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# LEGAL INSIGHTS QUARTERLY

## June 2024 – August 2024

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**Preface to the June 2024 Issue**

The June 2024 issue of Legal Insights Quarterly was compiled to offer an in-depth exploration of upcoming legal challenges and the forefront of contemporary legal issues in Turkiye.

In this issue, the Corporate Law section sheds light on the intricate landscape of share subscription agreements, unveiling their significance in merger and acquisition transactions. This section offers detailed insights into the specifications, obligations, and closing transactions associated with share subscription agreements. Moving on to the Banking and Finance Law section, the focus shifts to the types and characteristics of bank letters of guarantee. Under the Capital Markets Law section, our topic is the distribution of dividends and advance dividends in joint-stock companies which are subject to regulatory frameworks.

The Competition Law section offers detailed insights into diverse realms, ranging from the recent amendments to Law No. 4054 on the Protection of Competition to nuanced analyses of key legal aspects including evaluation of non-compete obligations in merger transactions, unconditional approval for an acquisition in small package delivery services; clearance of a highly disputed transaction based on global commitments submitted by Microsoft to the European Commission and Meta's data combining conduct between Instagram and Threads and imposition of interim measures against Meta to prevent potential competition violations.

The Employment Law section of the issue offers profound insights into recent legal developments with an analysis of a pivotal ruling by the 9th Chamber of the High Court of Appeals, providing an in-depth perspective on mediation minutes' enforceability. In the Litigation section, our focus turns to a landmark decision by the Constitutional Court addressing conflicting judgments on non-pecuniary damages in breach of contract cases. The Data Protection Law section illuminates the trajectory of Turkish Personal Data Protection Legislation, highlighting the pivotal amendments made in alignment with the EU's GDPR. Moving forward, the Internet Law section juxtaposes the EU's Digital Services Act with Turkiye's E-Commerce Law, offering a comprehensive analysis of their similarities and distinctions, particularly concerning the regulation of unlawful content. Moreover, the Telecommunications Law section delineates the recent amendments to the allocation procedures and principles of domain names. Lastly, the Intellectual Property Law section marks a new era as the Turkish Patent and Trademark Office assumes authority in adjudicating trademark cancellation cases.

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.

June 2024

# Corporate Law

***Share Subscription Agreements***

## I. Introduction

In merger and acquisition transactions, when an investor opts to subscribe for the new shares to be issued during a capital increase, they undertake to pay the price of these shares, which constitutes their investment amount, directly to the company issuing the shares. This investment amount is subsequently infused into the company's capital through a capital increase accompanied by a share premium.

New shareholders may enter into a share subscription agreement which would specify how and in which way this investment amount will be used by the company. Essentially, this agreement delineates the way for the new shareholder to enter the target company by acquiring freshly issued shares through a capital increase. Unlike the share purchase agreements where existing shares are sold from a shareholder to third party purchaser, in this way, shares are created that did not previously exist in the company and the purchaser becomes an additional shareholder in the company by acquiring them.

## II. Specifications of Share Subscription Agreements

Share subscription agreements represent the mechanism through which an investor participates in a capital increase, thereby acquiring shareholder status by subscribing to newly issued shares during the company's capital expansion process. There are several issues to be considered in share subscription agreements:

Share subscription agreements are encountered in share purchase processes. Typically, with share purchase agreements, the purchaser is granted ownership of the existing shares of the target company, whereas within share subscription agreements, the purchaser is bestowed with ownership of newly issued shares generated via a capital increase by the company. These agreements involve the creation of new shares within the target company through a capital increase process and regulate the terms under which the new shareholder would acquire ownership of these shares.

The primary objective of share subscription agreements is to facilitate the creation of new shares within the company. Therefore, the primary obligation set out in the share subscription agreement for both the company and existing shareholders is to facilitate the general assembly meetings concerning the capital increase, in a manner that facilitates the investor's acquisition of new shares.

The most important obligation of the investor is to undertake and pay the investment amount to the company as share capital (in cash or in kind). The consideration should be paid directly to the target company against the new shares issued by the company, in other words, the transaction takes place between the investor as the purchaser and the target company.

Typically, due diligence is conducted prior to the negotiation and preparation of share purchase agreements, to review the legal status, assets and liabilities of the company and uncover any adverse findings, which may need to be addressed in the Parties' negotiations. In this respect, share subscription agreements and share purchase agreements have similar characteristics. As a matter of fact, various representations and warranties are also included in the agreements, such as, that there are no encumbrances on the target company's shares, that the target company is neither bankrupt nor insolvent (including loss of share capital and technical bankruptcy under the thresholds of Article 376 of the Turkish Commercial Code) in accordance with the applicable laws, that all contracts to which the target company is a party are in force and enforceable, that the target company has obtained all necessary permits for its current business, that the target company is conducting and has conducted its activities in compliance with all applicable laws in all aspects, that the target company has duly obtained all environmental related licenses to conduct its business which remain valid, all of the company's assets belong to the target company and that all taxes that are due and payable by the transaction date have been duly paid.

As explained above, closing transactions usually require assessing the due diligence results and where necessary, set out certain conditions precedent. Accordingly, once these prerequisites are completed, a capital increase process may be initiated under the share subscription agreement. A general assembly meeting may not be required in the context of a share purchase transaction but should be convened where a share subscription agreement is in place, and the relevant general assembly resolution should be registered with the trade registry and announced in the trade registry gazette.

### III. Conclusion

Share subscription agreements delineate terms and conditions governing a purchaser's participation in a company's capital increase by subscribing for the newly issued shares. Accordingly, once the new shares are created through share capital increase by the target company, the purchaser then becomes a shareholder of the company as the owner of these shares. The parties to the subscription agreement are the purchaser and the target company. In this context, share subscription agreements differ from share purchase agreements both in terms of the parties and the nature of the shares purchased.

## Banking and Finance Law

### *Types and Characteristics of Bank Letter of Guarantee*

Turkish laws do not provide a specific definition for a bank letter of guarantee ("***Letter of Guarantee***") nor are there any particular provisions within the banking legislation regarding this instrument. Despite this, in practice, the letter of guarantee is one of the most commonly used methods whereby banks guarantee to pay certain debts on behalf of their customers, to third parties. In this article, we aim to reveal a comprehensive analysis on the letter of guarantee under Turkish laws.

### I. Nature of the Letter of Guarantee

A letter of guarantee is a contract between its addressee and the issuing bank; where the beneficiary of such relationship is the bank`s customer. In a letter of guarantee, the bank, upon the request of its customer (beneficiary), guarantees to pay up to a certain specified amount to a third party (addressee) who may have entered or will enter into an agreement with the bank`s customer, in the event the said customer fails to fulfil its payment obligations arising from its contractual relationship with the third party addressee.[1] To that end, the third party, as the creditor under the main contract with the customer, becomes a party to the letter of guarantee as its addressee and the underlying structure is transformed into a three-way relationship: (i) the issuance of letter of guarantee is requested by bank's customer, namely the beneficiary of letter of guarantee, (ii) the bank provides the said guarantee to the addressee, (iii) which is the creditor, under the main contract with the bank`s customer.

The legal nature of the letter of guarantee is controversial in the Turkish doctrine, as such contractual relationship may have the elements of a surety agreement or a guarantee agreement, or it may be deemed to be a *sui generis* agreement. The Supreme Court, with its decisions on the unification of conflicting judgments (the "**Supreme Court Decisions**"), has defined the letter of guarantee as a guarantee agreement whereby the guarantor undertakes to be responsible for the obligations of a third party (its customer).

## II. Main Characteristics of the Letter of Guarantee

The main characteristic of the letter of guarantee considering the decisions of the Supreme Court on unification of conflicting judgments as follows.

A letter of guarantee is the undertaking of the third party's action. Indeed, the bank bears the risk arising from the non-fulfilment of its client's payment obligations to the addressee.

The letter of guarantee is independent from the third party's obligation under the main contract, and thus its validity is not affected by the validity of this principal obligation. In the Supreme Court Decisions it was stated that the relationship between the bank and the addressee in a letter of guarantee is a contract that is distinct from the principal obligation that exists between the addressee and the beneficiary of the letter of guarantee. Therefore, even if the agreement the letter of guarantee is provided for is not valid, this will not affect the validity of the letter of guarantee. In other words, the letter of guarantee will continue to be valid regardless of the validity of the contract between the customer of the bank and the third party.

The letter of guarantee usually burdens only one party with a payment obligation, namely the bank. That said, in practice, banks have a contractual relationship with their customers and may require securities to be provided to mitigate the burden of banks on payment obligations arising from the letter of guarantee, as well as set out the fees and commissions to be charged its customer for its issuance.

## III. Payment Request and Liquidation of Letter of Guarantee

Once the risk is realized, in order words, if the beneficiary fails to fulfil its payment obligation to the addressee, the addressee may request the bank to liquidate the letter of guarantee, which simply means converting the letter of guarantee into cash. Under Turkish laws, there is no specific form required for such an application. That said, in practice banks generally ask that the payment request is made in writing, along with submitting the original letter of guarantee. The bank will liquidate the letter of guarantee and pay the claimed

[1] Tekinalp, Ünal, Banka Hukukunun Esasları, Vedat Kitapçılık, İstanbul, Turkiye, 2009, at 511.

amount to the addressee if (i) the risk determined in letter of guarantee is realized, (ii) the payment request is in accordance with the letter of guarantee and (iii) the addressee requests payment in accordance with the terms agreed in the letter of guarantee. These conditions may be freely determined according to the type of letter of guarantee and mutual agreement of the parties within the framework of freedom of contract. If the addressee applies to the bank for the payment before the risk is realized, the bank may reject the request for liquidation of the letter of guarantee. That being said, if the bank accepts this payment request without the risk being realized, the beneficiary may apply to the court for an interim injunction against the bank to suspend the payment.

With regard to the expiration of the bank's payment obligation arising from the letter of guarantee, in the absence of specific statutory provisions pertaining to letters of guarantees, the general provisions of the Turkish Code of Obligations No. 6098 ("**TCO**") that set out the reasons for terminating payment obligations would be considered applicable. Accordingly, a letter of guarantee may be terminated when: (i) the bank performs its payment obligation upon the realization of the risk, (ii) beneficiary duly performs its obligations arising from the main contract, in other words, the cessation of the risk, (iii) realization of the risk due to gross fault of addressee, for instance impossibility of performance of the addressee's obligation under the main contract, and (iv) if the letter of guarantee is issued with a period of time and if the risk has not realized upon expiry of the term of letters of guarantee, then letter of guarantee shall be terminated.

## IV. Types of Letters of Guarantee

In general, the types of letters of guarantee are distinguished based on their term (indefinite or with a limited duration) or whether they are issued unconditionally or with certain conditions. In case of a letter of guarantee with an expiration date, if the risk is not realized within the period specified in such letter of guarantee, the guarantee obligation of the bank arising from letter of guarantee will cease on the expiration date. In case of an indefinite term letter of guarantee, the bank may continue to be liable for the payment obligation arising from the letter of guarantee indefinitely. However, in this case, the long stop date will apply, and the bank's liability will expire at the end of 10 (ten) years as of the realization of the risk, as per Article 146 of the TCO.

A letter of guarantee may be issued either unconditionally or conditionally. It may be agreed by the parties that the letter of guarantee will be liquidated upon first demand, with no conditions set for the payment. In case of such unconditional letter of guarantee, the bank will only examine whether the letter of guarantee meets the formal requirements, and the payment must be made upon the first demand. The parties may put a condition on the liquidation of the letter of guarantee. In this case, the realization of the risk is not sufficient for the letter of guarantee to be liquidated, as the agreed conditions must also be met. Therefore, the bank will liquidate the letter of guarantee at the first demand only if the relevant conditions are also satisfied. For instance, the bank may request to see certain documents before making a payment, and the parties may agree on these as conditions for payment in the letter of guarantee. If such conditions are not duly met, the bank will not liquidate the letter of guarantee upon the first demand until the conditions are met.

### V. Conclusion

In this context, the letter of guarantee guarantees the payment obligations of third parties and can be liquidated if the relevant conditions are met, depending on the type of the letter of guarantee. In practice, a letter of guarantee is one of the effective mechanisms for protecting the creditor of the main contractual relationship. Such guarantees issued by banks are more credible and also commercially valuable, as they are easier to liquidate.

## Capital Markets Law

***Distribution of Dividends and Advance Dividends in Joint Stock Companies Subject to Capital Markets Law***

### I. Introduction

The distribution of dividends and advance dividends in publicly listed joint stock companies are mainly regulated under the Capital Markets Law No. 6362 ("***CML***") and the Communiqué on Dividends (II-19.1) ("***Communiqué***"). The CML outlines the general scope for dividends and advance dividends, while the Communiqué provides detailed provisions as to their distribution. Unlike the Turkish Commercial Code No. 6102 ("***TCC***"), the CML does not specify a minimum rate for allocation of a "first dividend" (a 5% initial tranche of total dividends distributable to the shareholders). The aim of the CML, as clearly stated in the reasoning of the law, is to provide flexibility to the publicly listed joint stock companies in determining the level of dividends that would be best suited for their financial structures and investment policies.

### II. Distribution of Dividends

Article 19 of the CML sets out the principles regarding dividend distribution (i) to the shareholders of publicly listed joint stock companies, and (ii) to other relevant parties that are not the shareholders of the company. Publicly listed joint stock companies may distribute dividends within the framework of their dividend distribution policies, which are determined by their general assembly of shareholders in accordance with the applicable legislation. The Capital Markets Board ("***CMB***") is authorized to set out various principles regarding the dividend distribution policies of publicly listed companies, taking into account various types of partnership structures which these companies may operate in.

According to Article 4 of the Communiqué, dividends shall be distributed in accordance with the dividend distribution policy of the company and subject to a general assembly resolution of the shareholders. As per the Communiqué a dividend distribution policy should cover the following minimum content:

(i) Whether dividends will be distributed or not (if so, rate of the distribution),
(ii) method of payment,
(iii) timing of the payment,
(iv) Whether advance dividends will be distributed or not (if so, principles of the distribution).

