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LEGAL INSIGHTS QUARTERLY

September 2024 – November 2024

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Preface to the September 2024 Issue

The September 2024 issue of Legal Insights Quarterly was prepared to provide an extensive look into the upcoming legal issues, as well as the foremost contemporary legal agenda in Turkiye.

The Corporate Law section focuses on the intricate topic of conflict of interest for board members and shareholders, by providing a detailed examination of the legal framework designed to protect the interests of companies and their stakeholders.

While the Banking and Finance Law section addresses the pressing issue of liability of banks with respect to online banking transactions, the Capital Markets Law section sheds light on the process of selling shares newly issued by way of capital contribution and provides an analysis of the regulatory framework governing capital increases by publicly held companies.

The Competition Law section of the September 2024 issue includes reviews on two mergers and acquisitions cases, one of which scrutinizes the information technology services market and the other discusses an acquisition through the exercise of the pre-emption rights in the "*storage and supply of jet fuels*" market. This section further provides insight into the Competition Board's assessment on "*excessive pricing*" practices. Lastly, an analysis of a decision on self-preferencing through algorithm manipulation and misuse of third-party sellers' data in the online services market also takes its place amongst the diverse assessments under this section.

Moving on, the Dispute Resolution section provides a look into the Constitutional Court's noteworthy decision, where the Court found that an interim injunction lasting over 15 years violated the Applicant's right to property under Article 35 of the Turkish Constitution.

The section on Data Protection Law offers a detailed examination of the March 2024 amendments to Law No. 6698 on the Protection of Personal Data, which introduced new protocols for cross-border data transfers. In addition, Internet Law section explores Turkiye's pioneering steps towards regulating artificial intelligence, through the recently proposed Artificial Intelligence Law.

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

September 2024

Corporate Law

Conflict of Interest for Board Members and Shareholders

I. Introduction

Pursuant to the Turkish Commercial Code No. 6102 ("***TCC***"), members of the board of directors have a duty of care and a duty of loyalty to protect the interests of the company. With this understanding, the law explicitly prohibits a board member from participating in discussions of matters that can create a conflict between the personal interests of such board member, and the interests of the company.

Similarly, the TCC stipulates that shareholders may not vote on matters that involve a conflict of interest, in the general assembly.

In this article, we will discuss the concept of conflict of interest under the TCC, as applied to the members of the board of directors as well as the shareholders of a company.

II. Prohibition for the Board Members

The primary responsibility of the board of directors is to act in the best interest of the company and to adopt its resolutions in good faith and honesty. Within this context, as per Article 369 of the TCC, board members and third parties authorized to manage the company, are under the obligation to fulfill their duties of care as prudent directors, and to protect the interests of the company in good faith (as per their duty of loyalty). Members of the board of directors, especially in cases where there are conflicts of interest, are expected to put aside their personal interests and prioritize those of the company. Accordingly, Article 393 of the TCC provides that board members are prohibited from participating in the discussions of matters they have a conflict of interest in, during board meetings.

Prohibition of participating in discussions (due to a conflict of interest) of the board member, comes into play when the personal interests of (i) the board member outside the company, (ii) their descendants or ascendants, (iii) their spouse, (iv) persons related by blood or by marriage, up to and including third-degree relatives, conflicts with the interests of the company. If the board member is a legal entity, then the scope of such prohibition shall be limited to the interests of the relevant legal entity. The reasoning of Article 393 of the TCC states that since the scope of the prohibition of participation in discussions is related to interests outside the company, the personal interests of the relevant board member within the company are not covered by this prohibition. In any event, the prohibition to participate in discussions should be evaluated on a case-by-case basis.

If the board of directors has any doubt as to whether the matter in question can be characterized as a conflict of interest and whether it is within the scope of the prohibition of participating in discussions, the board shall put this to a vote and resolve whether the matter falls within the scope of conflict of interest. The board member who is the subject of this potential conflict will have no voting rights in such decision. Having said that, the (rest of the) board of directors may not always be aware of the conflict of interest and in such a case, the relevant member must disclose it to the board and comply with the said obligation.

As per Article 340 of the TCC, Article 393 of the TCC is a mandatory provision; *i.e.,* it is not possible to remove or forego this

prohibition by way of the articles of association or a shareholders' resolution.

Board members acting in violation of such prohibition and participating in the board meeting, other non-conflicting board members who were aware of the conflict of interest but failed to object to the relevant board member attending the meeting, and board members who voted in favor of such board member attending the meeting, shall be personally liable to indemnify any damages incurred by the company due to the conflict of interest.

III. Shareholders' Voting Restrictions

Shareholders' voting rights may be restricted by law or through the company's articles of association, under certain conditions. One of these is set forth in Article 436 of the TCC on restriction of the shareholders' right to vote on matters that may create a conflict due to their personal interests. Pursuant to the said article, a shareholder may not cast votes in the deliberations related to a matter, a transaction, or a claim before any judicial or arbitral body, which is between them or their related parties (which the article lists as their spouse or descendants, or the sole proprietorships in which they are partners or the companies under their control) and the company. In addition, those members of the board of directors and signatories with executive managing authority who own shares in the company, will not be able to cast votes for General Assembly resolutions regarding their release as board members. Considering its scope in terms of the persons listed, Article 436 of the TCC is a special decision-making process regarding related party transactions.

Unlike Article 393 of the TCC, which prohibits board members from participating in the discussions on matters creating conflict of interest, under Article 436 of the TCC, the shareholder may still attend the general assembly meeting when the foregoing conflicting items in the agenda are being discussed. That said, the relevant shareholder shall not be able to vote on such matters. If the relevant shareholder votes in breach of this prohibition, the annulment of the general assembly resolution may be requested. This will require filing a lawsuit for the annulment of the general assembly resolution pursuant to Article 445 of the TCC. The said action for annulment may be brought by (i) the shareholders, (ii) the board of directors and/or (iii) any board member who would be personally held liable upon implementation of the resolution.

IV. Conclusion

The TCC prohibits board members from participating in meetings of the board of directors during discussions of matters related to their personal interests outside the company, in order to protect the interests of the company. However, in case of shareholders, the TCC's prohibition is limited to voting on the matter in order to protect the interests of the company and also the other shareholders; therefore, unlike Board members, the shareholders are able to participate in the general assembly during discussions on conflicting personal matters. If the relevant board member attends the meeting despite the prohibition, the relevant member will be required to indemnify the company for losses arising from the decision on the conflicting matter. On the other hand, if the relevant shareholder votes in the general assembly despite the prohibition, the applicable remedy is a lawsuit to be filed for the annulment of the decision in question.

