data public, since "making public" requires that (a) the data subject's intent was to make the data public, (b) the use of the data is

[42] https://kararlarbilgibankasi.anayasa.gov.tr/BB/2016/13010 (Last accessed on January 30, 2023)
[43] https://kararlarbilgibankasi.anayasa.gov.tr/BB/2018/31036 (Last accessed on January 30, 2023)
[44] https://hudoc.echr.coe.int/eng?i=001-159906 (Last accessed on January 30, 2023)

appropriate to the purpose for which it was made public. The Board imposed an administrative fine of TL 250,000 against the data controller pursuant to Article 18 (1) (b) of DPL.

The decision is also significant since the Board has decided that the Data Protection Authority ("***DPA***") will initiate an *ex officio* review pursuant to Article 15 of DPL on whether the transfer of data abroad through the use of the cloud services of Microsoft must be done pursuant to Article 9 of DPL.

II. DPA Guidelines in 2022 regarding Personal Data

In 2022, the DPA introduced significant developments in the data protection practice with the below guidelines. Other than the below, DPA has published two more draft guidelines and initiated a public consultation process for a short period of time: the Draft Guideline on Processing of Personal Data in Loyalty Programs and Draft Guideline Regarding the Issues to be Considered in the Processing of Genetic Data. Although these are significant in themselves, the drafts are no longer accessible and since finalized versions are not available, these were not included in the below summaries.

1. Guideline on Use of Cookies[45]

The DPA has published the final version of Guideline on the Use of Cookies ("***Cookie Guideline***") on June 20, 2022.

The Cookie Guideline aims to provide guidance and practical advice for all data controllers who operate a website. The Cookie Guideline covers the processing of personal data through cookies, and notes that those cookies that are not used for processing personal data are not in the scope of the Cookie Guideline applicable to desktop and mobile websites or web applications.

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

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

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

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

As for cases that do not fall under the scope of these two criteria, the below conditions will be applicable for the use of the cookies. The conditions for processing of personal data regarding the cookies

[45] https://www.kvkk.gov.tr/SharedFolderServer/CMSFiles/fb193dbb-b159-4221-8a7b-3addc083d33f.pdf (Last accessed on January 30, 2023)

within the Scope of the Law No. 6698 are as follows:

- Explicit consent, or

- other processing conditions set forth in Articles 5 and 6 of the Law (as a result of the assessment made by the data controller regarding the data processing activity through cookies).

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

The Cookie Guideline lists each cookie type and assesses them based on the above criteria.

Per the Cookie Guideline, in cases where consent to cookies is imposed on the data subject as a prerequisite for the service by placing a cookie wall for accessing the website, this cookie wall may harm the free will of the data subject, and in this case, the explicit consent obtained will not be a valid explicit consent. In cases where third-party cookies are placed on the website, it is emphasized that both the website owner and the third party are required to ensure that users are clearly informed about cookies and to obtain their explicit consent when necessary.

In the event that websites operating in Turkey transfer data abroad by using cookies through companies located abroad, this activity must also comply with the Law No. 6698 provisions concerning the transfer of personal data abroad. In this context, it is necessary to obtain explicit consent from the data subject or to have adequate protection in the country to which the transfer will be made, or to submit a letter of undertaking to the DPA.

The Cookie Guideline also provides illustrative examples of "good practices" and "bad practices" for data controllers with respect to the explicit consent to be obtained when processing personal data through the use of cookies.

2. Guideline on Protection of Personal Data in the Banking Sector

The DPA and the Banks Association of Turkey published the Guideline on Protection of Personal Data in the Banking Sector[46] ("***Banking Guideline***") on August 5, 2022.

The Banking Guideline states that banks are data controllers for the transactions they carry out within the scope of Article 4 of the Banking Law No. 5411 ("***Banking Law***"). In addition, the Banking Guideline states that the assessment will take the facts of the relevant case into consideration when determining whether a bank would qualify as a data controller or data processor for operations they conduct as agents or brokers with respect to insurance, private pensions, investment instruments, international fast money transfers and payment for invoices, taxes and fees. The

[46] https://kvkk.gov.tr/SharedFolderServer/CMSFiles/12236bad-8de1-4c94-aad6-bb93f53271fb.pdf (Last accessed on January 30, 2023)

Banking Guideline also states that banks can be a joint data controller.