Dividends shall be distributed equally for all shares existing as of the date of distribution regardless of their issuance or acquisition dates. However, any privileged shares may be subject to different terms due to the particular rights that may have been granted to such privileged shares.

### A. Payment in Installments

Dividend may be paid to the shareholders in installments of equal or different amounts, depending on the resolution of general assembly. The following terms apply to payment of the dividend in installments:

- The number of installments shall be determined by the general assembly, or by the board of directors, provided that it is expressly authorized by the general assembly.
- In cases where the installment payment schedule is not determined by the general assembly resolution, the payment schedule to be determined by the board of directors' resolution shall be announced to the public by the company within 15 (fifteen) days following the general assembly, in accordance with the CMB regulations on public disclosure of material events.
- Installments shall be paid equally to all existing shares as of the payment date, regardless of their issuance and acquisition dates.
- Dividend amounts which the general assembly decides to distribute to persons other than shareholders, shall be paid in proportion to the installments paid to the shareholders and in accordance with the same procedures and principles.

### B. The Recipients of the Dividend Payment

Pursuant to Article 19/2 of the CML, unless the statutory reserves and the dividend determined for the shareholders in the articles of association are duly set aside, no further reserves may be allocated or dividends transferred to the following financial year accounts, or paid to the beneficial owners, members of board of directors or employees of the company.

In order to distribute dividends to the privileged shareholders, beneficial owners, members of the board of directors, employees and persons other than shareholders, the articles of association of the company must include a provision in this regard. As stipulated under Article 5/4 of the Communiqué, if there is a provision in this regard but the dividend rate is not determined, the dividend to be distributed to such persons cannot exceed one fourth of the dividend distributed to shareholders in any case, except those arising from privileged shares.

### C. Companies whose Shares are not Traded on the Stock Exchange

The Communiqué stipulates special provisions on the dividend distribution for publicly listed companies whose shares are not traded on the stock exchange. Accordingly, the dividend distribution rate of such public joint stock companies cannot be less than twenty percent of their net distributable profit for the fiscal year, taking into account the net amount of total donations made, determined in accordance with the provisions the Communiqué. Publicly held companies whose shares are not traded on the stock exchange are obliged to distribute dividends in full and in cash. These companies cannot benefit from the practice of distributing dividends in installments according to Article 7 of the Communiqué. Dividend payments are made upon the presentation of the dividend coupon to the company.

In addition, if the amount of the dividend calculated in these companies is less than five percent of the share capital, according to the last annual financial statements to be submitted to general assembly, or if the net distributable profit for the fiscal year is less than TRY 100,000 according to the said financial statements, no dividends may be distributed for the relevant accounting period. Such circumstance and underlying reason should be announced to the public within the framework of the CMB's regulations on public disclosure of material events.

## III. Advance Dividends

Article 20 of CML and the Communiqué sets forth provisions regarding the payment of advance dividends in publicly listed companies. Advance dividend is an advance payment made by joint stock companies before the end of their accounting period, which will be deducted from the dividend to be distributed at the end of the fiscal year. Advance dividend can only be distributed to shareholders; and privileged shares are not taken into consideration when paying the advance dividends.

Companies whose shares are traded on the stock exchange may distribute advance dividends in cash, based on the profit amounts calculated in their interim financial statements. Advance dividends for a certain interim period cannot be distributed in installments according to Article 9 of the Communiqué. Publicly listed joint stock companies wishing to distribute advanced dividends must have a provision in their articles of association and their board of directors must be authorized to distribute advanced dividends limited to the relevant accounting period by a general assembly resolution. When the general assembly authorizes the board of the directors to distribute advance dividends, it is compulsory for the board of directors to resolve on whether the advance dividend is distributed or not, and also to publicly announce the resolution, in accordance with the Capital Markets Board's regulations on public disclosure of material events, during the announcement of interim financial statements at the latest.

According to Article 20/1 of CML and Article 10/2 of the Communiqué, advance dividends to be distributed may not exceed half of the amount that remains after deducting the (i) reserves required to be set aside in accordance with the TCC and articles of association, and (ii) losses of previous years, from the net profit for the period according to the interim financial statements. Also, total amount of advance dividends to be distributed in an accounting period shall not exceed the lower of a) half of the net amount of profits of the previous year, and b) other sources of profit distribution, except for the net profit realized for the period in the relevant interim financial statements.

## IV. Conclusion

Dividend is the essential financial right of the shareholders in joint stock companies, which is also in line with the main objective of the company to make profit. The distribution of dividends and advance dividends in publicly listed joint stock companies are subject to the provisions under the CML and the Communiqué, and this is mainly left to the discretion of the company's dividend distribution policies for publicly listed companies. That said, certain ratios are stipulated for companies whose shares are not listed in the stock exchange. The CML treats investors equally in terms of dividend distribution, by disregarding the date of issuance and acquisition of the shares. All in all, publicly listed joint stock companies enjoy more flexibility and transparency in terms of the dividends and advance dividends in line with the main principles of the CML. The failure to comply with the provisions of applicable legislation may lead to board members and auditors being held liable due to any misconduct in calculation and distribution of the dividend.

## Competition / Antitrust Law

### *Amendment of Investigation Procedures under Law No. 4054: A Step Closer to the European Commission's Practice*

#### I. Introduction

On May 29, 2024, Law No. 7511 on the Amendment of Turkish Commercial Code and Certain Acts ("***Law No. 7511***") was published in the Official Gazette (no.32560). Law No. 7511 introduced amendments to Article 43 and Article 45 of Law No. 4054 on the Protection of Competition ("***Law No. 4054***"), foreseeing changes to the procedure governing full-fledged investigations conducted by the Turkish Competition Authority ("***Authority***") ("***Amendments***"). The Amendments, effective as of the date of publication (i.e. May 29, 2024), entirely repeal the first written defence procedures and introduce certain limitations for the Authority's additional opinion procedure, as well as the investigated undertakings' right to third written defence. These changes reflect an effort to ensure procedural efficiency by simplifying the Authority's investigation procedures and align them more closely with the European Commission's ("***Commission***") procedures, while concurrently preserving fundamental principle of right to defence for undertakings undergoing investigation.

#### II. Investigation Procedures after the Amendments

Prior to the Amendments, a full-fledged investigation encompassed three separate written defences and an oral hearing: (i) "first written defence" following the receipt of the Authority's investigation notice, (ii) "second written defence" following the receipt of the Authority's investigation report (the equivalent of the Commission's statement of objections), (iii) "third written defence" following the receipt of the Authority's additional opinion and (iv) an oral hearing before the Turkish Competition Board ("***Board***"). In an effort to ensure procedural efficiency and align the Authority's investigation procedures with the Commission's procedures, the Amendments introduces significant changes to the procedural aspects of the full-fledged investigations.

A key amendment is the abolishment of the first written defence. Instead, the focus now centres primarily on the period following the Authority's investigation report, where undertakings retain the right to submit a second written defence which is the backbone of defence instruments. Furthermore, the Amendments introduce a conditional right to submit a third written defence, while undertakings could automatically exercise this right previously. With the Amendments, submission of a third written defence is contingent upon a change in the opinion articulated in the investigation report by case handlers. Additionally, the timeframe for preparation of additional opinion and submission of third Written defence has been significantly reduced, from up to 30 days to 15 days for the additional opinion and from up to 60 days to 30 days for third written defence.

The proposal for Law No. 7511 indicates that the rationale of this amendment is to expedite the investigation and resolution procedures while still allowing undertakings adequate time to prepare and submit their defences. This approach mirrors the procedures of the Commission on which the Authority's investigation procedures are modelled, where parties are entitled to reply to the Statement of Objections in writing and request an oral hearing.

## III. Comments

While abolishment and limitations of written defences may spark concerns regarding the right to defence of undertakings undergoing investigation, it is crucial to recognize that these changes do not inherently diminish the parties' capabilities to present their case or responding to allegations. Article 44/1 of Law No. 4054 explicitly states that during the investigation stage of the Board, the person or persons claimed to have infringed Law No. 4054 may, at all times, submit to the Board any information and evidence likely to influence the decision. This provision underscores the fundamental principle of due process, ensuring that parties have the opportunity to present their case and provide relevant evidence in their defence. Moreover, Article 44/3 imposes a significant constraint on the Board, stipulating that its decisions cannot be based on issues about which the parties have not been informed and granted the right to defence. Therefore, the parties retain substantial rights to present evidence and arguments in their defence still with the Amendments.

# *An Emerging Debate in Merger Control Review: Turkish Competition Board Puts Duration of Non-Compete Obligations Under Close Scrutiny*

## I. Introduction

The Turkish Competition Board ("***Board***") has been reviewing non-compete and non-solicitation obligations in concentrations noticeably more rigorously over the last few years. The Board's Karel/GlobalPbx[2] and Topkapı/Hamurlab[3] decisions are two of the most recent cases which shed some light on the Board's approach to ancillary restraints in acquisitions. The Board's assessment in these cases focuses on the duration of non-compete obligations imposed to the sellers in the relevant transactions, and in particular, whether a non-compete obligation exceeding three years could be deemed legitimate from a competition law standpoint.

## II. Legal Background on Ancillary Restraints under the Turkish Merger Control Regime

As per paragraph 48 of the Turkish Competition Authority's (the "***Authority***") Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions (the "***Guidelines***"), the restrictive obligations should be directly related to and necessary for the transaction, to be permissible as ancillary restraints. Paragraph 53 of the Guidelines sets forth that non-competition clauses may only be justified by a legitimate objective of implementing the transaction when their duration, their geographical field of application, their

[2] The Board's Karel/GlobalPbx decision dated 28.09.2023 and numbered 23-46/865-306.
[3] The Board's Topkapı/Hamurlabs decision dated 03.08.2023 and numbered 23-36/672-228.

subject matter, and the persons subject to them do not go beyond what is reasonably necessary to achieve that end.

The Board's case law and paragraph 54 of the Guidelines provide that as a rule of thumb, restrictive covenants that are imposed on the transaction parties should be capped at three years. That being said, paragraph 54 of the Guidelines also adds that in case there is a high level of know-how and customer loyalty in the transferred business, a non-compete period set longer than three years should also be considered as ancillary to the transaction.

According to paragraph 55 of the Guidelines, as a rule, non-compete obligations must be limited to those goods and services which the target company / economic unit was operating with or engaged in, prior to the transaction. Paragraph 57 of the Guidelines indicates that restraints concerning the seller itself and the economic units and agencies which constitute an economic unit with the seller may be accepted as reasonable, while non-competition obligations that go beyond these, especially those concerning the dealers of the seller or users, will not be accepted as necessary or related restrictions. The geographical scope of a non-competition clause must be limited to the area in which the seller offers the relevant products or services prior to the transfer of the shares, since the purchaser does not need to be protected against competition from the seller in territories which have not been previously penetrated by the seller.

## III. The Board's Substantive Analysis in Karel/GlobalPbx and Topkapı/Hamurlabs Decisions

The Board's Karel/GlobalPbx decision concerned the acquisition of sole control over GlobalPbx İletişim Teknolojileri AŞ ("***GlobalPbx***") and the software assets related to its Santralcell business unit ("***Santralcell***") from Polar Araştırma Teknoloji AŞ ("***Polar***") by Karel Elektronik San. ve Tic. AŞ ("***Karel***").

In its competitive assessment of the transaction, the Board found a horizontal overlap between the activities of the parties in the telephone exchange market and more specifically in its cloud telephone exchange sub-segment. Furthermore, given that Santralcell technology is purchased by Karel, the Board also identified a vertical relationship between the parties in relation to the Santralcell product. The Board assessed that the combined market shares of the parties do not exceed 20% in the telephone exchange market or its sub-segment and concluded that the transaction does not raise any horizontal competitive concerns. With respect to the vertical relationship between the parties, the Board found that the market shares of the parties do not exceed 25% and concluded that the transaction does not raise any vertical competitive concerns. The Board therefore granted unconditional approval to the transaction.

The Board's Topkapı/Hamurlabs decision concerned the acquisition of joint control over Hamurlabs Elektronik Hizmetler Yazılım ve Ticaret Anonim Şirketi ("***Hamurlabs***") by Topkapı Danışmanlık Elektronik Hizmetler Pazarlama ve Ticaret Anonim Şirketi ("***Topkapı***") and the existing controlling shareholders of Hamurlabs.

In terms of the substantive analysis of the transaction, the Board found a vertical relationship between e-commerce platform services provided by Topkapı and the provision of inventory/stock management software services by Hamurlabs. Due to the Parties' low market shares in the vertically affected markets, the Board concluded that the transaction would not raise any competition law concerns. As a result, the Board unconditionally approved the transaction.

## IV. Evaluation of Non-Compete Obligations in Decisions on Karel/GlobalPbx and Topkapı/ Hamurlabs

The transaction agreements in both transactions contained non-compete obligations imposed on the sellers and the durations of the obligations exceeded three years. In this respect, the Board assessed the non-compete obligations in the transactions from an ancillary restraints perspective.

In the Karel/GlobalPbx transaction, the duration of the non-compete obligation was five years from the date of the signing the transaction agreement and it restricted Polar and Polar's affiliated entities from (i) establishing a relationship with any business that competes with GlobalPbx, or engaging in any activity that falls within GlobalPbx's field of activity and (ii) persuading or soliciting any GlobalPbx employees to leave the company.

In its assessment, the Board remarked that (i) the restriction concerned the undertakings in Turkiye that compete with GlobalPbx, (ii) it prevents Polar and its affiliated entities from engaging in manufacturing, research and development activities in the same field as GlobalPbx, (iii) it requires Polar to refrain from persuading or soliciting any employee, member of the board of directors, manager, advisor or customer of GlobalPbx to leave GlobalPbx, (iv) this obligation does not qualify as a non-solicit obligation given that employees that leave GlobalPbx are able to work for Polar, and (v) Karel introduced this obligation given that it acquires Santralcell technology. To that end, the Board evaluated that this non-compete obligation is directly related to the transaction; it is necessary to achieve the benefits anticipated from the transaction; and therefore, it is reasonable in terms of its subject matter, geographical area, and the persons subject to it.