Banking and Finance Law

Legal Liability of Banks in Internet (Online) Banking Transactions

I. Introduction

Internet (online) banking enables customers to perform various transactions online through the bank's mobile application or website, based on the internet banking agreement between the bank and the customer, without visiting the bank's physical branch in person. Internet banking agreements are service agreements that enable bank customers to perform online transactions such as opening a bank account, credit card transactions, payments, wire transfers, FX purchase and sale, rendering instructions, purchasing stocks and similar investment instruments through the bank's mobile application or its website.

In this article, we aim to provide a legal perspective to the liability regime of banks and their additional obligations within the scope of internet banking transactions, especially in cases of fraudulent activities in online wire transfers.

II. Internet Banking Transactions

Legal liability for banks may arise due to the bank's wrongful acts, and the non-fulfilment, or improper fulfilment of its obligations arising from their contractual relationship with customers.

In addition, banks will be liable due to their obligation to act prudently, as they are legal entity traders due to the requirement of establishment of banks in the form of joint-stock companies, as per the banking legislation. As per Banking Law No. 5411 ("***Banking Law***") the banks have the status of "trust institutions" as referred to under the reasoning of the said provision, due to their fiduciary nature. They are characterized as "trust and credit institutions" and the reasoning of the Banking Law emphasizes that banks are closely linked with public order and public interest. In this context, besides the obligation to act prudently, banks are also subject to a much wider and severe liability regime due to their fiduciary status, as emphasized in the Supreme Court decisions[1].

The broader liability regime of banks shall also apply to internet banking transactions. If banks provide their customers with internet banking services such as purchasing/selling FX, performing stock exchange transactions or making various payments, wire transfers, but the customer cannot perform these transactions due to bank's inability to provide such service at the time of usage, the bank will be contractually liable. In the event that these transactions cannot be performed, the customer may ask the bank that acts in breach of the contractual obligation to indemnify them for the damage incurred.

a. Fraud Through Wire Transfers

We will specifically address the liability of the bank in wire transfers since wire transfers are one of the most frequently performed transactions in internet banking and such transactions are also frequently

[1]Supreme Court, 11th Civil Chamber's Decision numbered E. 2014/1643 K. 2014/4837 dated March 13, 2014,
Supreme Court, 11th Civil Chamber's Decision numbered E. 2015/8521 K. 2016/3192 dated March 23, 2016,
Supreme Court, 11th Civil Chamber's Decision numbered E. 2018/633 K. 2019/6021 dated October 1, 2019.

used within the scope of fraudulent activities. A fraudulent transaction occurs when third parties transfer an amount in the deposit account to another account, without the customer's consent by using information garnered with malicious intent. In this case, it should be noted that since the money is the property of the bank, this transaction is committed against the bank. Therefore, the bank may ask the third party (tortfeasor) to indemnify them, in accordance with the rules of tort as stipulated under the Turkish Code of Obligation No. 6098 ("***TCO***").

The customer may also, under their contractual relationship with the bank, demand a refund of the funds fraudulently transferred out of their account. If the bank does not refund the money in question, customers who claim that the money in their account has been transferred without their authorization to another account via internet banking, may file a lawsuit on the ground that the bank has not taken the necessary security measures.

b. Preventive Measures

Banks are obliged to take preventive measures to protect their customers from internet banking frauds. Pursuant to Article 36 of the Regulation on Information Systems and Electronic Banking Services of Banks ("***Regulation***"), banks must establish monitoring mechanisms to detect and prevent transactions that usually carry a risk of fraud, within the scope of electronic banking services. Indeed, in one of its decisions[2] the Supreme Court ruled that the bank is liable even for slight defects arising from the failure to fulfil its due care.

[2] Supreme Court, 11th Civil Chamber's Decision numbered E. 2013/8049 K. 2013/22632 dated December 11, 2013.

Banks should also warn their customers when they identify risk-related transactions. Pursuant to Article 37 of the Regulation, customers must be clearly informed about the conditions, risks and exceptional circumstances regarding the internet banking services provided. Further, the bank's website must include content that informs the customer on such matters, including guidance on what to do in case the customer encounters a fraud case. Those banks that fail in their duty to inform will not be able to evade liability by claiming that the customers are at fault.

c. Elimination of Liability

Banks have a fiduciary duty; a heavier burden of due care because of their nature as trust institutions. The customers are also obliged to protect their sensitive information and internet banking passwords. Otherwise, the customer may be liable for breach of its own obligations of due care. For instance, if the customer shares his/her internet banking password with a third party or leaves his/her mobile phone or other mobile devices unprotected and accessible by third parties, the customer shall also be deemed to be at fault.

Within this context, in one of its decisions[3], the Supreme Court ruled that although the bank bears this responsibility as a result of the contractual relationship between the bank and the customer, the bank may compensate the customer for damages in proportion to the customer's fault as the customer fails to exercise the due care for the protection of its private and sensitive information.

[3] Supreme Court General Assembly of Civil Chambers' Decision numbered E. 2017/2224 K. 2018/1753 dated November 22, 2018.

III. Acts of Bank Personnel, Auxiliary Persons and Bank Managers

The banks are liable for damage caused by their employees to the bank's customers in accordance with Article 66 of the TCO. As an employer, the bank is obliged to indemnify the damage caused by the employee to others during the performance of the work assigned to the employee. In this context, the bank will also be liable in accordance with the principle of employer's (vicarious) liability in cases that arise due to negligence of the bank personnel which may have caused harm to the customer.

While performing various transactions within the scope of internet banking, the banks receive various services from telecommunication companies, *e.g.,* to send an OTP (one-time password) SMS text during online purchases. In this context, the contractor telecommunication company is deemed to be an auxiliary of the bank (engaged to assist the bank in performing its contractual obligations) pursuant to Article 116 of the TCO. Even if the bank has lawfully entrusted the performance of the obligation, or the exercise of the right arising from an obligation relationship to its auxiliaries, such as employees of the auxiliaries, it is obliged to indemnify any harm they cause to the customer during the execution of the work they are tasked to do. Therefore, in this case, the bank may also be liable for the damage caused by the telecommunication company during the course of its services related to internet banking.