The Banking Guideline includes guidance on the topics that should be included in the data processing agreements to be made between the data controller and the data processor. Separate referrals are also made with respect to the banks` support services, agreements made with companies and their affiliates, open banking as well as cases where banks act as agents.

Since the explicit consent to be obtained from the data subjects does not have to be "written", the bank does not have to provide a written and signed text, but the data controller is responsible for proving that explicit consent has been obtained. In the case of a bank branch, approval can be obtained for explicit consent texts from the data subjects, by ink signature or other methods (digital signature, e-signature, etc.) prescribed by the legislation. If the explicit consent is requested from the data subjects from the ATM, the consent for the explicit consent text can be obtained after the person logs into the ATM. When it comes to Internet/mobile banking, boxes/buttons and similar methods that allow people to tick and opt-in can be used in order to obtain explicit consent from the data subjects. In the selections made with this box/button and similar methods, the options should not be pre-selected but require positive action from the user.

Pursuant to Article 73 of the Banking Law, information that constitutes a customer`s confidential information cannot be transferred domestically or abroad in the absence of the customer's own request or instruction to that effect, even with the explicit consent of the data subject, except in cases which are exempt from the confidentiality obligation. In the Banking Guideline, it is stated that the competent authorities may request information and documents from the banks in certain cases as stipulated by the Law No. 6698, and that providing information within the scope of these requests is limited to answering the questions asked by the authorities on related issues in accordance with Article 73 and 159 of the Banking Law. In this context, banks will be able to transfer data to the competent authorities, provided that it is limited to the answers to such information requests.

In terms of data transfers abroad, the Banking Guideline refers to the conditions stipulated in paragraph 6 of Article 9 of the Law No. 6698 and reminds that provisions that would be applicable under other laws are reserved. The Banking Guideline also underlines that the provisions of the Banking Law regarding the transfer of customer confidential data, have a ‘specific rule’ status according to Law No. 6698. Accordingly, this may not necessarily mean that where a cross-border personal data transfer is free of conditions under the Law No. 6698, it would automatically be allowed under the Banking Law, or vice versa. While assessing a cross-border transfer situation, both laws should be carefully assessed and applied together, when possible.

In the Banking Guideline it is also stated that each bank will be able to create its own notice wording in accordance with its own operation and systems, with respect to the personal data categories, data collection method, processing purposes and legal justifications, and the parties to which personal data is transferred. On the other hand, the information to be given to the data subject under the notification requirement must be compatible with the information disclosed in the Data Controllers Registry Information System (VERBIS). Since the bank has a large

number of data processing purposes, it would be appropriate for banks to prepare the notice wordings themselves. The Banking Guideline assesses the specific situations banks may encounter and guides the banks on how to fulfill their transparency obligation. The Banking Guideline gives general advice on certain acceptable transparency methods in the banking practice such as providing a layered transparency notice *i.e.*, first providing a summary explanation by directing the data subjects to a more detailed compliant transparency notice, or by informing that their personal data are collected by providing an explanation as character limits in the banking technologies *e.g.*, internet banking, ATMs allow.

On the other hand, banks are obliged to notify the real persons (staff, visitors, etc.) whose data they process. It is recommended in the Banking Guideline that additional information should be provided to the data subject at the stages of obtaining personal data within the scope of banking activities. For instance, specific notice can be made on issues such as the use of biometric data in identity verification or products/processes that may affect large audiences and where new technologies are used, or participation in any contests/prize draws. As a rule, the obligation to notify must be fulfilled by the data controller at the stage of obtaining personal data.

The obligation of deletion, destruction and anonymization of personal data in the Banking Guideline is processed under three headings: (i) Retention of data in banking, (ii) purpose of processing being no longer valid or needed, and (iii) destruction methods. Banks are responsible for preparing their data processing inventory and keeping it up to date. Within the scope of these obligations, the Banking Guideline included guidance for banks by referring to the legislative items regarding the retention periods of data. In addition, there are guiding tables on the destruction methods of banks in the Banking Guideline. Banks must comply with both the data security obligations listed in the banking legislation and the data security obligations stipulated in accordance with Law No. 6698. The Guideline explains in detail the data security obligations of banks, which they are subject to as per the banking legislation. Each bank also determines its data retention and destruction policies in accordance with its assessment.

3. Other Developments

The Constitutional Court's ("***Court***") decision on the right to request protection of personal data ("***Decision***") was published on the Official Gazette on December 20, 2022.[47] The Court decided that the applicant's right to an effective remedy related to his right to request the protection of personal data has been violated, due to the courts' failure to examine the applicant's claim on its merits.