In terms of the duration of the non-compete obligation, the transaction parties explained that in the software industry, know-how and the identity of the software developer who possesses that know-how are very important in the eyes of customers; the purpose of Karel's investment in the transaction is to acquire a portfolio of Santralcell's established customers and its know-how in the industry; in the absence of a non-compete obligation, Polar would be able to develop a new software with the same features as Santralcell and retain its customers thanks to its existing know-how, which would render Karel's investment fruitless.

However, the Board indicated that the duration of this non-compete obligation was not in line with the Guidelines and the Board's decisional practice; and that the transaction parties failed to justify why a non-compete obligation with a duration of three years would be insufficient to ensure Karel would achieve the anticipated benefits from the transaction. In this respect, the Board underlined that Karel will also acquire Polar's human resources in addition to the license related to the technology in order to engage in activities concerning the Santralcell technology; Karel is already familiar with this market considering that Karel had procured Santralcell product from Polar prior to the transaction; and Karel is also active in the telephone exchange market. As a result, the Board concluded that a five-year non-compete obligation is not necessary for Karel, such obligation could restrict the seller's freedom to enterprise more than what is reasonable and necessary, and the non-compete obligation will be regarded as an ancillary restraint if its duration is limited to three years.

In its Topkapı/Hamurlabs decision, the Board concluded that the non-compete obligation imposed on the sellers would be considered as an ancillary restraint if the duration of the non-compete obligation is reduced to three years. The Board's reasoned decision does not disclose the original duration of the non-compete obligation envisaged in the transaction agreement, the transaction parties' justifications on the original duration, or the Board's reasoning in reducing the duration to three years.

Over the last fifteen years until early 2022, there have been numerous cases where the Board has deemed those non-compete clauses that were envisaged to be in force for five years as ancillary restraints, based on the specifics of each case.[4] However, since early 2022, the Board's approach towards non-compete obligations exceeding three years is stricter and in several cases, the Board decided that the non-compete obligations whose duration exceeded three years are not reasonable, and their duration should be reduced to three years in order to be deemed ancillary restraints, despite the transaction parties' explanations on the high level of know-how that is being transferred.[5] The Board's Karel/GlobalPbx and Topkapı/Hamurlabs decisions fall into the latter category where the Board scrutinizes the terms of non-compete obligations rigorously and evaluates the transaction parties' justifications in the light of market conditions and transaction dynamics.

## V. Conclusion

A potential shift in the Board's approach towards assessing non-compete and non-solicitation obligations under the Turkish merger control regime was signaled in 2022 with the Vinmar/Arısan and LG/Checklas cases. This trend continued in 2023 with Karel/GlobalPbx and Topkapı/Hamurlabs decisions, which imply that the Board may not find the transaction parties' justifications convincing and will not hesitate to interfere with the terms of non-compete obligations in transaction agreements. In

[4] *E.g.,* the Board's Adatıp/Lokman Hekim decision dated 24.03.2022 and numbered 22-14/233-101, Ren/Bimed decision dated 16.12.2021 and numbered 21-61/868-BD, QTerminals/Port Akdeniz decision dated 26.11.2020 and numbered 20-51/708-316, LeasePlan/LPD decision dated 03.12.2014 and numbered 14-47/862-392, UZC/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, Nezih/Turkish Youth decision dated 22.4.2010 and numbered 10-33/529-188, Corio Yatırım decision dated 25.12.2008 and numbered 08-75/1188-457.

[5] The Board's Vinmar/Arısan decision dated 24.02.2022 and numbered 22-10/155-63; LG/Checklas decision dated 14.04.2022 and numbered 22-17/286-130.

the light of this new development, undertakings are expected to be more careful and meticulous than ever during transaction negotiations in an effort to comply with the Board's decisional practice.

### *Turkish Competition Board Delivered its Unconditional Approval Decision for DHL Group's Acquisition of MNG Kargo*

## I. Introduction

The Turkish Competition Board ("***Board***") unconditionally approved the acquisition of sole control over MNG Kargo Yurtiçi ve Yurtdışı Taşımacılık A.Ş. ("***MNG***") by Deutsche Post AG ("***DHL Group***"), one of the largest logistics companies in the world. [6] The Board's reasoned decision includes a detailed competitive assessment of the transaction based on various theories of harm concerning the vertical relationship between the transaction parties in Turkiye.

## II. Relevant Market Definitions for Small Package Delivery

The Board remarked that the transaction parties are active in small package delivery services, and in particular, its sub-segments for domestic small package delivery services and international express small package delivery services. In order to assess the relationship between the parties' activities in this industry, the Board considered MNG as a reseller due to its domestic activities, and DHL Group as an integrator under its international activities. For background, the Board explained that the reselling operating model allows a small package delivery provider to resell the international services purchased from a small package delivery provider to another small package delivery provider or a customer. In this operating model, integrators are the service provider, and the undertakings, which are in the reseller position, are the purchaser.

In terms of market definition, based on the decisional practice of the Board [7] and Commission, [8] the Board indicated that small package delivery services diverge from other delivery services, and the small package delivery is identified by weight. It was noted that small package delivery services are categorized as domestic and international depending on the place of delivery indicated by the sender. On this basis, the Board determined that the relevant product markets could be defined as the "market for domestic small package delivery services" and the "market for international express small package delivery services." The Board indicated that the relevant geographical market for domestic small package delivery could be determined as the borders of the Republic of Turkiye, and for international express small package delivery, the geographic scope could be determined as international small package delivery activities departing from and arriving to Turkiye. All in all, the Board ultimately left the relevant product and geographic market definitions open, as the transaction does not give rise to competition law concerns under alternative definitions.

[6] The Board's DHL Group/MNG decision dated 28.09.2023 and numbered 23-46/863-305.

[7] The Board's decision dated 21.10.2010 and numbered 10-66/1405-526; decision dated 20.09.2012 and numbered 12-44/1342-447; decision dated 02.12.2015 and numbered 15-42/713-259.

[8] Commission decision of 08.01.2016 in COMP/M.7630- FedEx/TNT Express; Commission decision of 30.01.2013 in COMP/M.6570 – UPS/ TNT Express.

## III. The Substantive Analysis of the Transaction

The Board identified that the transaction parties' activities in Turkiye horizontally overlapped in the market for domestic small package delivery services. Based on the market share analysis of the Board, it was determined that the parties' combined market share in this market in Turkiye is below 20%. The Board also underlined that (i) there are a large number of competitors active in this market in Turkiye; (ii) MNG is only the sixth largest player in 2022 due to a decrease in its market share compared to the previous year; (iii) there are no significant barriers to entry or expansion; (iv) in fact, 26 players entered the market in the last five years; (v) new entrants are able to capture market share from larger players by virtue of strong competition in the market; and (vi) the transaction does not result in a material change in the level of concentration in the market. As a result, the Board concluded that the transaction does not result in any horizontal competition law concerns.

The Board also determined that there is a vertical relationship between MNG and DHL Group in the market for international express small package delivery services. This is due to the fact that in the reselling operating model for international delivery, local domestic package companies procure services from integrators such as DHL Group, FedEx Corporation ("***FedEx***"), United Parcel Service Inc. ("***UPS***") and Aramex PJSC ("***Aramex***"). There is a vertical relationship between the integrators (as service providers) and the domestic package companies (which are the buyers).

In order the assess whether this vertical relationship leads to input foreclosure, the Board first assessed whether DHL Group enjoys market power in the upstream market for international express small package delivery. Despite the DHL Group's high market share in this segment, the Board underlined that DHL Group lost a portion of its share to its competitor, and another competitor increased its market share to come remarkably close to the DHL Group. The Board also reviewed the market shares of DHL Group and its competitors in the market for international deferred small package delivery, as well as a broader market for international small package delivery, without segmenting the market based on speed of delivery (*i.e.*, between express and deferred delivery). Based on these, the Board considered that there are other large integrators in the market and the market shares of these undertakings are close to each other.

With respect to its input foreclosure analysis, as a second step, the Board looked into MNG's share within DHL Group's sales and analyzed DHL Group's supply of international express small package delivery services to the largest domestic package companies. As a result of this analysis, the Board found out that DHL Group provides services to a large number of resellers including domestic package companies and logistics firms. In addition, the Board also took into account the shares of integrators from which MNG and the competing domestic package companies procure services for the delivery of their packages abroad. On this basis, the Board concluded that (i) domestic package companies supply international small package delivery services from alternative integrators other than DHL Group, (ii) the purchases of these companies from DHL Group are very limited, (iii) in the light of existing alternative integrators, DHL Group is not an unavoidable trading partner for the resellers, (iv) resellers are able to work with multiple integrators at the same time, and (v) resellers can easily switch suppliers despite the limited number of integrators in the market.

As part of its input foreclosure analysis, the Board also evaluated the level of competition in the downstream market for domestic small package delivery services. In this respect, the Board underlined that the market for domestic small package delivery services is highly competitive with a considerable number of players and there are no significant entry barriers for an undertaking that focuses on domestic activities to enter into the market for international package delivery. Having reviewed the market shares of MNG and its competitors in the market for reselling activities for international express small package delivery, the Board pointed out that resellers also compete with integrators in this market at the retail level; market shares of MNG and other resellers that focus on domestic market are limited; and the actual competition occurs between integrators. As for the potential competition between resellers and integrators at the retail level, the Board noted that since, unlike integrators, domestic package companies focus on local delivery activities, MNG cannot be regarded as DHL Group's close competitor in terms of its reseller operations.

Considering the relatively low market shares of MNG in terms of domestic small package delivery services and its activities as a reseller, the Board assessed that it might not be reasonable for DHL Group to risk its commercial relationship with its existing customers and engage in input foreclosure to increase MNG's market share in the downstream market. The Board further noted that there is no ongoing customer-supplier relationship between DHL Group and MNG; and even if DHL Group engaged in input foreclosure and provided services to only MNG post-transaction, MNG's share within DHL Group's total deliveries would be very limited and its profit for DHL Group would be negligible. Therefore, the Board concluded that it would not be reasonable and rational for DHL Group to cease supplying input to MNG's competitors in the downstream market. As such, it was resolved that DHL Group would not have any ability or incentive to engage in input foreclosure post-transaction.

In terms of the risk of customer foreclosure, the Board remarked that (i) MNG's market shares for domestic small package delivery services and its activities as a reseller are very low, (ii) there are significant domestic package companies and a number of logistics firms that act as resellers in the downstream market, (iii) integrators provide services to multiple logistics firms and local distributors, (iv) MNG does not qualify as a customer with buyer power vis-a-vis integrators, and (v) considering the number of significant customers in the market, even if MNG directed all of its purchases to DHL Group, integrators would not face any customer foreclosure. In addition, the Board concluded that since the combined entity's market power in the downstream market will not be materially increased after the transaction, DHL Group will not have any ability or incentive to engage in customer foreclosure.

As for other unilateral effects of the transaction, the Board evaluated the potential risk of exchange of competitively sensitive information related to undertakings active in the downstream market with MNG by DHL Group. In particular, the Board considered the potential concerns that MNG would obtain a significant amount of data related to its competitors by virtue of information that DHL Group has, as part of its commercial relationships with domestic package customers, and if DHL Group transferred such data to MNG, MNG would have the ability to access a customer portfolio which it would not have accessed otherwise via its own commercial activities. In relation to this concern, the Board remarked that (i) actual competition between domestic package companies takes place in the market for domestic small package delivery; (ii) almost all of the domestic package companies conduct their domestic operations on their own without cooperating with integrators; (iii) therefore there is no data exchange in relation to these activities; and (iv) it would not be reasonable for DHL Group to exchange information on international activities of domestic package companies with MNG, given that international delivery is not the main area of activity of MNG and its competitors.

In addition, the Board also evaluated potential concerns over exchange of information on prices offered by domestic package companies to integrators. The Board explained that in rare instances, integrators procure services from domestic package companies. Within this relationship, domestic package companies convey the prices for the services they offer to integrators and this way, integrators receive information on the prices of undertakings in the downstream market. However, given that the price information for the relevant services differ based on the transaction volume of the customer, which routes they are working, customer profile etc., this price information will only constitute one of the prices that a domestic package company applies for a customer. As such, the Board concluded that this price information would not be sufficient to make any inferences regarding the pricing policy of the domestic package companies and it cannot be regarded as competitively sensitive information.

In terms of coordinated effects resulting from the transaction, due to MNG's low market share as a reseller in the international small package delivery market, the Board assessed that MNG is not a buyer which would encourage undertakings to coordination or facilitate the use of deterrence mechanisms for undertakings that diverge from coordination. Furthermore, given that the transaction will not result in a decrease in the number of integrators and the downstream market is highly competitive with a large number of players, the Board concluded that it is unlikely that the transaction will lead to coordination in the upstream market. On this basis, the Board unconditionally approved the transaction.

## IV. Conclusion

The Board's DHL Group/MNG decision is important for its comprehensive analysis of potential vertical competition law concerns that might arise from a transaction that impacts both international and domestic markets. In particular, the Board's assessment of the risk of input foreclosure, concerns over exchange of competitively sensitive information due to vertical integration and potential coordinated effects in vertically related markets can serve as a guideline for undertakings that operate in industries with similar nature in future transactions.

## *Turkish Competition Board Clears Microsoft's Acquisition of Activision Blizzard by Finding its Global Commitments Sufficient for the Turkish Market*[9]

### I. Introduction

On 18 January 2024, the Turkish Competition Authority published the Turkish Competition Board's reasoned decision [10] concerning the acquisition of sole control over Activision Blizzard Inc (Activision Blizzard) by Microsoft Corporation. The transaction concerns a reverse triangular merger [11] in which Anchorage Merger Sub Inc (Merger Sub), a solely controlled subsidiary of Microsoft established exclusively for the purpose of realising the transaction, will be merged with Activision Blizzard under Activision Blizzard, after which Merger Sub will cease to exist and Activision Blizzard will be the surviving company. As a result of the transaction, Activision Blizzard will become a 100% subsidiary of Microsoft and will be under its sole control.

The Board concluded that the commitments submitted by Microsoft to the European Commission within the scope of the transaction eliminated the concerns surrounding market foreclosure, and accordingly granted clearance to the transaction on the grounds that the commitments are also valid for Turkiye and will be valid for the undertakings that will enter the Turkish market in the future.