Finally, the liability of bank managers should also be mentioned. According to Article 369 of the Turkish Commercial Code No. 6102 ("***TCC***"), the directors of a joint-stock company are obliged to fulfil their duties with the care of a prudent manager. In addition, bank managers are required to act in accordance with the principles specified in the Regulation on Corporate Governance Principles of Banks. Thus, limits of bank managers' liability have also been expanded through such principles, in addition to Article 369 of the TCC.

IV. Conclusion

Banks have a wider duty of care as they are deemed to be fiduciaries, *i.e.,* trust institutions and therefore scope of liability for their services including internet banking is much broader. The bank is obliged to indemnify the damage that may have been incurred by its customers due to internet banking activities. In addition to this, the bank is liable for any damage caused by its employees in the course of their employment, in accordance with Article 66 of the TCO.

Capital Markets Law

Turkiye: Sale of New Shares Issued Through Capital Contribution

I. Introduction

Under Turkish legislation, share capital increase refers to an increase in the amount of the company's share capital in the main share capital system or issued share capital in the registered share capital system. When this increase is achieved through a share capital commitment, also known as "capital increase from external sources" or "capital increase through capital subscription," shareholders or third parties agree to contribute a new asset to the company as share capital. Once this commitment is fulfilled, the share capital amount set out in the company's articles of association and balance sheet is increased. In this process, new shares are issued for

those shareholders or third parties who made the commitment to increase.

Pursuant to Communiqué on Shares VII-128.1 ("***Communiqué***") applicable for the publicly held companies, shares to be issued via a capital increase through capital contribution may be sold with or without a public offering. In this article, we aim to reveal an analysis on the public offering of shares of publicly held companies to be issued via capital increase through capital contribution, as well as the sale of such shares without public offering.

II. Public Offering of Shares via Capital Increase

Firstly, pursuant to Article 12/4 of the Communiqué, in capital increases through capital contribution in publicly held companies, it is obligatory to fulfill the capital contribution obligation by paying in cash. However, receivables arising from the funds previously contributed to the company in cash and affirmed by a financial advisor's report may be set off against the capital contribution obligation, if due and payable. The obligation of the capital contribution in cash arising from capital increases to be made by publicly held companies cannot be set off against the transfer of assets other than receivables in cash to such company. In capital increases through capital contribution to be made by publicly held companies, if the funds to be obtained from the capital increase exceed the existing share capital of such company and will be used for the payment of debts to the related parties defined in the relevant regulations of the Capital Markets Board ("***CMB***") which arise from non-cash asset transfers by the related party to the company, this capital increase will be considered as a material event. In this case, before such company submits the prospectus regarding the capital increase for the approval of the CMB, the shareholders must be granted the right to exit within the scope of Article 24 of the Capital Markets Law No. 6362.

Article 12 of the Communiqué provides for certain procedures to be performed prior to applying to the CMB for approval on the capital increase through capital contribution by publicly held companies. In this regard, (i) in the case of authorized capital system, the board of directors shall pass a resolution outlining the amount of capital to be increased and the principles of sales, (ii) whereas in the case of share capital system, the board of directors shall prepare draft an amendment to the relevant "share capital" article in the articles of association.

In the share capital system, draft amendment of the share capital, together with the relevant resolution of the board of directors, and a certified public accountant report certifying that the existing capital of the company is paid, will be submitted to the CMB for its approval on the capital increase. Within a maximum of six months following receipt of the approval of the CMB with respect to amendment to the article on the share capital of the articles of association, the general assembly of shareholders shall be convened to resolve on increasing the share capital. Draft amendments which are not approved by the general assembly of shareholders within six months as of the approval of the CMB in this regard will become null and void.

According to Article 12/1 (c) of the Communiqué, if the aim is to fully or partially restrict pre-emption rights of the shareholders, this should be clearly stated in the capital increase resolution of the board of directors (as authorized by the articles of association in the authorized

capital system to increase the share capital), or in the capital increase decision of the general assembly of shareholders in the share capital system. In that general assembly meeting, the full or partial restriction of pre-emption rights proposal must have been included in the agenda, and the board of directors must inform the shareholders about the reasons of restriction of pre-emptive rights. In the authorized capital system, the resolution of the board of directors to restrict pre-emptive rights will be published and announced in accordance with regulations of the CMB pertaining to the authorized capital system.

III. Sale of Shares via Capital Increase through Capital Contribution without a Public Offering

As per Article 13 of the Communiqué, there are two methods for capital increases through capital contribution, that publicly held companies can undertake in sales of shares without public offering: private placement and sales to qualified investors. The sale of the existing shares of the shareholders of the company without a public offering does not fall within this scope.

Sale of shares to be issued via conditional capital increases are deemed as private placement and there is no restriction on the number of investors in these sales. In order for the shares to be sold during the capital increase, any partial or full limitation of the shareholders' rights to acquire new shares (pre-emption rights) must be decided by the general assembly in the share capital system, and by the board of directors in the authorized capital system.

In addition, companies whose shares are traded on the stock exchange are obliged to sell the shares issued via the capital increase in the relevant market(s) of the stock exchange. In such a case, the sales price shall be determined in accordance with the exchange regulations. However, it is also possible to sell shares at a different price than the one to be determined as per the stock exchange regulations, with the approval of the CMB.

Lastly, in the sale of shares to be issued via the capital increase by publicly held companies whose shares are not traded on the stock exchange, a price determination report must be prepared by the authorized institution to determine the sales price.

IV. Conclusion

Pursuant to the Communiqué, the shares to be issued via capital increase through the capital contribution may be sold with or without a public offering. The transactions and decisions to be taken in the event of public offering of the shares to be issued by publicly held companies through capital contribution differ, depending on whether the company adopted the authorized capital system or the share capital system. That said, in the event of a share capital increase through capital contribution by publicly held companies, the capital contribution in either case must be paid in cash.

Competition / Antitrust Law

Turkish Competition Board's Teleperformance/Majorel Decision: An Assessment on Acquisitions through Voluntary Public Tender

I. Introduction

On May 14, 2024, the Turkish Competition Authority ("***Authority***") published the Turkish Competition Board's ("***Board***")

reasoned decision[4] ("***Teleperformance/Majorel Decision***") regarding the acquisition of sole control over Majorel Group Luxembourg S.A. ("***Majorel***"), by Teleperformance SE ("***Teleperformance***") through a voluntary public tender offer.