The decision is important as it could be a precedent for cases where data subjects request right of access to their personal data. Moreover, although the initial claim was related to consumer law (and thus handled by consumer courts), the Constitutional Court still found that the applicant's rights had been violated due to courts' obligation to make an evaluation within the scope of the Constitution, as explained below.

[47] https://www.resmigazete.gov.tr/eskiler/2022/12/20221220-4.pdf (Last accessed on January 30, 2023)

According to the Court's decision, the applicant had requested his Internet data, log records, IMEI information and the date of "Hot Spot" use of the years 2014 and 2015 with regards to his telephone line which is provided by a company named "A. Iletisim Hizmetleri A.S.". He also requested the log records for the dates when other subscribers' telephones used the same telephone number and the single IP number, while he was using the Internet through his telephone. The applicant stated in his application that the company's customer services rejected his application by stating that this information can only be shared if it is requested by a court, and accordingly the applicant filed a lawsuit before the Istanbul Anadolu 1st Consumer Court, and claimed that the information he requested pertains to his private life and should be shared with him by the service provider.

Istanbul Anadolu 1st Consumer Court dismissed the case by stating that the matters requested to be determined relate to material data rather than a right or legal relationship. The Applicant's appeal was also rejected due to the merits on the grounds that the information requested is beyond the obligatory minimum and such information can only be provided to judicial authorities upon a judgment, in order to catch the perpetrators of the crimes under Article 8 of the Law No. 5651; and, in the same vein as the first instance court, deemed that the request relates to material data, rather than a right or legal relationships; and, that the Applicant could not claim and prove before the Consumer Court that there is legitimate interest worthy of legal protection. The Applicant then made an individual application before the Constitutional Court, as a last resort.

The Applicant claimed that (i) the company rejected his application by stating that this information can only be shared if it is requested by a court and (ii) he was deprived of the right to access to personal data, the right to learn if the data is accurate or not, and the right to request the correction of data if it is not accurate, as the Consumer Court dismissed his case and that his right of protection of personal data, respect for private life, right to legal remedies and right of property are violated.

The Court stated that the first instance court had not examined the merits of the case, and when dismissing the case, had failed to provide a reason in accordance with the requirements of the right to request the protection of personal data under the Article 20 of the Constitution, and that it failed to provide relevant and sufficient reasoning which could justify such an implementation. The court further evaluated that the courts did not discuss or clarify the obligations of the company in terms of access to personal data and by not examining the merits of the case, negated an effective legal remedy which had been available in theory. In other words, a legal remedy that might potentially have been effective, lost its chance of success due to the interpretation of the courts.

Consequently, the Court concluded that the applicant's right to an effective remedy as related to his right to request the protection of personal data has been violated, due to the courts' interpretation that did not allow the case to be examined based on its merits. The Court unanimously concluded that the applicant's right to an effective remedy related to his right to request the protection of personal data has been violated and directed the Istanbul Anadolu 1st Consumer Court to retry the case and thus eliminate the consequences of the violation.

Internet Law

Constitutional Court's Recent Decision on the Freedom of Expression

On November 30, 2018, a civil servant who was employed as an engineer in a public institution applied to the Constitutional Court, alleging that she was being subjected to disciplinary action in violation of her freedom of expression, due to a post on her social media account. The Constitutional Court accepted this application with number 2018/36354 on October 18, 2022[48] on the grounds that the right to freedom of expression was violated.

In her social media post, the civil servant criticized certain unnamed individuals and implied that these people were being appointed/promoted not on their merits but because they were supporters of a certain religious sect and subsequently this post became a source of news in a local newspaper. The newspaper article named the public institution where the applicant was working, and noted that the post in question caused confusion in the institution, that its employees were being investigated for being a member of a terrorist organization and that these people were in managerial positions, and that the said public institution was under threat of a religious sect. The public institution where the applicant worked initiated a disciplinary investigation against the applicant who was accused of "exceeding the limits of freedom of expression through social media post, and indirectly accusing the institution and the administrators with baseless allegations, trying to harm and tarnish the public image of institution, thus behaving in a manner that does not befit the esteem of a civil servant and undermining their trust."