This article aims to provide an overview of the Decision and offer insight into the Authority's approach towards applicability of global commitments within the scope of mergers and acquisitions in Turkiye.

### II. Overview of the Transaction

#### A. Parties' Activities and Relevant Markets

Microsoft's activities globally and in Turkiye are substantially similar. While its core areas of activity are productivity and business processes, intelligent cloud and more personal computing, Microsoft has activities in:

(i) game development and publishing;
(ii) game distribution;
(iii) sale of licensed products related to games;
(iv) online display advertising; and
(v) game console hardware markets with respect to the gaming sector.

As a global game development, publishing and distribution company, Activision Blizzard's activities in the gaming industry consist of:

(i) game development and publishing;
(ii) game distribution;
(iii) game-related licensed product sales; and
(iv) online display advertising markets.

Activision Blizzard does not have any subsidiaries in Turkiye but publishes games in Turkiye through its business units:

(i) Activision Publishing, Inc;

[9] First appeared in ILO on February 29, 2024 with the title "Turkish Competition Board clears Microsoft's acquisition of Activision Blizzard by finding global commitments sufficient for market" (https://www.gurkaynak.av.tr/Content/dosya/3671/turkish-competition-board-clears-microsofts-acquisition-of-activision-blizzard.pdf)
[10] The Board's decision dated 13 July 2023 and numbered 23-31/592-202.
[11] According to the decisional practice of the Board, a reverse triangular merger constitutes an acquisition, rather than a merger (recent case law include *US Ecology/Republic Services* (24 March 2022; 22-14/216-93), *Take-Two/Zynga* (24 March 2022; 22-14/215-92), *American Securities/Ferro* (24 February 2022; 22-10/144-59)).

(i) Blizzard Entertainment, Inc; and
(ii) King Digital Entertainment.[12]

In the video game industry, from the moment a game is designed to the moment it is played by end users, two main activities come into play, namely:

(i) game development and publishing; and
(ii) game distribution and marketing.

Once a game is developed, it is licensed, marketed, and released by publishers in different regions. While games were traditionally played by pre-purchasing them at a certain price with a "buy-to-play" model, over time publishers have started to offer their games with the "free-to-play" model. With this model, games are offered for free and then monetised through in-game purchases or in-game advertisements.

Based on this, in the decision, the Board grounded its analysis of potentially relevant product markets on five main groups, namely:

(i) game development and publishing;
(ii) game distribution;
(iii) game playing tools (hardware gaming and cloud gaming);
(iv) licensed product sales; and online display advertising markets.

The Board refrained from defining the relevant product market for these five activity groups by assessing that the transaction does not give rise to competitive concerns and the existence of a precise definition would not affect the conclusion of the case as per paragraph 20 of the Guidelines on the Definition of Relevant Market. However, it was assessed that the game development and publishing market could be divided into two as:

(i) computer and console games; and
(ii) mobile games;

whereas the gaming hardware, within the scope of the game playing tools market could be divided into three:

(i) computers;
(ii) consoles; and
(iii) mobile devices (mainly phones and tablets).

It was then evaluated that the hypothetical console gaming and cloud gaming markets, in which the parties operate and which are affected by the transaction, should be taken into consideration within the game playing tools market.

In terms of the relevant geographic market, the Board firstly stated that the main factor determining the geographical boundaries of the markets for Microsoft, Sony Interactive Entertainment Europe Ltd (Sony) and other parties operating in the video game industry is the geographical area where the activities are carried out, like traditional markets. Accordingly, the Board considered that it is possible for consumers to benefit from online video gaming services regardless of the country or location in which they reside or are located. In parallel, the parties had explained in the filing that, for the purposes of the transaction, the relevant geographic market could be defined as worldwide, taking into account the fact that access to sources of supply, marketing, sales and pricing conditions are homogenous across regions.

[12] Activision Blizzard's most notable games are Call of Duty developed by Activision, World of Warcraft developed by Blizzard, and Candy Crush developed by King.

However, the Board also specified that user preferences are of great importance for the gaming sector, and it was observed that gaming services shaped by user preferences give rise to regional differences despite the fact that they are offered on a global scale. Taking into consideration that the cases where the geographic market is defined globally are quite limited both in the context of precedents in Turkiye and the decisions of foreign competition authorities in relation to the transaction, the Board defined the relevant geographic market as “Turkiye” since the distribution, marketing, sale, and pricing of the products concerned are generally similar throughout Turkiye.

### B. Assessments of the Competition Authorities and Sector Players

The transaction was unconditionally cleared by the competition authorities of Brazil, Chile, South Korea, Japan, Saudi Arabia, Serbia, South Africa, and Ukraine, whereas the UK’s Competition and Markets Authority (CMA) did not authorise the transaction. In the Decision, the Board took into consideration the assessments of other competition authorities,[13] as well as the opinions of the undertakings operating in the sector regarding the transaction.

The Commission concluded that the transaction would not result in a change within third-party multi-game subscription services as Microsoft would not have the incentive not to distribute Activision Blizzard’s games on Sony consoles, which sell four times more than Microsoft consoles in the European market, and the withdrawal of games from Sony consoles would not raise serious anti-competitive concerns since Activision Blizzard’s games are less popular in Europe than in the global market; whereas the Commission found that the exclusivity of Activision Blizzard games to Microsoft would restrict competition in the market for game distribution via the cloud. In this framework, Microsoft committed to provide free licenses for Activision Blizzard games to consumers and cloud service providers for a period of 10 years to address the Commission’s anti-competitive concerns. In response, the Commission deemed these commitments sufficient, and the transaction was authorised on the condition of full compliance with Microsoft’s commitments.

The CMA considered that competition in the UK market for the supply of cloud gaming services would ultimately be substantially hindered post-transaction for a number of reasons, including Microsoft having a cost and content advantage in cloud gaming with its assets and services owned prior to the transaction (*e,g.,* Xbox and Windows), its unique multi-product ecosystem which allows it to be the market leader and domination of market entry by large players who are able to overcome existing barriers to entry, such as the need to scale and network effects, resulting in unsuccessful entry and growth attempts of smaller players in the market. As such, the CMA held that Microsoft’s commitments regarding cloud gaming services could not be adapted to potential changes in the market, the anti-competitive concerns surrounding the transaction were structural, therefore the 10 year commitment period would not be sufficient

[13] The assessments of the Commission, CMA and Administrative Council for Economic Defense (CADE) were specifically taken into consideration.

and the concerns could only be addressed by dismissing the transaction.[14]

Opinions expressed by other players in the sector were mixed. While some undertakings specified, inter alia, that Microsoft will be the only company in the world with the server infrastructure power to support computer, mobile and console platforms in cloud gaming services, and the transaction would also give Microsoft unprecedented power and incentive for foreclosure of video game space, which would harm competition in game distribution, especially in light of Microsoft's history of market foreclosure strategy, others pointed out the continued existence of alternative game distribution channels and indicated, among other things, that Microsoft has no tendency to make the games for which it has acquired the rights exclusive to its own game consoles and Turkish players will not be affected in the short term as a result of the transaction since the majority of Turkish players play free games available on mobile and computers.

## C. Assessment on the Horizontal Overlaps

Within the scope of its assessment of the competitive effects of the transaction, the Board concluded that there is horizontal overlap between the parties' activities in:

(i) game publishing;
(ii) game distribution;
(iii) game-related licensed product sales; and
(iv) online display advertising.

However, it stated that each of these markets contains many competitors with high market shares, such as Electronic Arts Inc and Valve Corporation, both in Turkiye and globally, and that there will be many strong competitors after the transaction. Overall, as a result of horizontal overlaps analysis, the Board assessed that the transaction will not result in a significant impediment of competition in terms of both unilateral effects and coordination-inducing effects.

## D. Assessment on the Vertical Overlaps and Microsoft's Commitments

As regards the vertically affected markets, the Board evaluated that there is vertical overlap between the upstream market for the development and publishing of games, and the parties' activities in the downstream markets for:

(i) digital distribution of console and computer games;[15]
(ii) console hardware; and
(iii) cloud gaming services.[16]

[14] On 22 August 2023, Microsoft submitted a second filing to the CMA, this time for an acquisition by which Microsoft will acquire Activision, excluding Activision's cloud streaming rights outside of the European Economic Area. This filing was assessed as a separate merger investigation by the CMA, and the transaction was cleared on 13 October 2023.

[15] Since the parties do not have activities in the physical distribution channel and in the field of game distribution for mobile devices, the market for digital distribution of console and computer games was taken as a basis.

[16] Although it was assessed that there may be vertical overlap between Microsoft's cloud gaming services and Activision Blizzard's game development and publishing, it was determined that these activities of the parties do not overlap vertically in Turkiye since the cloud feature that Microsoft offers as part of its subscription-based gaming services is not currently available in Turkiye and Activision Blizzard does not currently distribute games in multi-game subscription services or cloud broadcasting. Therefore, the Board addressed this vertical relationship within the framework of the possibility that Microsoft begins offering cloud gaming services in Turkiye and Activision Blizzard games (CoD in particular) are only offered by Microsoft.

Within the scope of the unilateral effects assessment with respect to the markets for console hardware and digital distribution of console games,[17] the Board determined that it would not make economic sense for Microsoft to impose input foreclosures considering the market shares in the console hardware market, Sony's leading position in the market, the significance of Call of Duty (CoD) on Xbox, and the importance of the cross-play feature. Microsoft has also made numerous public statements committing to keeping CoD and Activision Blizzard's other content available on their current channels and even expanding them to other channels. Moreover, a letter of intent was signed between Microsoft and Nintendo Co, Ltd on 7 December 2022, including a 10-year commitment to provide CoD for Nintendo consoles. Subsequently, on 10 February 2023, Microsoft and Nintendo signed a final agreement to publish CoD games on Nintendo after the transaction. In this context, the Board concluded that Microsoft's negotiations with Sony and Nintendo for the provision of Activision Blizzard's games post-transaction indicates that Microsoft intends to provide these games to competing consoles for 10 years, even though the negotiations with Sony had not resulted in an agreement. Additionally, it was assessed that Microsoft needs third-party games to continue its console hardware activities, and therefore, will not have any customer foreclosure incentive.

Similarly, for the market for the digital distribution of computer games, the Board concluded that the combined undertaking would not have the opportunity or incentive to prevent competitors operating in the market from accessing Activision Blizzard's games or restrict customers due to factors such as Microsoft's low market share, the presence of a large number of players in the market and the existence of strong competitors.

As for unilateral effects in the cloud gaming services market, the Board evaluated that even if Microsoft begins to offer cloud gaming services in Turkiye, input foreclosure would not be economically feasible for Microsoft in light of its global share and the presence of many large and powerful players in the cloud gaming services market, while the parties' limited share in the market for game development and publishing and the fact that Microsoft generates revenue largely through the games of third-party developers would result in the inability of customer foreclosure.

Subsequently, the Board assessed the commitments submitted by Microsoft to the Commission regarding the cloud gaming market and their validity in Turkiye. In this context, in line with the information provided by Microsoft to the Authority, it was confirmed that the first of the open licenses providing streaming rights for Activision Blizzard games within the scope of the commitments, the Streaming Provider License, will be valid for 10 years globally, both for the undertakings already active in the market and for the undertakings that may enter the market within this period, while the second of the open licenses, the Consumer

[17] As it is not possible to purchase or access console games in digital form outside of the digital storefront associated with the console in question, it is not possible to evaluate the console hardware market separately from the market for the digital distribution of console games. Therefore, the assessments with respect to these two markets were made together. In addition, although Microsoft operates in the console hardware market, Activision Blizzard does not have any activities in console hardware or gaming hardware.

License, will be valid for a period of 10 years for all existing and potential consumers globally. Accordingly, the Board concluded that essentially the relevant commitments will also be valid for Turkiye for 10 years.

Considering that Microsoft has also entered into agreements with Nvidia Corp ("***Nvidia***"), Boosteroid Games SRL and Ubitus KK, which are other cloud game streaming providers in the market, and that these agreements have been declared by these undertakings to address their concerns regarding the Transaction, the Board also obtained the opinion of Lifecell Digital Ltd (Lifecell), which is the only undertaking that officially offers cloud gaming services in Turkiye and provides Nvidia's Geforce NOW (GFN) cloud gaming services in the Turkish market exclusively through the sub-brand Game+ established for this activity. Based on Lifecell's statements, it is understood that no competitive concerns will arise for Lifecell; on the contrary, consumers will have access to a wider game library due to Nvidia's agreement with Microsoft, Xbox games will become accessible with GFN, Activision Blizzard games will also be within the scope of this agreement if the Transaction is cleared, and this agreement will not be regional but will also be valid for Turkiye. Eventually, the Board concluded that the transaction would not raise anti-competitive concerns in terms of unilateral effects in the cloud gaming services market.

Finally, in terms of the coordination-inducing effects of the transaction, the Board determined that the presence of a large number of players operating in the market will make it difficult to establish coordination among undertakings and to discipline non-compliant undertakings as a result of a possible coordination, and held that the Transaction will not significantly impede competition and may be cleared.

## III. Conclusion

The decision provides further insight into the Board's approach towards the adequacy and validity of global commitments in merger control filings in Turkiye. Although it can be observed from the Board's precedents that there is a tendency to accept global commitments in mergers and acquisitions in Turkiye, the Board's conclusion that the global commitments submitted by Microsoft are sufficient for the Turkish market in such an acquisition involving two major global companies in the gaming industry, which has also been examined by various competition authorities for long periods, reaffirms the Board's approach to the matter for digital markets.

# *Meta's Data Combining Between Instagram and Threads Under Scrutiny with Interim Measures Decision Taken by the Turkish Competition Board*

## I. Introduction

On February 22, 2024, the Turkish Competition Authority ("***Authority***") published the Turkish Competition Board's ("***Board***") reasoned decision[18] concerning the request for interim measures within the scope of Article 9(4) of Law No. 4054 on the Protection of Competition ("***Law No. 4054***") regarding Meta Platforms, Inc.'s ("***Meta***") data combining conduct between its newly launched application, Threads, and Instagram.