II. The Board's Approach to Qualifying the Change of Control

With respect to the change of control through the proposed acquisition, the Board first noted that the transaction involves Teleperformance SE seeking to acquire Majorel, a publicly traded company listed in the Amsterdam Stock Exchange, through a voluntary public tender offer. Within this scope, in addition to the shares held by Majorel's senior management, three major shareholders of Majorel have committed to selling their shares to Teleperformance. Following this step, Teleperformance aims to acquire the majority of the shares of Majorel, after which Teleperformance, subject to meeting the relevant shareholding thresholds, intends to proceed with acquiring the remaining shares by proceeding with a mandatory squeeze-out for the outstanding shares and hold 100% of Majorel's shares.

Within the reasoned decision, the Board indicated that Luxembourg law allows a majority shareholder holding more than 95% of a company's shares to exercise a mandatory squeeze-out of the remaining shareholders. The Board acknowledged that if this threshold is reached, Teleperformance intends to trigger the mandatory squeeze-out mechanism. The Board even homologized this Luxembourgian squeeze-out mechanism to the Turkish concept of the "right to purchase" as described in Article 208 of the Turkish Commercial Code numbered 6102 ("***TCC***"). Different from the Luxembourgian rules, Article 208 of the TCC allows a majority shareholder holding at least 90% of a company's shares to force the remaining shareholders to sell their shares, under certain conditions. These include the minority shareholder(s) preventing the company from running its business, not acting in good faith, creating obvious dissent, or behaving in a reckless manner.

The Board underlined that within the scope of the proposed transaction, the importance of the mandatory squeeze-out is that if the necessary requirements for this procedure are not met, there would still be a minority in the company. The Board thus discussed the scenario where Teleperformance's shareholding ratio falls short of 95% following the voluntary public offer tender, thereby preventing Teleperformance from acquiring 100% of the shares of Majorel through the squeeze-out process. Subsequently, the Board assessed that even if Teleperformance is unable to acquire 100% of Majorel's shares, there would be no other shareholder who would have veto rights, right to appoint members of the board of directors or supervisory board, or any other means of control over the majority of shares held by Teleperformance.

Finally, in terms of change of control assessment, the Board explained that even if Teleperformance takes over less than 100% of Majorel's shares, the remaining shareholders of Majorel will not have any means of control, and therefore Teleperformance will have sole control over Majorel since it holds the majority of shares in any case. The Board therefore classified the transaction as an acquisition under Article 7 of the Law No. 4054 on Protection of Competition ("***Law No.***

[4] The Board's *Teleperformance/Majorel* decision dated 31.08.2024 and numbered 23-40/761-266.

4054”) and Article 5 of the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board (“***Communiqué No. 2010/4***”) since Teleperformance will acquire sole control over Majorel by acquiring the majority of its shares and the parties’ turnover figures exceed the turnover thresholds set out in the paragraphs (a) and (b) of Article 7 of the Communiqué No. 2010/4.

III. Competitive Assessment of the Transaction and Relevant Product Markets

In assessing the activities of Teleperformance and Majorel, the Board found that both undertakings are active in information technology (“***IT***”) services, IT consulting, and business process (“***BP***”) services. The Board noted that the acquirer operates in Turkiye through its three subsidiaries: (i) Metis Bilgisayar Sistemleri Sanayi ve Ticaret A.Ş. (“***Metis Bilgisayar***”), (ii) Metis Anadolu Çağrı Merkezleri A.Ş. (“***Metis Anadolu***”), and (iii) TLS Danışmanlık Hizmetleri ve Ticaret Ltd. Şti. (“***TLS Danışmanlık***”), with Metis Bilgisayar and Metis Anadolu providing call center and office support services to corporate clients, while TLS Danışmanlık focusing on visa application services.

The target’s two subsidiaries in Turkiye are (i) Majorel Telekomünikasyon A.Ş. (“***Majorel Telekomünikasyon***”) and (ii) Entegrasyon Servis ve Teknoloji Ticaret A.Ş. (“***Entegrasyon Servis***”). Majorel Telekomünikasyon offers a range of BP services including customer support, sales, office support operations, and social media management. Entegrasyon Servis specializes in IT, communication hardware, and software procurement, sales, and marketing.

Finally, the Board indicated there were horizontal overlaps between Teleperformance and Majorel in IT services, IT consulting, and BP services, but found no vertical overlaps in their activities. Having said that, the Board noted that the integrated market shares of the parties in the affected markets for the last three years (*i.e.,* 2020, 2021 and 2022) were below 20%, indicating that their combined presence in these markets is not significant enough to raise competition concerns.

The Board also noted the highly competitive nature of the IT services sector, characterized by significant research and development, diverse consumer options, new market entries, emerging technologies, and the strong negotiating power of well-informed customers who can switch suppliers if necessary. Having considered the low market shares and numerous strong players active across the three affected markets, the Board concluded that the transaction would not result in any significant competition concerns.

IV. Conclusion

The reasoned decision provides insight into how the Authority approaches change of control in acquisitions, particularly through public tender offers. The Teleperformance/Majorel decision is crucial as it sets a precedent for the Board’s evaluation of voluntary public tender offers within the context of competition law in Turkiye. It also demonstrates the Board’s assessment of the lack of significant veto rights or control mechanisms among remaining shareholders in cases of sole control acquisition.

Turkish Competition Board Greenlights BP-THY Opet Deal: A Comprehensive Analysis of Jet Fuels Market

I. Background Information

On April 16, 2024, the Turkish Competition Authority (the "***Authority***") published the Turkish Competition Board's (the "***Board***") reasoned decision[5] which assessed the notification concerning the acquisition of contribution shares and related assets of BP Petrolleri A.Ş. ("***BP***") by THY Opet Havacılık Yakıtları A.Ş. ("***THY Opet***") through the exercise of the pre-emption right, under the Joint Aviation Operation Agreement signed between Shell Company of Türkiye Limited Merkezi Londra Türkiye Şubesi ("***Shell***"), THY Opet, and BP, covering Antalya, Bodrum-Milas Airport, and Izmir Adnan Menderes Airport in Turkish Airfields for Storage and Aircraft Refuelling ("***Joint Operation Agreement***"). The Board's reasoned decision provides an up-to-date insight into the dynamics of the Turkish jet fuel market.