In the investigation held by the public institution, statements were taken from both the journalist who made the news and the applicant herself. The journalist stated that the source of their news item was the applicant's social media post, they had not been contacted [by the applicant or third parties] to publish this, they had accessed the post through the social media account of a friend of the applicant, they were not informed about the identities of the alleged members of the religious sect, and claimed they had made the news as it was written in the post.

In her statement, the applicant stated that she did not include the name of any person, institution or religious sect in her post, and that she believed the post was sent to the newspaper by someone she was friends with on social media without her knowledge and whose identity she did not know. The applicant also denied the allegations, defending that, the newspaper had added the extra content aside from her post, that upon her objection, the newspaper had published a disclaimer, and that the public institution was aware of these circumstances. In her second statement, she further stated that as her post did not identify any institution or religious sect, it had not been newsworthy on its own and contents had been distorted by the newspaper.

After the disciplinary investigation, it was decided that a disciplinary warning be issued to the applicant, for engaging in "behavior incompatible with the esteem of a civil servant" pursuant to sub-paragraph (e) of the first paragraph of Article 125 of

[48] https://www.resmigazete.gov.tr/eskiler/2022/11/20221117-5.pdf (last accessed on January 24, 2023).

the Civil Servants Act with no. 657. The applicant objected to this decision, but her objection was rejected. Thereupon, the applicant filed a lawsuit for annulment against the disciplinary action and the Antalya 2nd Administrative Court stated that the applicant did not mention any institution or person in her critical post, and so dismissed the allegation that the applicant had tried to harm the institution and its administrators with baseless accusations and tried to tarnish its reputation; finding the institution's administrative action to be unlawful. However, upon the institution's appeal against this decision, the regional administrative court definitively decided to annul the administrative court's decision and reject the case, finding that the applicant had indeed committed the alleged act against her employer.

Thereupon, the applicant claimed that although the social media post had not identified any institution or religious sect, her punishment had violated her freedom of expression, as well as the principle of equality since had she not been a civil servant she would not have been subject to disciplinary action and also her right to a fair trial as the court's annulment decision was overturned by an incomplete and insufficient examination.

The Constitutional Court, in its evaluation stated that; the allegation regarding the violation of freedom of expression and dissemination of thought should be accepted, however that the warning issued to the applicant because of her social media post and behavior not befitting the esteem of a civil servant was not found to be a breach of freedom of expression.

Telecommunications Law

Development on the Refund of the Amounts Unfairly Received from the Consumers

The Information Technologies and Communication Authority ("***ICTA***") published the Draft Amendment on the Regulations Regarding Refunds ("***the Draft***"), with its decision of December 22, 2022 numbered 2022/İK-THD/326.[49] The Draft is mainly about the amounts which were received unfairly from the consumers by the operators, and amends certain decisions of the ICTA.

The Draft provides the following regulations and amendments:

The following paragraph is added at the end of Article 2 of the ICTA's decision No. 2010/DK-10/55 dated January 27, 2010 with the ICTA's decision of April 12, 2018 and with number 2018/DK-THD/116,"*In case of failure to be informed through SMS, the notification message should also be forwarded to operators with GSM, IMT-2000/UMTS and IMT authorization to be sent to all active mobile numbers that are registered to the Turkish Republic Identity Number or Foreigner Identity Number of the creditor.*"

Accordingly, with this amendment, if the prepaid subscribers - whose subscriptions are terminated for various reasons - could not be informed through SMS for the remaining balance in their accounts, the relevant notification message will be forwarded to operators with GSM, IMT-

[49] *See:* https://www.btk.gov.tr/uploads/boarddecisions/iadelerle-ilgili-duzenlemelerde-degisiklik-yapilmasina-dair-taslak/326-2022-web.pdf (Last accessed on January 13, 2022).

2000/UMTS and IMT authorization, to be sent to all active mobile numbers of the relevant consumer, which are registered to their Turkish Republic Identity Numbers or Foreigner Identity Numbers.

Another significant amendment is made on the Procedures and Principles for Checking Debt and Credit Information.[50] Pursuant to the subparagraph which is added to Article 4, it will be possible for legal heirs to check the debt and credit records of their deceased relatives, through the e-Government Gate and the web service offered by the operators. The authorized persons of corporate entities will also be able to use e-Government Gate system to access various services. Accordingly, the operators should forward the relevant information to the e-Government Gate, to be accessed by the authorized representative of corporate entities or the real persons (legal heirs) who would be running these checks at the e-Government Gate. Article 3 of the Draft also governs that the operator would commence the restriction and cancellation processes for the relevant mobile service if active, in the absence of a transfer request from the legal heirs.