The Authority mainly scrutinized whether Meta violated Article 6 of Law No. 4054

[18] The Board's decision dated 08.02.2024 and numbered 24-07/125-50 ("***Decision***").

by linking Threads, which was launched in Turkiye in July 2023, with Instagram. During the process, Meta made some updates to be implemented as of November 2023, allowing Threads profiles to be deleted without the user having to delete the associated Instagram account, as well. Accordingly, Meta assessed that the current situation does not require interim measures in terms of the tying allegations, stating that it has already made sufficient improvements in the application.

On the other hand, the Board determined during the pre-investigation [19] that Meta combined the data obtained through Threads with the data obtained through Instagram and concluded that the potential anti-competitive effect of this conduct necessitates further detailed evaluation within the scope of an investigation, taking into account the obligations imposed on Meta to terminate the data combining conduct in its previous decision concerning Meta ("***Meta/WhatsApp***").[20]

In light of the information obtained within the scope of the file, the Board decided to take interim measures against Meta, which was found to be in a dominant position in the social media market. The market was broadly defined to include Instagram during the Pre-Investigation, to prevent the combining of the data obtained by Meta through Threads, with the data obtained from Instagram, in order to prevent competition violations that may occur in the relevant market subject to the investigation and the irreparable damages that may arise until the final decision is taken.

[19] The Board launched the pre-investigation through its decision dated 03.08.2023 and numbered 23-36/667-M ("***Pre-Investigation***").

[20] The Board's decision dated 20.10.2022 and numbered 22-48/706-299.

## II. Data Combining Practices of Meta

Threads was launched globally in July 2023, initially with the exception of the European Union ("***EU***"), a decision which the Board considered stemmed from the regulations introduced for digital markets in the EU. Referencing the Digital Markets Act ("***DMA***"), the Board stated that Meta must have had to fulfil the obligations stipulated by the DMA in order to make Threads available in the EU. Having said that, as Meta expressed during the Pre-Investigation its aim to launch Threads to users in the EU by the end of 2023 and later announced the availability of Threads in the EU on December 14, 2023, the Board concluded that Meta has rendered Threads compliant with the relevant obligations under the DMA.

In terms of the data combining policies of the two applications in Turkiye, the Board noted that (i) sign-in information, (ii) account number, (iii) name and username, (iv) profile information such as profile photo, bio and connections, (v) followers, (vi) accounts followed, and (vii) age information on Instagram are listed among the data stated to be transferred from Instagram to Threads under Instagram's Help Centre. Furthermore, Meta explained in its response petition that users who create a Threads profile based on their Instagram accounts are informed that Treads and Instagram personal data can be combined during the Threads profile creation phase.

In addition, the Board remarked that the data from Threads may also be transferred to Instagram to personalize and improve experiences on Instagram, as well as to increase the security and integrity of the services. Indeed, it is stated that Meta can collect information such as which articles a user, who forgets to log out of their Threads account and then visits a new website, reads at what time of the day.

The Board then expressed that the following information will be collected through Threads and used to provide, personalise, and improve Threads and other Meta products (including streamlined personalization of the experience on Threads and Instagram) to measure an analyse the performance of Meta products and to provide other business services (including advertising):

(i) Data provided by the user when using or interacting with Threads,
(ii) Information provided when creating a Threads profile,
(iii) Content and interactions created when using Threads,
(iv) Information about followers, other users and communities that are connected and interacted with,
(v) Information about third-party services and third-party users who interact with Threads, and
(vi) Application, browser, and device information.

It is further stated that users must accept the Threads Privacy Policy and Threads Additional Privacy Policy in order to use Threads' services under Article 6 of Threads' Terms and Conditions.

## III. The Board's Commentary on Proceedings Concerning Meta

Before proceeding with its assessment on the interim measures within the scope of the case at hand, the Board first recalled its findings in *Meta/WhatsApp*, explaining that Meta's data collection policy in terms of all its products and services, including Meta's "core services" such as Facebook, WhatsApp, Instagram and Messenger, is based on the terms of service and privacy policies of each product, and within the scope of these policies, Meta collects a wide variety of data from its products under different categories. Moreover, the Board stated that with the help of the data it collects, Meta enables users to access and discover content personalised to their interest on one hand, and advertisers to grow their business and reach audiences that are likely to be interested in its products or services on the other. Based on the information it receives, Meta is able to offer tailored experiences, innovative advertisements, and ad measurement solutions. The Board also conveyed that it was emphasised in *Meta/WhatsApp* that Meta uses the data it collects to personalise the features and content it offers (such as the News Feed, Instagram Feed, Instagram Stories, and ads of a user) and make recommendations to its users on aspects such as groups, events, or topics the user may be interested in or prefer to follow.

As for proceedings against Meta in other jurisdictions, the Board noted Bundeskartellamt's Facebook/Oculus investigation, which was initiated in 2020 on whether Meta's tying of Oculus virtual reality products with its social media platform, Facebook, gives rise to a violation of competition.[21] In this scope, the Board referred to Bundeskartellamt's declaration of Meta as a company of paramount significance across markets, and conclusion that Meta is in a dominant position in the social media market in

[21] Oculus, which used to be operated separately from Facebook, began to be offered as an additional function on Facebook's social network under "Facebook Reality Labs." The use of "Quest 2 VR" goggles is conditional on having a Facebook account.

Germany, with an important position in the emerging virtual reality market.[22]

The Board expressed that Bundeskartellamt may prohibit the imposition of terms and conditions on data processing policies that "*create or appreciably raise barriers to entry or lead to such a result, in particular by conditioning the use of services on the user's agreement on the processing of data from other services of the undertaking or from third-party providers, without giving users sufficient choice as to whether, how and for what purpose such data are processed*".[23] Moreover, the Board underlined that Bundeskartellamt focused on the fact that Facebook and Oculus are different services, that adequate choice must be provided to users in the data processing policies for these services, the choice architecture and consent requests, as well as the limited purposes for which it is permissible to continue to combine their data without their consent.[24]

## IV. Assessment on the Interim Measures

In accordance with the findings in *Meta/WhatsApp*, as well as those of Bundeskartellamt, the Board reiterated that Meta, as a long-standing player in the market, has a wide, comprehensive, and detailed data accumulation, which allows it to track user preferences and requests in a timely manner, and enables it to develop and design products and services in line with user preferences. The size and diversity of Meta's user base, in addition to the presence of users from all ages also appeals to advertisers to use Facebook and Instagram.[25] This is due to the fact that the data power gained through the size of the user base is used to improve the business and services offered, and is also crucial for services offered by the advertiser in related markets, which enables platforms offering zero-price services to generate revenue through targeted advertising.

The Board remarked that the fact that advertisers are increasingly turning to Meta products due to Meta's user portfolio not only allows Meta to generate more revenue and therefore, allocate more resources to develop services, but also makes it difficult for competitors to access advertisers and therefore, financial resources. Hence, given that indirect network effects also exist in the market, the Board concluded that this situation creates a barrier to entry and makes it difficult for potential competitors in the social media market to attract advertisers to finance their services.

Moreover, the Board explained that Meta's operations as an ecosystem with its core and related services contribute to each service offered by Meta, enabling it to transfer the strength and know-how gained from one service to other, and reinforcing its market position and power in terms of each service it offers. Therefore, the Board

[22] During the investigation, Meta committed to allowing users to open a "Meta account" separate from their Facebook and Instagram accounts and to use Oculus products (Quest 2 and Quest Pro goggles) through this account.

[23] German Competition Act (GWB), Section 19a (2)(4)(a).

[24] Bundeskartellamt and Meta are awaiting the conclusion of the Court of Justice of the European Union's ("***CJEU***") assessment of the "Facebook data processing policies" to finalise this aspect of the investigation. In the meantime, the parties have agreed that, until the date of the CJEU judgment, data obtained under Oculus in relation to users accessing virtual reality products using a separate Meta account will be kept separate from data obtained from other Meta services.

[25] As stated by Meta within the scope of the Pre-Investigation, advertisements are currently not offered on Threads.

held that the data combining which may arise from the data transfer mechanism between Instagram and Threads may result in either the creation or increasing of barriers to entry in the market, or usage of data obtained through services in which market power is held in different markets, which may give rise to the significant hindering of competition.

These evaluations, in addition to the Board's assessment that Meta enjoys a dominant position within the scope of the ongoing investigation, were held to strengthen the existence of potential anti-competitive effects that data combining will cause in the market in Turkiye. As such, the Board concluded that combining the data obtained by Meta through Threads and Instagram will (i) serve to maintain and further strengthen Meta's current dominant position in the market, (ii) result in exclusionary practices, and (iii) raise concerns such as prevention of consumers' free choice due to the obligation imposed on users to accept Threads' terms of use and privacy policies in order to be able to use Threads.

## V. Conclusion

In conclusion, the Board held that, as there is a high possibility of damage to the competitive environment and mostly irreparable consequences in the market in case of delay in interfering with potential competition concerns in digital markets, interim measures must be taken against Meta to prevent the combining of data by Meta obtained through Threads and Instagram under Article 9(4) of Law No. 4054 to prevent such irreparable damages which may result from the data combining, which has been previously determined to be a violation of competition by the Board in Meta/WhatsApp, and concluded that such interim measures may eliminate potential anti-competitive concerns that may arise during the ongoing investigation until the final decision is rendered by the Board.

The Decision underscores the complexities inherent in regulating digital markets and the need for a nuanced approach balancing market dynamics with regulatory oversight. By addressing potential anti-competitive effects while acknowledging the complexities of the rapidly evolving digital landscape, the Board seeks to ensure a level playing field for market stakeholders while fostering innovation and consumer choice.

Following the Board's binding Decision, on April 15, 2024, Meta officially announced that it will temporarily suspend Threads in Turkiye as of April 29, 2024, due to the Board's decision. Meta added that it disagrees with the interim order and will appeal the Board's decision before the administrative courts in Ankara. Meta also notes that it will continue to constructively engage with the Authority to bring Threads back to Turkiye as quickly as possible.

# *The Turkish Competition Authority Fines Aksaray Unlu Mamülleri Gıda Sanayi ve Ticaret Limited Şirketi for Providing False/Misleading Information*

## I. Introduction

The Turkish Competition Board ("***Board***") has recently published its reasoned decision[26] ("***Decision***") wherein it assessed whether Aksaray Unlu Mamülleri Gıda Sanayi Ticaret Ltd. Şti. ("***UNTAD***") provided false/misleading information to the Turkish Competition Authority

[26] The Board's decision dated 17.08.2023 and numbered 23-39/730-251.

("***Authority***"). The Decision is an example of the Board's application of Article 16(1)(c) of Law No. 4054 on the Protection of Competition ("***Law No. 4054***") authorising the Board to impose on undertakings an administrative fine for providing false/misleading information.

## II. Background

The Board decided to launch an investigation against certain producers/suppliers and retailers operating in the FMCG sector to decide whether they violated Article 4 of the Law No. 4054. During the dawn raid at Citygross's premises within the scope of the relevant investigation, the Authority obtained some documents which raised concerns that UNTAD may have engaged in resale price maintenance practices. Based on these documents, the Board also decided to launch a preliminary investigation against UNTAD. Within the scope of this preliminary investigation and during the dawn raid conducted at UNTAD's premises, the Authority obtained seven draft dealership contracts which included non-compete and resale price maintenance terms. The Authority then requested UNTAD to submit copies of all distinct types of agreements executed with its customers to determine whether the draft contracts were signed. UNTAD submitted four executed contracts to the Competition Authority. The Authority then requested UNTAD's three customers to provide the same contracts in order to compare the agreements submitted by UNTAD and the agreements submitted by its customers. Since the Board found that these agreements were the same and included the same clauses, the Board did not make an assessment whether UNTAD had provided false/misleading information to the Authority. Following the preliminary investigation, the Board launched an investigation against UNTAD.

However, the Board observed that the terms concerning resale price determination in the draft agreements obtained during the dawn raid were not included in the signed agreements submitted before the Authority by UNTAD and its resellers. Accordingly, due to the possibility that the agreements may have been amended following the Authority's information request and such amended agreements submitted to the Authority, the Authority obtained copies of the 35 agreements with wet ink/original signatures that were executed between UNTAD and its resellers during the dawn raid conducted at UNTAD's premises, in order to entirely eliminate concerns whether the anti-competitive provisions in the draft agreements were included in the actual signed agreements. The Board determined that 33 of the 35 contracts included the relevant anti-competitive provisions, but an agreement signed between UNTAD and one of its resellers submitted by UNTAD as per the Authority's information request during the preliminary investigation period does not include these anti-competitive provisions.

Upon the Authority's request, UNTAD explained the discrepancies between the contract submitted by UNTAD and the same contract obtained during the dawn raid during the investigation by stating that (i) the difference arises from the fact that the draft was changed after UNTAD's reseller had executed the contract, since there was missing content on the document and (ii) the contract submitted to the Authority was the previous contract which was not signed.

The Board concluded that (i) the relevant provisions which might raise anti-competitive concerns were not included in the agreement submitted by UNTAD, (ii) the rest of the clauses were same, therefore (iii) it was considered that the clauses in the agreement obtained during the dawn raid were removed from the contract when the contract samples were submitted to the Authority. Regarding UNTAD's explanations on the differences between the contracts, the Board decided that (i) the fact that 33 of the 35 contracts sent by UNTAD were the same and included the same clauses indicates that the agreements between UNTAD and its resellers were prepared as a standard template agreement, and (ii) all of the parts that were altered in these contracts may cause concerns. Accordingly, the Board did not take into account UNTAD's explanations that the discrepancies between the contracts were solely due to the mistake of UNTAD's employee.

Following this evaluation, the Board decided to impose an administrative monetary fine on UNTAD pursuant to Article 16(1)(c) of the Law No. 4054 based on the grounds that UNTAD provided false/misleading information to the Authority. The administrative fine was calculated as 0.1% of the annual gross revenue of UNTAD in 2022. The actual amount of the administrative fine was not disclosed in the Decision.