Before delving into its substantive analysis, the Board examined the parties' activities. THY Opet, which was established as a joint venture between Türk Hava Yolları A.O. ("***THY***") and OPET Petrolcülük A.Ş. ("***Opet***"), is active in storage, supply and sales of aviation fuel in various airports. While OPET operates in fuel distribution, THY operates in aviation transport. BP is an integrated energy company focused on three business pillars as hydrocarbons, mobility and low-carbon energy. It operates in storage, wholesale and retail sales of gasoline, paraffin oil, diesel oil, fuel oil, naphtha and biodiesel products and delivery of mineral oil and bunker fuel (mineral oil, fuel oil, aviation fuels (jet fuel), gasoline, diesel oil, marine oil) activities in Turkiye.

Within the reasoned decision, it is notable that the Board provided detailed explanations on the Turkish jet fuel market in addition to elaborating on the regulations pertaining to fuel and aviation sectors in Turkiye. Based on this, the jet fuel supply chain includes an extensive process from the provision of jet fuel by companies operating refineries to the delivery of jet fuel to airport companies, which are the end users of this product. The Board further evaluated that the supply chain in the aviation fuels market could be explained as "refinery/import to distributor company to consumer". Following a brief analysis of the supply chain system for jet fuels, the Board assessed the relevant product market.

II. The Board's Assessment on the Relevant Product and Geographic Markets

The Board opted to divide aviation fuels into two subgroups: avgas (aviation gas) and jet fuels. Avgas is a high-octane type of gasoline used in airplanes with internal combustion engines. Due to its relatively low consumption, the domestic need for avgas is met through imports. The second type of aviation fuel, jet fuel, is used in airplanes with jet engines, with the most frequently used type being A-1.

The supply chain of jet fuels consists of mainly three stages as (i) refinery activities, where refinery companies are the main actors, (ii) fuel companies and (iii) airplane companies as end-consumers. Storage and supply of jet fuel sales represent the vertical element of the supply chain; on the other hand, sales of jet fuels and its storage are two separate markets

[5] The Board's decision dated 14.12.2023 and numbered 23-58/1131-405.

and are differentiated in terms of price, cost and regulations. Considering that the undertakings selling jet fuel either manage storage and supply activities through their own facilities, or outsource these services to ensure delivery to airplanes, the Board evaluated that storage and supply services are complementary and should therefore constitute separate product markets.

Although the jet fuel sales market was not initially deemed to be one of the directly affected markets, the Board concluded that it should be examined due to its close connection with the storage and supply of jet fuels. The Board highlighted that undertakings could provide jet fuel to aviation companies in three ways: (i) obtaining operating rights for airport storage facilities, which allows for the transmission of fuel from refineries to storage and then to airplanes via hydrants or tankers, (ii) utilizing third-party storage services if the company does not have its own facilities, enabling fuel transmission to airplanes, and (iii) invoicing the fuel to service-receiving companies for a fee when the company cannot transmit fuel to airport warehouses, with these companies then handling the transmission to airplanes. Based on this, the Board defined the relevant product market as "storage and supply of jet fuels" market, while it also made assessments on the sales of jet fuels market.

In terms of geographic market, the Board indicated that refueling airplanes is typically done at the location where the airplane is set to take off. Moreover, even if the cost of aviation fuel supply at any given airport significantly increases for the airline company, it is very difficult for the airline to find an alternative fuel source from another location. The Board also explained that taking on more fuel than needed at the departure airport and not refueling at the destination airport on the return journey presents risks within the framework of flight safety. Therefore, departure and destination locations cannot be considered substitutes for each other. Considering that each airplane depends on the fuel supply system and supplier at its take-off location, and that the fuel supply at each airport is distinct, the Board defined the relevant geographic markets for the notified transaction as "Antalya, Bodrum-Milas, and İzmir Adnan Menderes airports."

III. The Board's Competitive Assessment

After reviewing the Joint Operation Agreement, the Board indicated that an "Operating Committee" has been established to oversee the financing and construction of facilities and to monitor certain policies. Regarding the decision-making mechanism, the agreement specifies quorum requirements. For instance, when a majority vote is needed for a decision, the majority vote of the Operating Committee members who are present or represented at the meeting is required. Post-transaction, the decision-making process of the joint venture will change so that the Operating Committee will make decisions jointly with Shell and THY Opet, whereas, prior to the transaction, decisions were made jointly by Shell, THY Opet, and BP. The Board also noted that the transaction entails the transfer of BP's stake and associated assets under the Joint Operation Agreement to THY Opet. Post-transaction, THY Opet will take over the operation of the fuel supply and storage facilities and will generate revenue from these operations. Accordingly, the Board referred to certain precedents where it clearly acknowledged that the acquisition of control over assets of an undertaking, which a market turnover

can be attributed, is considered an acquisition within the Turkish merger control regime.

Based on the foregoing, pursuant to Article 5 of Communiqué No. 2010/4, the Board determined that the transaction was qualified as an acquisition and stated that the turnover thresholds specified under Article 7 of Communiqué No. 2010/4 were exceeded.

In terms of affected markets, the Board determined that establishing infrastructure services for storage and supply of aviation fuels was related to BP's contribution shares and related assets, while sales of aviation fuels were not subject to acquisition. In this regard, before its detailed analysis, the Board evaluated that a horizontal overlap might occur between THY Opet's activities and BP's activities regarding contribution shares and related assets in terms of "storage and supply of jet fuels". The Board then assessed both unilateral and potential coordinated effects. Regarding unilateral effects, the Board considered the market shares of the parties and their competitors in the market for the storage and supply of jet fuels. The Board found that Petrol Ofisi's market share is significantly high, positioning it as the market leader. In this respect, the Board considered that the transaction would not significantly impede effective competition in the market.

Regarding the effects resulting in coordination, the Board made an assessment as to whether the presence of THY Opet could make the market structure more transparent by its market position, potentially leading undertakings to engage in anticompetitive practices. In this framework, the Board assessed that the reduction in the number of active players in the market following the proposed transaction might pose a potential coordination risk. Moreover, the Board indicated that another potential anticompetitive issue was the risk of price coordination. However, due to significant variations in revenues from storage services at different airports (driven by factors such as cost, capacity utilization rate, and the supply and operation processes of undertakings) the Board assessed that the coordination risk in the relevant market would be relatively limited. In addition, the Board reiterated the role of regulatory power (*i.e.,* regulations concerning the energy market regulatory authority) in maintaining competitive prices and noted the substantial financial power of customers which can help prevent anticompetitive practices and further price increases.

IV. Conclusion

The Board concluded that the proposed transaction would not significantly impede effective competition in any market and thus granted unconditional approval. The Board's reasoned decision delivers a thorough analysis of the Turkish jet fuel market, encompassing detailed evaluations of both the relevant product and geographic markets. This decision is significant as it establishes a precedent for a deeper understanding of market dynamics within the framework of competition law.