Furthermore, pursuant to the subparagraph added to Article 5 of the Procedures and Principles for Checking Debt and Credit Information, in order to prove that the last warning for the payment of their invoice was received by the consumers, the operator will send a short message at least seven (7) days before this last warning to all active mobile numbers of the subscribers, as registered under their Republic of Turkey Identity Number or Foreigner Identity Number, via GSM, IMT-2000/UMTS and IMT operators.

The draft also amends Article 11 of Procedures and Principles for Checking Debt and Credit Information titled "Informing the Authority regarding the Refunds". With the proposed amendment, the operators will be required to fill out the table attached to the Draft and submit it to ICTA and Ministry of Transportation along with the original or certified bank receipts within seven days.

The subparagraph (a) of Article 2 of the Draft, which regulates the e-Government Gateway services, enters into force on March 1, 2023 while the other articles entered into force on December 31, 2022. Accordingly, operators might find it necessary to revise their operations as per the foregoing and take the necessary steps in line with these amendments.

White Collar Irregularities

Standards of Corporate Compliance Programs Based on Recent Trends of the DOJ

Admittedly, all corporate compliance professionals, regardless of the country they practice in, might at one point find themselves having to monitor extra-territorial applicability of the United States laws and regulations, in the likely event that they are dealing with a multinational corporation. In this sense, it might be beneficial to adopt a holistic approach and look into the recent practices and publications of the U.S. enforcement authority, the Department of Justice ("***DOJ***"), rather than merely dwelling on the relevant legislation.

[50] *See:* https://tuketici.btk.gov.tr/uploads/pages/usul-ve-esaslar/borc-ve-alacak-bilgilerinin-sorgulanmasina-iliskin-usul-ve-esaslar-466-081-278-konsolide.pdf (Last accessed on January 25, 2022).

The DOJ is tasked with enforcement of U.S. laws (including those with extraterritorial applicability) and actively publishes press releases on enforcement actions, texts of the speeches given by officials in the DOJ, and publicly retains and revises advisory guidelines for prosecutors who are investigating corporate-level wrongdoings.

Below is a roadmap of standards of good corporate compliance programs as can be gleaned from DOJ's recent practices and publications.

Further Revisions to Corporate Criminal Enforcement Policies (also known as the "Monaco Memo") Following Discussions with Corporate Crime Advisory Group

Lisa Monaco, the DOJ's Deputy Attorney, issued a memorandum on the DOJ's Corporate Criminal Enforcement Policy ("***Memorandum***") on September 15, 2022.[51] The Memorandum provides guidance on how prosecutors should ensure both individual and corporate accountability, and suggests that, going forward, the DOJ will take a more nuanced approach on (i) cooperation credit that can be gained by "voluntary and timely disclosure of all relevant, non-privileged facts" learned through internal investigations, (ii) factors to assess when determining whether to forego a prosecution in the U.S. if it has been already prosecuted in a foreign jurisdiction, (iii) strength of a corporation's existing compliance program, (iv) appointment of independent monitors, including their selection and the appropriate scope of a monitor's work, (v) transparency in criminal enforcement actions.

- Corporate Cooperation

Companies seeking credit for cooperation are expected to timely preserve, collect, and disclose relevant documents which may be located both within the United States and overseas. On this point, it is worthy to note that the Memorandum recognizes that data protection and privacy laws of foreign countries may restrict production of documents located overseas. In such a case, the cooperating corporation bears the burden of establishing the existence of any restriction on production and of identifying reasonable alternatives to provide the requested facts and evidence, and is expected to work diligently to identify all available legal bases to preserve, collect, and produce such documents, data, and other evidence expeditiously.

The Memorandum also stipulates that prosecutors should provide credit to corporations that find ways to navigate issues of foreign law and produce such records. However, it states that where it is evident that the corporation is using data protection laws of foreign countries as a way to shield misconduct and investigation, DOJ must adopt a contrary method and use it as an adverse inference as to the cooperation's cooperation.

- Company Policies on Use of Personal Devices and Third Party Applications

The Memorandum recognizes that information stored in personal electronic devices and third party applications may be critical for investigations. As part of evaluating a corporation's policies and mechanisms for identifying, reporting, investigating, and remediating potential violations of law, the DOJ advises that

[51] https://www.justice.gov/opa/speech/file/1535301/download (Last accessed on January 26, 2023)

prosecutors should consider whether the corporation has implemented effective policies and procedures governing the use of personal devices and third-party messaging platforms to ensure that business-related electronic data and communications are preserved.