## III. The Board's Approach to Providing False or Misleading Information

As per Article 16 of the Law No. 4054, if an undertaking provides incomplete, false or misleading information or document, or does not provide the requested information or document within the duration set out by the Authority, the Board shall impose on the undertaking an administrative fine of 0.1% of its annual gross revenues in the financial year preceding the decision, or over the revenues generated by the end of the financial year closest to the date of the decision, which would be determined by the Board, if it is not possible to calculate at the time. Indeed, there are various decisions whereby the Authority applies Article 16(1)(c) of Law No. 4054 and checks the information submitted by entities from various sources and imposes a fine in case of detection of false/incomplete information. This decision serves as a recent example of this approach.

## IV. Conclusion

The Board's precedents on providing false/misleading information show the importance of providing complete and correct data to the Authority. The Decision is one of the examples to indicate that undertakings should not hide any information from the Authority and provide all data available to them and ensure that all data submitted to the Authority is accurate. The Board can always check the information submitted from various sources, make further assessments whether the submitted information is accurate and impose a fine in case of detection of false/incomplete information.

## Employment Law

### *The High Court of Appeals Rules that Unclear Terms in Minutes of Mediation May Result in Annulment of the Minutes*

### I. Introduction

The 9th Chamber of the High Court of Appeals ("***Court***"), through its recent decision dated October 25, 2023 and numbered 2023/10079 E. 2023/15580 K. ("***Decision***"), has introduced a significant perspective regarding the provision stipulating that, once the parties reach an agreement at the conclusion of the mediation process, they are prohibited from filing a lawsuit on the agreed-upon matters, due to the mediation minutes being regarded as final judgment on the disputed matter.

This principle is stipulated under Article 18/5 of Law No. 6325 on Mediation in Civil Disputes, stating that if an agreement is reached at the end of the mediation process, the parties cannot file a lawsuit on the matters agreed upon. However, the Court ruled that this provision shall be narrowly interpreted and shall solely apply to those matters that have been clearly and undoubtedly agreed upon. Moreover, in the Decision, it was ruled that if the minutes do not clearly indicate the precise intention of both parties to settle, a lawsuit may nonetheless be filed.

### II. The Background of the Decision

The parties to the dispute initiated a mandatory mediation process for the plaintiff employee's claims arising from their employment contract and signed mediation minutes at the end of the mediation process.

However, the plaintiff filed a lawsuit and claimed that he was forced into signing pre-drafted mediation minutes without having any direct interaction with the mediator, who also served as the attorney for the defendant, potentially influencing the mediation outcome. Consequently, the plaintiff requested the annulment of the minutes. The defendant, on the other hand, asserted that the plaintiff signed the mediation minutes willingly, denied any allegations regarding the mediator's prejudicial role, and claimed that the plaintiff was acting in bad faith. The plaintiff filed the annulment lawsuit on the ground that the wording of the minutes is unclear and does not reflect any intention of settling the dispute.

### III. Decision and Reasoning of the Court

The Court first determined that mediation minutes shall be regarded as an agreement and therefore shall be subject to contract law. Accordingly, the Court concluded that the parties are bound to comply with the validity requirements of the contracts, one of which is having consensus on the disputed matters with a clear and express intention. The Court stated that consensus is defined as "*meeting of the party's minds on material aspects of the matters subject to the agreement*". In other words, consensus is the mutual agreement of the parties about the issues that constitute the main pillars of the contract itself. The Court further evaluated that since the parties waive their right to bring any claims against one another upon execution of mediation minutes as to the settlement of the dispute, their intention to settle should be explicitly reflected in the minutes. The Court also underlined that the mere implication of parties agreeing to settle the disputes within the meeting minutes does not suffice as consensus, and that the parties are required to specify the terms explicitly, and on what grounds and consideration the agreement is made, in order for this to be deemed as the Applicant cannot use the right to bring a claim on the agreed matters. So, the Court pointed out that if the terms and conditions on which the agreement is made are not clearly laid out, the meeting minutes shall be annulled, and the employee may proceed with filing a lawsuit. The Court further indicated that the framework of the settlement, as a manifestation of the intention to settle, shall be subject to strict interpretation and the matters that are not clearly settled with a specified consideration (*i.e.* payment) may also be subject to the lawsuit.

Consequently, the Court decided to annul the meeting minutes and allow the employee to proceed with the lawsuit since the meeting minutes did not reflect clear intention on part of the employee to settle the dispute.

### IV. Conclusion

Pursuant to the Decision, it is determined that mediation minutes as to settlement should be clear, concise and leave no doubt that the parties have indeed reached an agreement. In cases where a mediation agreement lacks such clarity, bringing claims before court is still allowed with a view to safeguard the right to access the court, notwithstanding the prohibition stipulated under Article 18/5 of Law No. 6325 on Mediation in Civil Disputes.

## Litigation

### *The Constitutional Court Rules that Contradictory Decisions on Disputes with Similar Subject Matters Violates the Right to a Fair Trial*

### I. Introduction

As a well-established precedent, the High Court of Appeals has consistently ruled that compensation for non-pecuniary damages may also be claimed in cases of breach of contract. However, in a High Court of Appeals decision that is the subject to the application at hand, a conflicting judgment was handed down by the High Court of Appeals. On November 15, 2023, upon the complaint of the Applicant ("***Applicant***") the Constitutional Court decided in its Decision numbered 2019/22055 ("***Decision***") that the High Court of Appeals violated the Applicant's right to a fair trial, as the judgment in question concludes that breach of contractual obligation cannot be give rise to non-pecuniary damages, which fundamentally differs from the previous precedents.

### II. Dispute Subject to the Decision

The Applicant filed a lawsuit for compensation of damages before the Consumers Court, claiming non-pecuniary damages. The ground of the claim was that the furniture that the Applicant had ordered arrived 20 days after his wedding and this was a clear breach of contract. In this context, Applicant emphasized that he suffered non-pecuniary damage since (i) the furniture subject to the agreement between him and the seller was not delivered on the specified date despite the seller's commitment to deliver the furniture before the wedding, and (ii) Applicant had to spend the first 20 days of his marriage without any furniture, which was a great grievance and inconvenience for his family.

The first instance court accepted the case and ruled that the Applicant is entitled to claim non-pecuniary damages, which was appealed by the defendant.

The High Court of Appeals ruled that the personal rights of the Applicant are not violated and therefore is not entitled to be granted any compensation for non-pecuniary damages on the grounds of breach of contract. The High Court of Appeals highlighted that even if the alleged act is against the law, the plaintiff would not be entitled to non-pecuniary damages, since his personal rights were not violated.

Upon the decision of the High Court of Appeals, the Applicant applied to Constitutional Court, asking for the dismissal of the decision of the High Court of Appeals since it contradicts the well-established precedents.

## III. Evaluations of the Constitutional Court

The Constitutional Court pointed out the previous judgments of the High Court of Appeals wherein it was consistently ruled that compensation for non-pecuniary damages can be claimed due to breach of contract, which may also cause a violation of personal rights. The Constitutional Court also emphasized that approximately seven months after the High Court of Appeals' judgment subject to the individual application at hand, the High Court of Appeals accepted a non-pecuniary damage claim based on furniture not being delivered till the wedding date. Therefore, the Constitutional Court determined that there is a contradiction between the precedents of the Civil Chambers of the High Court of Appeals in cases that are filed with non-pecuniary damage claims based on violation of personal rights due to breach of contract.

Consequently, the Constitutional Court concluded that the right to a fair trial has been violated since such contradictory precedents contravene the principle of foreseeability and may damage the public's trust in the judicial system. The Constitutional Court pointed to the previous judgments of the High Court of Appeals wherein it was consistently ruled that compensation for non-pecuniary damages can be claimed due to breach of contract since breach of contract may cause a violation of personal rights too. The Constitutional Court also emphasized that approximately seven months after the High Court of Appeals' judgment subject to the individual application at hand, the High Court of Appeals accepted a non-pecuniary damage claim based on furniture not being delivered till the wedding date. Therefore, the Constitutional Court determined that there is a contradiction between the precedents of the Civil Chambers of the High Court of Appeals in cases that are filed with non-pecuniary damage claims based on violation of personal rights due to breach of contract.

Consequently, the Constitutional Court concluded that the right to a fair trial has been violated since such contradictory precedents contravene the principle of foreseeability and may damage public's trust in judicial system.

## IV. Conclusion

By virtue of this decision, the Constitutional Court draws attention to the importance of *stare decisis*. The Decision elaborates that when it comes to disputes that have similar subject matters, the courts must adopt the same approach and follow the well-established precedents. So, with this decision of the Constitutional Court, it is determined that ruling a judgment contrary to previous precedents violates the right to a fair trial.

## Data Protection Law

### *Significant Changes to the Turkish Personal Data Protection Legislation*

On February 16, 2024, the Law Proposal amending the Code of Criminal Procedure, Certain Laws and Statutory Decree numbered 659 ("***Proposal***") was published on the Grand National Assembly of Turkiye's ("***GNAT***") official website. [27] The Proposal also included amendments to the Law numbered 6698 on the Protection of Personal Data ("***DPL***") and was submitted for further discussion before the Justice Commission, Constitution Commission and Planning and Budget Commission of GNAT.

As stated in the general recital of the Proposal,[28] the Human Rights Action Plan announced in 2021, the Economic Reforms Action Plan and the 2024-2026 Medium Term Program all included the objective of aligning the DPL with the European Union's ("***EU***") General Data Protection Regulation ("***GDPR***"). In this respect, the essential provisions relating to legal bases for processing special categories of personal data and cross-border data transfers are amended under the Proposal.

On March 1, 2024, the GNAT announced on its website that the Proposal introducing changes to Article 6 (Conditions for processing of special categories of personal data), Article 9 (Transfer of personal data abroad) and Article 18 (Minor Offences) of the DPL has been accepted by the GNAT and became law ("***Amendment***"). [29] The Amendment was published in the Official Gazette on March 12, 2024 [30] upon being confirmed by the President and comes into force on June 1, 2024 as further detailed below.

### I. Amendments regarding Special Categories of Personal Data

Special categories of personal data are defined under first paragraph of Article 6 of the DPL as "*personal data regarding race, ethnic origin, political opinion, philosophical belief, religion, religious sect or any other beliefs, appearance and clothing, information regarding memberships to associations, foundations or unions, health, sexual life, criminal conviction and biometric and genetic data*." Processing such data was regulated in a strict manner under the current version of the DPL, which caused challenges especially for employers and companies operating in the health sector.

One of the most significant changes brought by Article 33 of the Amendment is the new processing conditions introduced for special categories of personal data. The recital for Article 33 of the Amendment states that the conditions for processing special categories of personal data are revised by taking the GDPR into consideration. Although the prohibition on

[27] https://cdn.tbmm.gov.tr/KKBSPublicFile/D28/Y2/T2/WebOnergeMetni/6e8b6477-2942-49d1-acf1-cfa13bcac252.pdf (Last accessed on March 5, 2024)
[28] https://cdn.tbmm.gov.tr/KKBSPublicFile/D28/Y2/T2/WebOnergeMetni/6e8b6477-2942-49d1-acf1-cfa13bcac252.pdf, p.15 (Last accessed on March 5, 2024)

[29] https://www.tbmm.gov.tr/Haber/Detay?Id=58ea63d5-7f59-473f-b3cb-018dfbd0e2bf (Last accessed on March 5, 2024)
[30] https://www.resmigazete.gov.tr/eskiler/2024/03/20240312-1.htm (Last accessed on March 12, 2024)

processing special categories of personal data is reserved and the conditions are still listed exhaustively under the amended article, there are now additional conditions in terms of processing such personal data.

With Article 33 of the Amendment, the second paragraph of Article 6 of the DPL is repealed, and the new conditions are set forth under a third paragraph added to the said article. In this respect, the amended conditions for processing special categories of personal data are as follows:

(i) With the explicit consent of the data subject,

(ii) When explicitly stipulated by laws,

(iii) When necessary for the protection of life or bodily integrity of the data subject or another person who is unable to express consent due to actual impossibility or whose consent is not deemed legally valid,

(iv) When related to personal data which was publicly disclosed by the data subject themselves, and in accordance with their intent in disclosure,

(v) When necessary for the establishment, exercise, or defense of a legal claim,

(vi) When required by individuals or authorized institutions or organizations under a confidentiality obligation, for purposes such as protecting public health, conducting preventive medicine, medical diagnosis, treatment, and care services, as well as planning, management, and financing of health services.

(vii) When necessary for fulfilling legal obligations regarding employment, occupational health and safety, social security, social services, and social assistance.

(viii) With regard to personal data processed by foundations, associations, and other non-profit organizations established for political, philosophical, religious or unionization purposes, data pertaining to current or former members, participants or individuals regularly in contact with these organizations, provided that such processing is in compliance with their legislation and objectives, limited to their operational scope, and that personal data is not disclosed to third parties.

## II. Amendments regarding Transfer of Personal Data Abroad

Transferring personal data abroad was a major challenge both for data controllers and data processors as the current version of the DPL had very limited instruments to rely on for cross-border transactions. In this regard, the current version of Article 9 only allowed cross-border transfers based on the data subject's consent as the principal rule. In addition, pursuant to second paragraph of the existing article, personal data can be also transferred abroad if one of the legal conditions stipulated under Article 5/2 and Article 6/3 is met and a decision of the Personal Data Protection Board ("***Board***") setting forth that the country to which the personal data is being transferred has an adequate level of protection (adequacy decision). On the other hand, transferring personal data without the explicit consent of the data subject to countries for which there exists no adequacy decision is only possible if data controllers in Turkiye and the respective country undertake an adequate level of protection in writing and the Board permits it provided that one of the legal conditions is met.

The recital for Article 34 of the Amendment amending the said conditions for cross-border transfers under Article 9 of the DPL also acknowledges the challenges that the current version causes for the actors that process personal data, as the Board has not rendered an adequacy decision since the enactment of the DPL in 2016 and only approved a few of the undertakings among more than eighty applications received in the meantime. Therefore, an amendment to Article 9 of the DPL regulating cross-border transactions was a long-awaited change, especially for group companies that have foreign affiliates or subsidiaries.

The recital also states that the Amendment was based on the GDPR's provisions as the EU considered the ever-developing technology and digitalization and requirements arising from the dynamic commercial life while regulating the instruments for cross-border transfers during the preparation of the GDPR.