Turkish Competition Board's Sahibinden Decision: An Assessment of Excessive Pricing

I. Introduction

The Turkish Competition Authority ("***Authority***") has concluded its full-fledged investigation launched against one of the Turkiye's prominent e-marketplaces

enabling third parties to market and sell goods and real estate properties, Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret Anonim Şirketi (“***Sahibinden***”), for abuse of dominant position by excessive pricing.[6] Although the Turkish Competition Board (“***Board***”), the decision-making body of the Authority, held that Sahibinden enjoys a dominant position in the online platform market for real estate sales and vehicle sales/rental by business subscribers and individual subscribers, the Board ultimately found no abuse of dominance. Below offers further insight into the background of the case and the Board’s assessment.

II. Overview of Sahibinden’s Business

Sahibinden conducts its business under two main business models: e-commerce and advertising. The former facilitates the sale and payment of goods by bringing buyers and sellers together on its website, allowing it to measure sales rates. This model accounts for a small percentage of Sahibinden’s overall earnings. The latter only brings buyers and sellers together as an intermediary and transactions take place without Sahibinden being involved. The subscriber who makes the purchase or rents the goods makes no payment to Sahibinden.

Sahibinden distinguishes between business subscribers and individual subscribers, applying different pricing policies to each. Although the complaints which gave rise to the investigation relate to the excessive prices imposed on business subscribers advertising vehicles they were selling or renting, the Board ex officio expanded the investigation to real estate listings as well.

[6] The Board’s decision numbered 23-31/604-204 and dated 13.07.2023.

III. Assessment of Dominant Position

Article 3 of Law No. 4054 on Protection of Competition (“***Law No. 4054***”) defines a dominant position as the ability of one or more undertakings in a particular market to determine economic parameters such as price, supply, production volume and distribution, by acting independently of their competitors and customers.

Before assessing whether Sahibinden abused its dominant position under Article 6 of Law No. 4054, the Board first evaluated whether Sahibinden holds a dominant position in the market. The Board held that:

(i) The market shares of the competitors and the changes over time indicate no competitive pressure on Sahibinden. Sahibinden maintains its lead in the market in a consistent manner.

(ii) Despite no significant barriers to entry to the market; network effects arising out of Sahibinden’s multi-sided platform characteristics, economies of scale, user habits, Sahibinden’s high brand recognition, Sahibinden’s financial and economic power would likely undermine entries to the market.

(iii) Customers lack the power to develop a strategy against Sahibinden, nor are they powerful and large enough to create their own supply. They also tend to list their portfolio first on Sahibinden, and then resort to other platforms if they are not satisfied with the Sahibinden experience.

Thus, the Board acknowledged that Sahibinden is in the dominant position in

the online platform market for real estate sales and vehicle sales/rental by business subscribers and individual subscribers.

IV. Competitive Assessment

Article 6 of Law No. 4054 prohibits *the abuse of dominant position by one or more undertakings on their own or through agreements with others or through concerted practices*. Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings set out the abusive actions of undertakings which are in the dominant position in a market.

The decision cites three main types of abuse of dominant position: exclusionary, discriminatory and exploitative. Abuses of exploitative nature are characterized by a dominant undertaking directly harming customers. Excessive pricing, which is one of the exploitative abuses, is a controversial topic and in certain jurisdictions it is not deemed to be an infringement of competition law.

No established definition of excessive price exists; however, it is generally considered to mean a price which is constantly set significantly above the competitive level. This transfers consumer surplus to those holding market power as producer surplus, while some consumer surplus disappears.

The widely accepted conditions necessitating intervention in abuse of dominant position by excessive pricings are as follows:

(i) High and non-transitory entry barriers

(ii) Near-monopole dominant positions

(iii) Lack of sectoral regulations,

(iv) Restricting incentives for innovation

In assessments of excessive pricing, the economic value test is central. Later-developed approaches, such as excessive profitability, extensive evidence, price reductions post-entry and the structural approach are based on the framework already established by the economic value test. The economic value test consists of two steps: one being the comparison of price and cost of product/service, second being the comparison of price with itself or with the competing product/service.

Applying the economic value test to Sahibinden’s prices, the Board has identified that Sahibinden’s prices far exceeded its costs in the real estate and vehicle categories. In the absence of any established rule which lays down the extent to which profit margin indicates excessive pricing, the Board made a comparison with the competitor’s prices. Such comparison revealed that (i) the price gap between Sahibinden’s and its closest competitor’s prices in the real estate category narrowed over time and (ii) considering the number of impressions, the prices of Sahibinden’s competitor, Arabam.com, occasionally surpassed those of Sahibinden. The Board also found that harm to consumers, another criterion sought in excessive pricing assessments, does not exist, as the impact of Sahibinden’s prices is negligible.

V. Conclusion

The decision indicates that the Board sets high standards for excessive pricing assessments. It emphasizes that intervention in the market just because an undertaking puts excessive price tags is only warranted where the competition in the market faces an insurmountable risk. It

is also worth noting that the Board does not deviate from the European Commission's approach in excessive pricing assessments and aligns its case law with that of the Commission.

Turkish Competition Board's Approach Towards Self-preferencing: Trendyol Decision

I. Introduction

On May 24, 2024, the Turkish Competition Board's (the "***Board***") reasoned decision[7] concerning the self-preferencing allegations against DSM Grup Danışmanlık İletişim ve Satış Ticaret A.Ş. ("***Trendyol***") was published on the Turkish Competition Authority's ("***Authority***") official website ("***Trendyol Decision***"). The Board, with a dissenting opinion of two Board members concerning the calculation of the monetary fine, unanimously decided that Trendyol (i) is dominant in the multi-category e-marketplace market, and (ii) violated Article 6 of Law No.4054 on Protection of Competition ("***Law No. 4054***") and complicated its competitors' activities by unfairly favoring its own retail services, through interventions to the algorithm and use third-party sellers' data on its e-marketplace. As a result, the Board imposed an administrative fine of TL 61,342,847.73 and certain remedies to put an end to the violation and protect effective competition in the market.

The Trendyol Decision discusses the Board's and European Commission's decisional practice on and evaluates the different types of self-preferencing. Considering the increased focus on digital markets all around the world, the Trendyol Decision provides an important insight into and sheds light on the Board's approach to the digital markets, as well as the relatively new type of an abuse theory of self-preferencing.