- Foreign Prosecutions

Currently, existence of a foreign prosecution may provide grounds to forego federal prosecution. In this sense the Memorandum introduces a new ground by establishing criteria for determining whether such foreign prosecution can be recognized in the United States. The Memorandum sets out that the prosecutors should consider the following factors, among others: (i) the strength of the other jurisdiction's interest in the prosecution, (ii) the other jurisdiction's ability and willingness to prosecute effectively, and (iii) the probable sentence and/or other consequences if the individual is convicted in the other jurisdiction.

- Strength of Compliance Programs

The Memorandum provides that prosecutors should evaluate a corporation's compliance program as a factor in determining the appropriate terms for a corporate resolution, including whether an independent compliance monitor is warranted. It explains that prosecutors should assess the adequacy and effectiveness of the corporation's compliance program at two points in time: (i) the time of the offense, and (ii) the time of a charging decision.

The Memorandum also sets forth an exhaustive list of factors to consider when determining whether prosecutors may require use of independent compliance monitors as part of a corporate criminal resolution.

- Transparency in Corporate Criminal Enforcement Actions

The Memorandum requires that DOJ's agreements with corporations be published on DOJ's website (absent exceptional circumstances) by including certain details such as (i) an agreed-upon statement of facts outlining the criminal conduct that forms the basis for the agreement, (ii) a statement of relevant considerations that explains the DOJ's reasons for entering into the agreement, (iii) cooperation credit received, if any, (iv) corporation's history of misconduct, (v) the state of the corporation's compliance program at the time of the underlying criminal conduct and the time of the resolution, and (vi) the reasons for imposing an independent compliance monitor or any other compliance undertaking, if applicable.

Speech of Deputy Attorney General Lisa Monaco of September 15, 2022

On the same day the Memorandum was published, DOJ's Deputy Attorney General clarified their revised position through a speech.[52] Some of the most important points made, which expanded on the Memorandum, were as follows:

- Undue or intentional delay in producing information or documents, particularly those that show individual culpability will result in the reduction or denial of corporation credit.

- If a company has prior history of misconduct, criminal resolutions entered between the DOJ and such company that occurred more than ten years before the conduct currently

[52] https://www.justice.gov/opa/speech/file/1535301/download (Last accessed on January 26, 2023)

under investigation, and civil or regulatory resolutions that took place more than five years before the current conduct will be accorded less weight.

- Every component within the DOJ that prosecutes corporate crime must have a program that incentivizes voluntary self-disclosure.

- Companies may employ the "carrots and sticks" approach within their discrete corporate policies, by introducing "clawback provisions", "escrowing of compensation", and "other ways to financially hold individuals accountable for criminal misconduct" of the company.

Four recent enforcement actions based on violation of corporate governance rules

- Lafarge SA

LaFarge SA, a France-based cement company pled guilty to conspiring to provide material resources and support to U.S. designated terrorist organizations and agreed to pay USD 778 million via a resolution.

According to the DOJ's press release, LaFarge SA's senior executives participated in a scheme wherein they concealed payments to terrorist organizations, demonstrating a failure of its corporate culture. Additionally, LaFarge SA also lacked a robust anti-corruption compliance program, including an adequate anti-corruption policy and employee training. Further, LaFarge failed to monitor business communications on non-firm devices and communications platforms which employees used to discuss and execute the scheme.

- Stericycle Inc.

Stericycle Inc., an international waste management network, agreed to pay USD 84 million to resolve parallel investigations by authorities in the U.S. and in Brazil into the bribery of foreign government officials in Brazil, Mexico, and Argentina. The resolution reached with Stericycle was based on a number of factors, including, among others, the company's failure to voluntarily and timely disclose the conduct that triggered the investigation and the nature, seriousness, and pervasiveness of the offense. Stericycle received full credit for its cooperation with the department's investigation and engaged in extensive remedial measures.

- Glencore International A.G.

Swiss based mining firm Glencore International A.G. and Glencore Ltd., agreed to pay over USD 1.1 billion to resolve the government's investigations into violations of the Foreign Corrupt Practices Act ("***FCPA***"). According to DOJ's press release, Glencore and its subsidiaries caused approximately USD 79.6 million in payments to be made to intermediary companies in order to secure improper advantages to obtain and retain business with state-owned and state-controlled entities in the West African countries.