Pursuant to Article 34 of the Amendment amending Article 9 of the DPL, personal data may be transferred abroad by data controllers and processors:

(i) if one of the conditions stipulated under Articles 5 and 6 of DPL is applicable, and there is an adequacy decision regarding the country, international organization, or sectors within the country to which data will be transferred.

(ii) if there is no adequacy decision, provided that one of the conditions stipulated under Articles 5 and 6 of DPL is applicable and the data subjects have the opportunity to exercise their rights and access effective legal remedies in the country of transfer, upon the provision of one of the following appropriate safeguards by the parties:

- the existence of an agreement (that does not fall under the status of international agreement) between the public institutions and organizations or international organizations abroad, and the public institutions or professional organizations with public institution status in Turkiye; as well as an authorization granted by the Board.
- the existence of binding corporate rules approved by the Board, including provisions related to the protection of personal data, to which companies within the group engaged in common economic activities are obliged to comply.
- the existence of a standard contract announced by the Board pertaining to matters such as data categories, purposes of data transfer, recipients and recipient groups, technical and administrative measures to be taken by the data recipient, and additional measures for special categories of personal data.
- the existence of a written undertaking including provisions ensuring adequate protection and

authorization granted by the Board.

(iii) if there is no adequacy decision and none of the appropriate safeguards above can be provided, only in the presence of one of the following conditions on a temporary basis:

- with the explicit consent of the data subject, provided that they are informed about the potential risks of the transfer,
- when necessary for the execution of a contract between the data subject and the data controller or for the implementation of pre-contractual measures taken at the request of the data subject,
- when necessary for the conclusion or execution of a contract in the interest of the data subject between the data controller and another real or legal person,
- when necessary for an overriding public interest,
- when necessary for the establishment, exercise, or defense of a legal claim.
- when necessary for the protection of life or bodily integrity of the data subject or another person who is unable to express consent due to actual impossibility or whose consent is not deemed legally valid,
- in case of transferring data from a register that is available to the public or accessible by persons with a legitimate interest, upon meeting the necessary conditions for accessing the register as stipulated in the relevant legislation, and upon the request of the person with a legitimate interest.

The Amendment also sets forth that the said provisions and safeguards stipulated under the DPL will be applicable to subsequent transfers, and transfers to international organizations and the procedures and principles regarding the implementation of the amended article will be regulated under a regulation. So, the Data Protection Authority ("***Authority***") is expected to publish a comprehensive regulation also containing the standard contract and detailed guidance on the new cross-border transfer instruments following the enactment of the Amendment.

## III. Other Provisions

The Amendment also introduces changes in Article 18 of the DPL which regulates minor offences related to the infringement of the DPL. In this regard, in line with the new obligation set forth in the amended Article 9, the data processors and data controllers who fail to notify the Board upon the conclusion of a standard contract which is also brought by the Amendment within five days following the signing date will be subject to an administrative fine ranging from TRY 50,000 up to TRY 1,000,000.

In addition, apart from addressing the challenges related to processing special categories of personal data and transferring personal data abroad, the Amendment brings clarity regarding the imposition of administrative fines and legal remedies against the Board's decisions. In this regard, the Amendment stipulates that the administrative fines that may be imposed on data controllers, for failing to fulfil their obligation to inform data subjects, failing to fulfil the obligations relating to data security, failing to comply with the Board's decisions, or failing to register with VERBIS (the data controllers` registry); whereas, the administrative fine for failing to notify the Board upon the conclusion of a standard contract within five days, will be imposed on both data controllers and data processors who are real persons and (non-public) legal entities. The Amendment also explicitly states that the administrative courts will have jurisdiction as the higher appeal courts for the decisions rendered by the Board (as opposed to the criminal judgeships of peace who currently hold jurisdiction).

### IV. Entry Into Force

The Amendment is set to enter into force on June 1, 2024. That being said, the Amendment also states that the current wording of the first paragraph of Article 9 of the DPL, which stipulates that personal data cannot be transferred abroad without the explicit consent of the data subject, will remain in force until September 1, 2024, along with the amended version. Further, applications submitted to the criminal judgeships of peace until June 1, 2024, will be concluded by the same judgeships.

### V. Conclusion

It is clear that the Amendments will improve the challenges that the data processing actors face, especially while processing special categories of personal data and during cross-border data transfers. With the Amendments, data processors will have a wider range of legal bases to rely on for processing special categories of personal data, specifically the employers who wish to collect employees' health data for complying with occupational safety regulations and data processors operating in the health sector who had to exclusively rely on explicit consent under the current original wording of the DPL. The Amendment also brings clarity to another discussion on the legal remedies against the Board's decisions, while in general bringing Turkiye's data protection regime closer to that of the EU. However, the Authority's and Board's further actions are much needed for guidance on the implementation of the Amendment.

## Internet Law

***Comparing the EU's Digital Services Act with Turkiye's E-Commerce Law: Differences and Similarities with respect to Unlawful Contents***

### I. Introduction

The European Union's "Digital Services Act" ("***DSA***"),[31] which sets forth certain rules regarding e-commerce, became fully applicable on February 17, 2024. The DSA updated the "Electronic Commerce Directive" dated 2000.[32]

In the words of the European Commission, *"the DSA regulates online intermediaries and platforms such as marketplaces, social networks, content-sharing platforms, app stores, and online travel and accommodation platforms. Its main goal is to prevent illegal and harmful activities online and the spread of disinformation. It*

[31]Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC, published in the Official Journal of the European Union on October 27, 2022.

[32] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, published in the Official Journal of the European Union on July 17, 2000.

*ensures user safety, protects fundamental rights, and creates a fair and open online platform environment."*[33]

In Turkiye, the main body of law governing e-commerce is the "Law No. 6563 on the Regulation of Electronic Commerce" ("***ECL***")[34] which has been in effect since 2014. Certain amendments have been made to the ECL over time, most recently in 2022.

Arguably the most important secondary legislation, named "Regulation on Electronic Commerce Intermediary Service Providers ("***ISPs***") and Electronic Commerce Service Providers ("***SPs***")" ("***Regulation***")[35] also came into effect in 2022. The Regulation governs particularly the responsibilities of the ISPs. In line with the ECL, the Regulation also designates ISPs as a central point for addressing unlawful content (when required) and regulates their responsibility in dealing with such content. Therefore, we will focus on the impacts of such regulations on ISPs.

While there is no doubt that the DSA is more comprehensive in terms of regulating e-commerce compared to the ECL, both legislations share somewhat similar provisions concerning unlawful content. In this brief comparison, we will be outlining the legal landscape regarding unlawful contents under the DSA and the ECL, and focusing on the corresponding provisions therein.

## II. The General Liability Regime of ISPs regarding Unlawful Content under the DSA and ECL

Article 8 of the DSA outlines the general rule applicable to ISPs regarding illegal content. According to the said article, *"No general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on those providers."*. The DSA further tailors the general rule and lays down the liability regime of the ISPs based on the nature of their services.

Since intermediary services ("***IS***") are divided into three different categories in the DSA which are subject to different liability regimes, these three categories will need to be explained at the outset. Unlike the DSA, the ECL does not treat such services differently and does not categorize them according to their nature.

In the DSA, IS are classified into three categories: "*mere conduit services"*, "*caching services"*, and "*hosting services"*. These categories are further defined in Article 3 of the DSA:

(i) **Mere conduit service**: Mere conduit services consist of the transmission of information provided by a recipient of the service in a communication network, or the provision of access to a communication network,

(ii) **Caching service:** Caching services consist of the transmission of information provided by a

[33] https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en (Last accessed on April 15, 2024)

[34] Law No. 6563 on the Regulation of Electronic Commerce (*Elektronik Ticaretin Düzenlenmesi Hakkında Kanun*) published in the Official Gazette of the Republic of Turkiye numbered 29166 on November 5, 2014.

[35] Regulation on Electronic Commerce Intermediary Service Providers and Electronic Commerce Service Providers (*Elektronik Ticaret Aracı Hizmet Sağlayıcı ve Elektronik Ticaret Hizmet Sağlayıcılar Hakkında Yönetmelik*) published in the Official Gazette of the Republic of Turkiye numbered 32058 on December 29, 2022.

recipient of the service in a communication network, involving the automatic, intermediate, and temporary storage of that information, performed for the sole purpose of making the information's onward transmission to other recipients upon their request more efficient, and

(iii) **Hosting service:** Hosting services consist of the storage of information provided by, and at the request of, a recipient of the service.

In line with the definitions of such services; Articles 4, 5, and 6 of the DSA determine the responsibilities of ISPs regarding the content they transmit, allow access to, or store through their services. These articles are briefly discussed below:

(i) Article 4 of the DSA, titled "*Mere conduit*" outlines the conditions under which an ISP will not be held liable for the content transmitted or accessed through their service. Specifically, the ISPs (offering mere conduit services) will not be liable if they meet the following criteria: (***i***) they do not initiate the transmission, (***ii***) they do not select the recipient of the transmission, and (***iii***) they do not select or modify the information contained in the transmission.

(ii) Article 5 of the DSA, titled "*Caching*" outlines the conditions under which an ISP will not be held liable for automatically or temporarily storing information transmitted through their service (if, done solely to make the information more efficient or secure for onward transmission to other recipients upon request). Specifically, these ISPs (offering caching services) will not be liable if they meet the following criteria: (***i***) they do not modify the information, (***ii***) they comply with the conditions for access to the information, (***iii***) they comply with industry-recognized rules regarding the updating of the information, (***iv***) they do not interfere with the lawful use of technology to obtain data on the information's use, and (***v***) they promptly remove or disable access to the stored information upon learning that the initial source of the transmission has been removed from the network, access to it has been disabled, or a judicial or administrative authority has ordered its removal or disablement.

(iii) Lastly, Article 6 of the DSA, titled "*Hosting*" outlines the conditions under which an ISP will not be held liable for information stored at the request of a recipient of the service. Specifically, the ISPs (offering hosting services) will not be liable if they meet the following criteria: (***i***) they do not have actual knowledge of illegal activity or content, and in terms of claims for damages, they are not aware of facts or circumstances indicating the presence of illegal activity or content, and (***ii***) upon gaining such knowledge or awareness, they promptly remove or disable access to the illegal content.

Article 7 of the DSA also clarifies that the ISPs would still be eligible for such liability exemptions referred to in Articles 4, 5, and 6, if they choose to investigate in good faith and in a diligent manner, and remove illegal content on their own initiative or take the necessary measures to comply with the applicable laws.

In contrast, the ECL does not distinguish between the types of services offered by ISPs. Rather, it merely establishes a general liability rule concerning illegal content. As per Article 9 of the ECL, as a general rule, the ISPs are not liable for unlawful aspects related to the content and the goods or services provided by the SPs, unless they are aware of such unlawfulness.

In short, according to the DSA, ISPs will not be responsible for content they were not aware was illegal, as long as they act fast enough to remove (or disable access to) it, upon discovering its nature by any means. This is also the case under the ECL. Therefore, it can be argued that the overall (non)liability of the ISPs stipulated in the relevant provisions in the DSA regarding unlawful contents is in line with Article 9 of the ECL.

## III. Becoming Aware of and Taking down Unlawful Content

One way to become aware of unlawful content is through court orders. Article 9 of the DSA, titled "*Orders to act against illegal content*", stipulates that the ISPs must inform the national, judicial, or administrative authority upon receiving an order to take action against unlawful content, whether they acted on the order and when they did so. The required minimum content for such orders, as well as their territorial scope and transmission are also outlined in Article 9 of the DSA.

In comparison, Article 9 of the ECL stipulates that when an ISP becomes aware that the content offered on its platform is unlawful, it must remove this content from publication without delay. Additionally, Article 10/3 of the Regulation specifies that unlawful content must be removed within 48 hours at the latest.

As can be seen, the ECL and the Regulation establish an explicit obligation for removal within a specific timeframe (*i.e.,* 48 hours), while the DSA does not address the explicit requirement for takedown within a specific period.

Another point that is regulated by the DSA is putting mechanisms in place to allow any individual or entity to notify the ISPs of the presence of unlawful content. Such mechanisms are stipulated in Article 16 of the DSA, and they must allow for the submission of notices exclusively by electronic means. Duly made notices through these mechanisms are considered to provide the ISP with knowledge of the reported illegal content. In comparison, the ECL does not stipulate such a mechanism directly. Article 6/1 of the Regulation only requires the ISPs to display certain information about themselves on their main web page.

The Regulation also envisages an "internal communication system" (*dahili iletişim sistemi*) to be put in place by the ISPs. However, this system differs from the mechanisms stipulated in the DSA, as it is solely intended for communication between ISPs and SPs. The internal communication system is defined in the ECL as "the system created by the ISP to facilitate all kinds of communication in the electronic commerce marketplace between the ISP and the SPs for which the ISP provides IS, easily and free of charge. For instance, complaints regarding intellectual and industrial property rights infringements, which will be discussed below, can be filed through this system.

## IV. Notification requirements of the ISPs with Regard to Illegal Content & Criminal Offenses under the DSA and ECL

Article 9 of the DSA, as mentioned above, brings notification requirement for the ISPs when they receive an order to act against illegal content, on whether and when they acted on the order. Accordingly, ISPs must notify both the national judicial or administrative authority and the recipient of their services regarding such order.

In addition to Article 9, Article 18 of the DSA, titled "*Notification of suspicions of criminal offences*" stipulates that the hosting ISPs must promptly inform law enforcement or judicial authorities if they become aware of any information indicating that a criminal offense posing a threat to the life or safety of people. The ISPs must provide all relevant information they have in connection with this suspicion.

Very much in line with the DSA, the ECL stipulates that an ISP must remove the illegal content from publication without delay and notify the relevant public institutions and organizations once it becomes aware of such content. Article 10/2 of the Regulation adds to this obligation by also requiring the ISP to send a notification to the relevant SP to which the content belongs.

Under Turkish law, the ISP must also, upon a right holder's complaint based on information and documents regarding the infringement of intellectual and industrial property rights, remove the product subject to the complaint from publication and notify the relevant SP and the right holder. This aligns with the provision of Article 16/5 of the DSA, which stipulates that the hosting ISP must notify the individual or entity (which notified the hosting ISP of illegal content) of its decision in respect of the unlawful content notified.