II. Background

On July 29, 2021, the Board decided to initiate a preliminary investigation against Trendyol further to the complaints about self-preferencing and discrimination, primarily alleging that Trendyol abused its dominant position in the e-marketplace by way of (i) discriminating among the sellers, (ii) making it difficult for the sellers to sell through their own sales channels by way of providing several opportunities and advantages to its customers such as basket discounts, free shipping and payment by credit card, and (iii) gaining unfair profit through its behaviors against the sellers on the e-marketplace. The complaints also included allegations about (i) predatory pricing/ complicating competitors' activities, (ii) exclusivity, and (iii) unfair contract terms.

As a result of the preliminary investigation, the Board decided to launch an investigation against Trendyol on September 23, 2021. During the investigation stage, the Board imposed[8] interim measures pursuant to Article 9/4 of the Law No. 4054, on the ground that some of Trendyol's activities that were being investigated could result in substantial and irreparable harm to competition if they are not prevented. Some of these interim measures required Trendyol to: (i) within the scope of its e-marketplace activities, cease all kinds of actions, including the algorithms and coding interventions, which provide an advantage to Trendyol's own

[7] The Board's Trendyol decision dated 26.07.2023 and numbered 23-33/633-213.

[8] The Board's Trendyol Interim Measure decision dated 30.09.2021 and numbered 21-46/669-334.

products and services over their competitors; (ii) cease using and transferring of data obtained through its e-marketplace activities in a way to advantage its own products and services; (iii) cease all kinds of actions, including the interventions through algorithms and coding, which may constitute discrimination among the sellers on the marketplace and (iv) take all necessary measures (*i.e.,* executive, technical and operational measures) in order to ensure the auditability of the abovementioned interim measures.[9]

While Trendyol applied for the commitment mechanism to eliminate the Authority's concerns and terminate the investigation, the Board did not accept the entirety of Trendyol's commitment package. Although the Board accepted Trendyol's commitments addressing the allegations concerning predatory pricing, complicating competitors' activities, exclusivity and unfair contract terms, it rejected the proposed commitments regarding self-preferencing and discrimination allegations and decided to continue the investigation with respect to these conducts.

III. Regulatory Framework for Self-Preferencing and the Board's Decisional Practice

Turkish competition law rules do not explicitly define self-preferencing as a standalone type of abuse. That said, the Board is not unfamiliar with self-preferencing conduct. In previous decisions, although the Board did not explicitly evaluate the investigated conduct under self-preferencing, it did assess the dominant undertakings' conduct of favoring their own products/services under Article 6 of Law No.4054 (akin to Article 102 of TFEU).[10]

In *Trendyol Interim Measure*,[11] the Board considered self-preferencing as a type of exclusionary abuse of dominant position and stated that self-preferencing is an anti-competitive behavior within the scope of Article 6(1)(a) of Law No. 4054 which considers *"preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,"* as an example of abuse of dominant position.

The Authority's Report on The Impact of Digital Transformation on Competition Law[12] defines self-preferencing as "*a way for companies with significant market power to project their market power onto another related market.*"[13] Therefore, the Authority's report seems to approach self-preferencing under the leveraging theory.

While the Turkish competition law regime has no specific rules on self-preferencing for the time being, following the Digital Markets Act ("***DMA***") in the European Union and the German digital markets regulation, a Draft Proposal on Amending

[9] Following Trendyol's appeal, Ankara 9th Administrative Court partly annulled the interim measures imposed on Trendyol (Ankara 9th Administrative Court's decision dated 25.05.2022 and numbered 2021/2069 E. and 2022/1157 K.).

[10] See *e.g.* the Board's Android decision numbered 18-33/555-273 and dated 19.09.2018; the Board's Shopping decision numbered 20-10/119-69 and dated 13.02.2020, the Board's Local Search decision numbered 21-20/248-105 and dated 08.04.2021, the Board's Facebook decision numbered 22-48/706-299 and dated 20.10.2022.

[11] The Board's Trendyol Interim Measure decision dated 30.09.2021 and numbered 21-46/669-334, para.10.

[12] The Authority's Report on The Impact of Digital Transformation on Competition Law, October 2023.

[13] The Authority's Report on The Impact of Digital Transformation on Competition Law, October 2023, para.246.

Law No. 4054 was prepared, focusing on updating the existing competition rules to address the concerns in the digital markets. The Draft Proposal on Amending Law No. 4054 was sent to various stakeholders for comments on October 14, 2022, and is not yet enacted by the Turkish Parliament. That said, the Turkish competition law regime is expected to be updated in the near future to address new types of conduct in the digital markets, including self-preferencing.

IV. The Board's Competitive Assessment in Trendyol Decision

The Board's assessment in the decision on Trendyol's investigated conduct starts with its detailed explanations on self-preferencing and different types of self-preferencing, as well as references to the Board's and European Commission's decisional practice, which shed lights to the Board's approach toward self-preferencing.

Specifically, the Board defines self-preferencing as "*the dominant undertaking's conduct of favoring its own products or services over the rivals competing with those products and services on the basis of the same platform service.*" The Board also states that self-preferencing is a type of exclusionary type of abuse of dominance, which can be evaluated under Article 6(1)(a) of Law No. 4054. In parallel to the leveraging theory, the Board notes that self-preferencing constitutes a competition concern since undertakings that hold a dominant position in a platform service gain an unfair competitive advantage by projecting their market power to another related market.

The Board makes an effect-based analysis and evaluates both the actual and potential effects on the retail market, as well as the potential effects on the market for e-marketplaces.

a. The Board's Assessment of Trendyol's Interventions in Algorithms

The Board evaluated whether Trendyol favored its own retail activities through algorithm interventions within the platform services in which Trendyol is active both as an intermediary and a retailer. In this sense, based on the documents collected at the on-site inspection as well as other findings reached during the investigation period, the Board concluded that Trendyol (i) artificially intervened in the follower numbers of the third-party retailers and its own private label brands to gain advantage for itself, (ii) intervened in the ranking of the products by placing its own private label brand on top results, and (iii) favored its own private label brands in the brand filtering screen. As a result, the Board stated that Trendyol intervened in the algorithms to favor its private label brands, which harms the competition in the marketplace by complicating the activities of the other retailers and excluding them.

b. The Board's Assessment of Trendyol's Use of Data

In terms of using the data that Trendyol had obtained within the scope of its activities as an intermediary, the Board stated that (i) Trendyol collects any past/current and individual/aggregated data regarding the marketplace, (ii) as the number of retailers and end-consumers increased, the size of collected data also increased, (iii) retailers on the marketplace cannot access the data on equal terms with Trendyol, and (iv) Trendyol analyzed and used the collected data for production, sale and marketing of its own private label products, thus gaining advantage over its competitors.