Glencore did not receive full credit for cooperation and remediation, because it did not consistently demonstrate a commitment to full cooperation, it was delayed in producing relevant evidence, and it did not timely and appropriately remediate with respect to disciplining certain employees involved in the misconduct. Although Glencore has taken remedial measures, some of the compliance enhancements were new and

had not been fully implemented or tested to demonstrate that they would prevent and detect similar misconduct in the future. As a result, DOJ appointed an independent compliance monitor for a term of three years.

- SAP SE, a global software company

SAP SE, a software company based in Walldorf, Germany, agreed to pay more than USD 8 million as part of a global resolution with the DOJ over voluntary disclosures the company made wherein it acknowledged violations of the Export Administration Regulations and the Iranian Transactions and Sanctions Regulations of the U.S.

DOJ reached its resolution with the company based upon SAP's voluntary self-disclosure upon extensive internal investigation and cooperation of over a three-year period. During this time, SAP worked with prosecutors and investigators, producing thousands of translated documents, answering inquiries and making foreign-based employees available for interviews in a mutually agreed upon overseas location. SAP also timely remediated and implemented significant changes to its export compliance and sanctions program.

Intellectual Property Law

The Regulation on E-Commerce Intermediary Service Providers and E-Commerce Service Providers to Require an Internal Communication System for due processing of Notices regarding Infringement of Intellectual and Industrial Rights

I. Introduction

The Regulation on E-Commerce Intermediary Service Providers and E-Commerce Service Providers ("***Regulation***"), which was published in the Official Gazette on December 29, 2022,[53] introduced a new obligation for e-commerce intermediary service providers. The purpose of the Regulation is described as "providing an efficient and fair competition environment and regulating the relationships between the e-commerce intermediary service providers and the e-commerce service providers in order to ensure the development of e-commerce".

In line with this purpose of the Regulation, a separate Section 4 has been added on the "Infringement of Intellectual and Industrial Rights", and Articles 12, 13, and 14 thereunder stipulate that the e-commerce intermediary service provider shall provide an internal communication system to ensure a simple and free-of-charge communication with e-commerce service providers for which it provides intermediary services.

[53] https://www.resmigazete.gov.tr/eskiler/2022/12/20221229-5.htm (Last accessed on January 31, 2023)

II. The details of the amendment

The details of the internal communication system to be regulated under Section 4 of the Regulation, are as follows:

1. Article 12

It has been regulated under Article 12 that, in case of an intellectual and industrial right violation, an application indicating the below elements shall be conveyed to the e-commerce intermediary service provider through the (i) internal communication system, (ii) public notary, or (iii) Registered E-Mail ("***REM***"):

- Trademark registry certificate issued by TURKISHPATENT, or copyright label form issued by the Ministry of Culture and Tourism, or the certificate of activity for collective management organizations within the meaning of the Law No. 5846.
- If the complainant is a real person: name, surname, Turkish ID number, address, e-mail address, and REM, if available; if the complainant is a legal person: trade name, address, e-mail address, REM; if the complaint is filed by the attorney: the above-mention details for both the attorney and the client, and the documentation to demonstrate the attorney`s authority to duly represent said client.
- The grounds for the alleged infringements of the subject-matter, the intellectual and industrial right and supporting evidence.
- The website displaying the infringing product.
- An undertaking by the complainant to indemnify any damages that may arise if the information and documents submitted under the complaint are untrue.

The above-listed elements pose great importance for complaints regarding intellectual and industrial right violations. This is because, as per Article 12/2 of the Regulation, it is explicitly regulated that in case of any lacking elements, the complaint will not be processed and the complainant will be informed of the deficiencies.

The e-commerce intermediary service provider is obliged to remove the subject-matter product without delay and no later than 48 (forty-eight) hours after it received the complaint. Once the product is removed, it must inform the e-commerce service provider (*i.e.*, whose product was removed as per the complaint) and the proprietor (of the infringed intellectual and industrial right) in question. The e-commerce service provider is entitled to object to this removal and the methods to raise such objection must be included in the notice to be sent to the e-commerce service provider by the e-commerce intermediary service provider upon removal.

It is also stated under Article 12 of the Regulation that the internal communication system to be set up by the e-commerce intermediary service provider can be used for all the notices and objections under this provision.