## V. Conclusion

In light of our brief comparison, it can be argued that the DSA manages to cover in detail various aspects of e-commerce, mainly the responsibilities of ISPs. In contrast, the ECL falls somewhat short in addressing these aspects, and an attempt was made to address these shortcomings through the Regulation. Nevertheless, it would be reasonable to anticipate updates to the ECL and its secondary legislation in the near future, taking Turkiye's ongoing efforts to harmonize its laws with EU regulations into consideration.

# Telecommunications Law

### *Amendment on the Allocation Procedures and Principles for Domain Names in the "a.tr" Structure*

The Information Technologies and Communications Authority ("***ICTA***") has amended the allocation procedures and principles of domain names in the "a.tr" structure along with domain name fees with its decision numbered 2024/DK-BTD/37 dated January 23, 2024. [36] Accordingly, in line with the Regulation on Internet Domain Names ("***Regulation***") and the Communiqué on Internet Domain Names ("***Communiqué***"), ICTA has decided to approve the amendments to the Principles and Procedures for the

[36] https://www.btk.gov.tr/uploads/undefined/37-2023-web.pdf (Last accessed on April 17, 2024)

Allocation of Domain Names in the Structure of "a.tr" ("***Principles and Procedures***"), accept the new fees for domain names to be allocated in the structure of "a.b.tr" to be applicable as of February 15, 2024, and to annually update such fees according to the relevant re-evaluation rate through ICTA's decision.

The Regulation, which aims to regulate the principles and procedures regarding the management of internet domain names with the ".tr" extension, sets forth two different structures for domain names, in the form of "a.b.tr" and "a.tr". Within this scope, the "tr" extension corresponds to the code determined according to the ISO (International Organization for Standardization) 3166 standard and used in the internet domain names of Turkiye, whereas the letter "b" means subdomains defined under internet domain names with the ".tr" extension and the letter "a" represents domains freely chosen by individuals within the framework of the Regulation. Pursuant to Article 6 of the Regulation, this part may consist only of letters (a-z), numbers (0-9), and hyphens (-),be at least two (2) characters long and at most sixty-three (63) characters long, not start or end with a hyphen (-),not have the third and fourth characters together as a hyphen (-), not have been allocated to someone else and not listed in the reserved list. Examples for the most common subdomains would be ".com", ".net", ".info", ".org", ".gov", ".edu", ".pol" and ".kep".

Under the legal framework outlined by the Regulation and the Communiqué, domain name allocations can be made through two different methods, referred to as "the documented method" and "the undocumented method". In the undocumented method, domain name allocations are subject to the "*first come, first served"* rule and when determining the first applicant, the time when the domain name application is received by TRABIS (.tr Network Information System) is taken into consideration. As to the documented method, such allocations are made after the relevant information and/or documentation is provided by the applicant to the registration institutions, who subsequently convey the information and/or documentation to TRABIS. Domain names to be allocated based on relevant documentation including ".av", ".bel", ".dr", ".edu", ".gov" and ".kep" are set out in the Regulation and can be issued only to specified persons. To illustrate, the subdomain ".av" can only be allocated to lawyers and law firms. Domain names for which the registration institutions complete the application process and pay the fee through TRABIS are allocated to the applicants.

Against this background, the Principles and Procedures focuses on domain names in the "a.tr" structure, which are allocated without subdomains. The difference between the "a.tr" and "a.b.tr" structures is merely structural and there is no difference in terms of their use.

In the allocation process of the "a.tr" domain name, which was initiated as of September 14, 2023, the priority is given to individuals who meet certain conditions and are already domain name holders, and the *"first come, first served"* rule is applied at the end of this process. This priority process is conducted under three categories. In the first category, those who have domain names with extensions "gov.tr", "edu.tr", "tsk.tr", "bel.tr", "pol.tr", and "k12.tr" allocated as of September 14, 2023, are to transition to domain names in the "a.tr" structure free of charge and automatically according to hierarchical order. In the second category, priority is given to professional organizations with public institution status, public benefit associations, tax-exempt foundations, and employer and employee professional organizations with domain names having "org.tr" extension allocated as of August 25, 2023. The third category gives priority to domain names with extensions "kep.tr", "av.tr", "dr.tr", "com.tr", "org.tr", "net.tr", "gen.tr", "web.tr", "name.tr", "info.tr", "biz.tr", "tv.tr", "bbs.tr" and "tel.tr" allocated as of August 25, 2023. ICTA's decision numbered 2024/DK-BTD/37 dated January 23, 2024 amending the Procedures and Principles has included the ".biz.tr" extension to the priority list under the third category.

The latter process[37] has been initiated on February 14, 2024, with the completion of other categories. In this regard, a four-month period has been granted for the completion of the third category. Applications are accepted during the three-month period between February 14, 2024 to May 14, 2024, and evaluations are carried out between May 14, 2024 and June 14, 2024.

## White Collar Irregularities

### ***The Role of Electronic Money Institutions in the Implementation of Anti-Money Laundering Regulations***

An "electronic money institution" is a legal entity that has been authorized by Central Bank of the Turkish Republic ("***CBTR***") to issue electronic money. The CBRT evaluates the applications by and issues authorizations to electronic money institutions, which are then published in the Official Gazette and also maintains an online list of authorized electronic money institutions. As of April 2024, there are fifty-seven (57) authorized electronic money institutions in Turkiye.

Electronic money is any monetary value that is issued on receipt of funds, stored electronically, for the purpose of making the payment transactions stipulated under Law No. 6493 on Payment and Security Settlement Systems, Payment Services and Electronic Money Institutions ("***Law No. 6493***") and accepted as a payment instrument by natural and legal persons other than the electronic money issuer. (Article 3 of Law No. 6493). To elaborate, electronic money is a pre-paid payment mechanism that operates via "pre-invested funds" or sales points terminals to direct transfers between two devices or through open networks.

Electronic money accounts may be requested via personal internet banking applications, by sending a digital request to the relevant bank. Once the electronic money account is authorized, the user will assign a random password to the bank account and use any ATM (cash machine) to deposit money on the electronic money account, use the account card number to send and/or receive money transfers online.

### I. How Are Electronic Money Institutions Used for Money-Laundering?

In a Financial Action Task Force ("***FATF***") report on money-laundering, the process is described as revolving around three stages; namely, "placement," "layering", and "integration." The first phase is "placement", which entails introducing the funds obtained from illegal

[37] https://www.trabis.gov.tr/content/atr_cat3_info (Last accessed on April 17, 2024)

activities into the banking system or into a legitimate stream of commerce. The second phase, known as the "layering" phase, involves separating money from its criminal origins by passing it through financial transactions, for instance transferring it into and out of several bank accounts, or exchanging it for cheques. Lastly, the third phase, referred to as the "integration" phase, entails aggregating the funds with legitimately obtained money or providing a plausible explanation for its ownership[38].

## II. Anti-Money-Laundering Regulations on "Electronic Money Institutions"

CBTR is authorized to review applications of electronic money institutions, to operate, to grant or deny permits, to modify the scope of existing licenses or to revoke a previously issued license. (Article 6 of Law No. 6493).

Once established, electronic money institutions will also be subject to strict reporting, record-keeping, and collaboration requirements. (Article 21 of Law No. 6493). In this scope, CBTR may request records, information, and documents from electronic money institutions regarding any transactions that are conducted by them under its supervision where it deems necessary. Additionally, CBTR may request the opinion of Financial Crimes Investigation Board ("***MASAK***") in determining the rights and obligations of the parties during investigations it conducts and operate on principles issued by MASAK on a case-by-case basis. (Article 12 (3) and Article 14 (6) of Law No. 6493)

Electronic money institutions have been included in the list of "obligated parties" according to the anti-money-laundering legislation ("***AML legislation***") in Turkiye, which means they face several obligations under Prevention of the Laundering of the Proceeds of Crime ("***Law No. 5549***"). These obligations are (i) know-your-customer requirements; (ii) reporting suspicious transactions; (iii) other measures regarding training, internal audits, controls, and risk management; (iv) continuous provision of information; (v) provision of information and documents; (vi) document preservation and provision.

## III. Know-Your-Customer Requirements

Per MASAK's General Communique No. 5, electronic money institutions are not required to conduct "know-your-customer" checks for electronic money issuances below certain monetary thresholds stipulated under the relevant Communique, if such issuance is not used for transfer of funds and is only carried out to withdraw cash or used for receiving products and services. (Section 2.2.11 of MASAK's General Communiqué No. 5).

If the electronic money issued exceeds the relevant monetary thresholds and the transaction is exclusively conducted online (*i.e.*, not in a physical place of business or face to face with the customer), then the electronic money institutions are required confirm identities of the real persons through a database operated by the General Directory of Population and Citizenship of the Ministry of Interior, and similarly, check for registration of legal entities by confirming their documents through Turkish Chambers of Stock Exchange and Income Administration Directory. The Communique also requires the electronic

[38] FATF Report on "Professional Money Laundering," 2018

money institutions to work with a bank account or credit card where the account owner identity is confirmed to match with the relevant real person or legal entity for all collections and payments.

## IV. Reporting of Suspicious Transactions

In the Turkish AML legislation, there is no specific monetary threshold for mandatory reporting of suspicious transactions. Accordingly, suspicious activities must be reported to MASAK by obligated parties regardless of the amount in question.

MASAK has issued sectoral guidelines for payment institutions and electronic payment institutions regarding how reports may be sent. According to the recent Guidelines, suspicious activity notification forms may be delivered to MASAK in person, or electronically through its online portal (*i.e.,* EMIS).

## V. Sanctions for Non-compliance

Electronic money institutions that operate without a license will be faced with an administrative monetary fine of TRY 779,179 up to TRY 17,531,539 (for 2024). However, if the entity has benefited through this non-compliance or caused a loss to be incurred, then the administrative monetary fine may be increased. (Article 27 of Law No. 6493.)

Failure to report suspicious transactions and hindering audits and investigation efforts of CBTR are also subject to administrative and judicial monetary fines. As per Article 13 (1) of Law No. 5549, an administrative fine in the amount of TRY 303,630 (approximately USD 10,000) (for 2024) could be imposed for failure to report a suspicious transaction. If the obligated party is an electronic money institution, or another financial institution listed under regulation, the administrative fine shall be doubled and, will not be less than 5% (five percent) of the amount of the suspicious transaction.

Furthermore, failure to report a suspicious transaction may be punished with imprisonment from 1 (one) year to 3 (three) years and with a judicial fine up to five thousand days (which would be between approximately TRY 100,000 (USD 3,300) and TRY 500,000 (USD 16, 51200), when calculated over the maximum daily rate of TL 100 (USD 3.30) and the minimum daily amount of TL 20 (USD 0.66). The courts will decide the applicable rate by taking into account the financial status of the relevant party.

Lastly, individuals who hinder the audit and investigation duties of CBTR may be subject to imprisonment from one year up to three years. (Article 29 of Law No. 6493.) Individuals who refrain from providing information and documents requested by CBTR would also be subject to imprisonment from three months up to one year and up to one-thousand-and-five-hundred (1500) days of judicial monetary fines (therefore a minimum of TRY 30, 000 and a maximum of TRY 150,000). Investigation of this crime is subject to CBTR’s application to the public prosecutor’s office with a complaint. (Article 37 (1) of Law No. 6493.)

## Intellectual Property Law

***Turkish Patent and Trademark Office Empowered to Adjudicate Trademark Cancellation Cases: A New Era Begins***

### I. Introduction

Industrial Property Law No. 6769 ("***IPL***") entered into force on 10 January 2017. As per Article 26 of IPL, the Turkish Patent and Trademark Office ("***TPTO***") was granted the authority to adjudicate on the cancellation of a trademark. However, pursuant to Article 192/a of the IPL, this article was to enter into force 7 years after the date of publication of the IPL, *i.e.* on January 10, 2024. Upon expiration of the seven-year period, the TPTO started to adjudicate on the trademark cancellation cases as of January 10, 2024.

### II. Background

Article 26 of the IPL grants the power to adjudicate trademark cancellation cases to an administrative body, *i.e.,* TPTO. However, the legislator deemed it fit to postpone the enforcement of Article 26 until 10 January 2024, seven years after the enactment of the IPL, in order to allow TPTO to prepare and restructure its institutional framework to facilitate the implementation of this authority. During this period of preparation granted to the TPTO, Civil Courts for Intellectual and Industrial Rights (IP Courts) still held the authority to decide on trademark cancellation.

### III. The Draft Regulation

As a part of the preparatory works, TPTO issued a Draft Regulation on Amendments to the Regulation on the Implementation of the Industrial Property Law ("***Draft Regulation***") for public opinion. The draft regulation sets out the procedural details of the application to be made regarding the trademark cancellation request. Nevertheless, the Draft Regulation is still not published and therefore not in force.

As per the Draft Regulation, instead of a lawsuit petition, the cancellation request shall be filed through a form indicating certain information such as (i) registration number of the relevant trademark, (ii) goods and services subject to the cancellation request, (iii) ID and contact information of the requesting party or their attorney, and (iv) reasons of the cancellation request.

In addition to the foregoing, the respondent shall have 1 month to respond and may be granted one additional 1 month, which again diverges from the proceedings before IP Courts.

On the other hand, it is not regulated which department of the TPTO will handle cancellation requests or whether a different department allocated to cancellation requests will be established.

As the Draft Regulation is not in force, there is an ambiguity in terms of the TPTO's practice regarding the trademark cancellation actions and these matters are still expected by the practitioners after almost 6 moths as of the TPTO's power adjudicate on the trademark cancellation cases entered into force.

### IV. Conclusion

The TPTO's authorization on trademark cancellation cases is a substantial development as it will significantly alleviate the workload of the IP Courts. Additionally, given TPTO's expertise in trademark and intellectual property matters and its ongoing practice for conducting reviews of a similar nature prior to registration of trademarks, one can assume that the legislator does not expect any deterioration in terms of the quality of such examination. On the other hand, currently there is no concrete guideline as to how TPTO will handle these requests, which leaves the process for the whole matter, in ambiguity.

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