2. Article 13

As mentioned under Article 12 of the Regulation, the e-commerce service provider is entitled to object to the removal of the product that it offers to the market on the online marketplace, by the e-commerce intermediary service provider. Article 13 of the Regulation elaborates on the objection process.

The objection can be submitted through (i) the internal communication system, (ii) a public notary, or (iii) REM. The e-commerce service provider is required to submit the below elements along with the objection:

- The name, surname, or trade name of the objecting party; or, if the objection is filed by the attorney or the legal representative, the name and surname of the attorney or legal representative and the client, and the power of attorney.
- The grounds of the objection, documents and supporting evidence showing that the removed product does not violate the intellectual and industrial rights of the complainant.
- Invoice or documents of similar nature, sufficient to prove the product's authenticity; contracts, similar documents, and evidence identifying the proprietor of the intellectual and industrial right, and any persons who had previously been authorized to sell or market the product by the proprietor.
- An undertaking by the objecting party to indemnify any damages if the information and documents submitted under the objection are untrue.

The above-listed elements are essential for objections against product removals, as Article 13/2 explicitly provides that in case of any deficiencies, the objection will not be processed and the objecting party will be informed of the same.

3. Article 14

Further to the complaint submitted by the proprietor and the objection submitted by the e-commerce service provider, the e-commerce intermediary service provider will settle the dispute. The method of resolution of the dispute by the e-commerce intermediary service provider is regulated under Article 14 of the Regulation.

After evaluation of the complaint and the objection, if the e-commerce intermediary service provider can easily conclude that the objection of the e-commerce service provider is admissible (*i.e.,* the removal of the product was unlawful), the e-commerce intermediary service provider is required to re-publish the products within 24 (twenty-four) hours after the objection was received. Once the product is re-published, it should notify the same to the e-commerce service provider and the proprietor of the infringed intellectual and industrial right.

Unless there is additional evidence supporting the infringement allegation regarding the relevant product, the e-commerce intermediary service provider will not process other complaints that may be submitted against the said product, if they are based on the same allegation. Also, it will inform the e-commerce service provider accordingly.

The Regulation limits the scope of the evaluation to be conducted by the e-commerce intermediary service provider and provides that only the documents submitted by the parties will be taken into account.

Finally, last subparagraph of Article 14 of the Regulation confirms that the parties' rights to pursue legal action and administrative proceedings are reserved.

III. Conclusion

The Regulation establishes a complaint–objection mechanism against a commonly

seen violation of intellectual and industrial rights, *i.e.,* through online sales. The violation of such rights through the internet is also acknowledged in the intellectual and industrial property law primary legislation, for instance, the Industrial Property Law No. 6769.

Upon examination of the Regulation, the first thing that comes to mind is that the main purpose of this mechanism is to provide a swift method to cease and remove the unauthorized and infringing use; since civil litigation regarding intellectual and industrial rights violations is a time-consuming and complex litigation, which minimize the benefit of removing the infringing use due to the rapidly-changing nature of online services or, sometimes, the infringed product itself. However, the reason for this litigation taking so long is that industrial and intellectual property law has a wide range of components which affect the lawful use of a right or, even the proprietorship of a right. Also, a legitimate legal proceeding regarding an allegation of intellectual and industrial property rights violation is conducted by specialized courts through multiple expert reports and detailed statements of parties obtained throughout the process. On the other hand, the complaint–objection mechanism that the Regulation brings regarding an allegation of intellectual and industrial property rights violation, which normally should be pursued before a specialized court, has a very basic method with a very limited scope. Also, the assessment and the resulting decision is expected to be conducted and handed down by a civilian private entity, *i.e.*, the e-commerce intermediary service provider, rather than a specialized court, and it is expected to be done correctly.

Based on the foregoing, although the reasoning behind the complaint–objection mechanism that the Regulation brings is understandable, the method to resolve the issue poses legal risks for every actor of this mechanism (*i.e.*, the proprietor of the right, the e-commerce intermediary service provider, and the e-commerce service provider) because (i) the limited scope of the examination to be conducted by the e-commerce intermediary service provider will not allow the law to be correctly implemented, (ii) the law would be implemented by a civil private entity who is not authorized to resolve a legal dispute, and (iii) there is a risk for an interpretation such that the judicial power and the authority to hand down a judgment, is transferred from specialized courts to e-commerce intermediary service providers with respect to violations of intellectual and industrial right on the internet medium.

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