As a result, the Board concluded that Trendyol adopted a self-preferencing strategy through use of data and interventions in algorithms and excluded the competitors. The Board found that the two behaviors constituted a single conduct of self-preferencing.

In terms of allegations regarding discrimination, the Board concluded that there is no evidence indicating that Trendyol had discriminated among the retailers.

V. Conclusion

As a result of the investigation, the Board concluded that Trendyol holds a dominant position in the market for multi-category e-marketplace and that it complicated its competitors' activities by unfairly favoring its own retail services through interventions to the algorithm and use of third-party sellers' data on its e-marketplace, and thus violated Article 6 of Law No. 4054. The Board imposed an administrative fine of TL 61,342,847.73 based on Trendyol's turnover generated as of the end of its 2021 financial year. Moreover, to address competition concerns, the Board imposed the following remedies -among others- on Trendyol: (i) refraining from implementing any kind of algorithm or coding interventions that provide an advantage to Trendyol's own private label products over competitors, with respect to its retail activities carried out through its marketplace (www.trendyol.com), and (ii) refraining from utilizing any data that is obtained or produced through Trendyol's marketplace activities for its private label products, etc.

The Trendyol Decision is one of the first decisions that evaluates self-preferencing in a comprehensive manner. Given the growing focus on the digital markets and the Ministry of Trade's efforts to amend the Law No. 4054, Trendyol Decision provides an important insight and sheds light to the Board's approach to the digital markets, as well as the relatively new type of abuse theory of self-preferencing.

Dispute Resolution

Constitutional Court Rules that Prolonged Interim Injunction Violates Property Rights

I. Introduction

The Constitutional Court, with its decision dated April 17, 2024, and numbered 2019/31923 ("***Decision***") ruled that the interim injunction on a property owned by the Applicant ("***Applicant***") which had been in force more than 15 years, violates the Applicant's right to property which is guaranteed under Article 35 of the Constitution. In the Decision, the Constitutional Court referred to the principle of proportionality and stated that the measure to be applied must be proportionate in terms of duration and scope.

II. Dispute Subject to the Decision

During the litigation, the first instance court decided to implement an interim injunction over the assets of the Applicant. As the trial was still pending, the Applicant filed an individual application before the Constitutional Court in 2019 on the grounds that his right to property has been violated due to the interim injunction remaining in force for a long time. Accordingly, the Applicant asked to be indemnified for his pecuniary and non-pecuniary damages.

III. Evaluations of the Constitutional Court

In terms of length of the preliminary injunction, the Constitutional Court referred to its previous precedents[14] and highlighted that a precautionary measure limiting the right to property must be applied proportionately in terms of scope and duration, and further stated that the continuation of the precautionary measure for an unreasonable period of time imposes an unbearable burden on the property owner, due to the suspension of their powers bestowed by the right to property for an indefinite period. Further to these determinations, the Constitutional Court concluded that since the interim injunction has been in force for more than 15 years in the same dispute, the Applicant's right to property guaranteed under Article 35 of the Constitution has been violated.

In the case at hand, the Constitutional Court found that indemnification by way of monetary compensation would be the effective remedy to eliminate the consequences of the violation. Accordingly, the Applicant's indemnification request for non-pecuniary damages was partially accepted, however his claim for pecuniary damages was rejected as the Applicant could not establish the chain of causation between the violation and the alleged losses.

IV. Conclusion

By virtue of the Decision, the Constitutional Court states that the violation in question does not require the removal of the precautionary measure, but also draws attention to the responsibility of the judicial authorities to observe the urgency and diligence required for limiting the right to property.

[14] Hesna Funda Baltalı and Baltalı Gıda Hayvancılık San. ve Tic. Ltd. Şti. ([GK], Appl. No: 2014/17196, 25/10/2018), İhsan Metin (Appl. No: 2015/7044, 23/1/2019) and Şeyhmus Terece ([GK], Appl. No: 2017/26532, 23/7/2020),

Data Protection Law

Updates on Transfer of Personal Data Abroad

On March 2, 2024, amendments to Law No. 6698 on the Protection of Personal Data ("***Law***") were enacted, introducing significant changes to the existing cross-border personal data transfer regime. The amendments entered into force on June 1, 2024.

Following the entry into force of the amendments to the Law, the Regulation on the Procedures and Principles Regarding the Cross-Border Transfer of Personal Data ("***Regulation***") was published in the Official Gazette of July 10, 2024, numbered 32598, which further regulates the revised regime on the transfer of personal data abroad. The Regulation entered into force on the date of its publication. Additionally, the Turkish Data Protection Authority ("***DPA***") announced the newly introduced standard contractual clauses and documents related to binding corporate rules on its website on the same day.

In this article, we aim to provide an overview of the newly introduced cross-border data transfer regime as detailed under the Regulation, with a specific focus on the standard contracts due to its significance among the recent changes.

I. Regulation on Principles and Procedures regarding the Transfer of Personal Data Abroad Entered into Force

The Regulation, which details the procedures and principles for transfer of personal data abroad, addresses the following key issues, particularly, the newly introduced standard contractual clauses and legalized binding corporate rules:

a. **Transfers Based on Adequacy Decision:** The Regulation sets forth that the Data Protection Authority ("***Authority***") may determine if a country, a particular sector within a country, or international organization provides adequate protection for transfer of personal data abroad. The references to particular sector(s) within a country and international organization were both newly introduced with the above-mentioned amendments to the Law, and subsequently included in the Regulation. This adequacy decision will be re-evaluated every four years at the latest.

b. **Transfers Based on Appropriate Safeguards:** In the absence of an adequacy decision, personal data can be transferred if one of the appropriate safeguards is met, provided the conditions in Articles 5 and 6 of the Law are satisfied, and the data subject can exercise their rights and seek effective legal remedies in the recipient country. The Regulation deems the following safeguards as appropriate:

   (i) **Existence of a non-International Agreement:** Appropriate safeguards can be established through non-international agreements on personal data protection, particularly for transfers between public institutions or international organizations abroad, and public institutions or professional associations that have public entity status in Turkiye. The Regulation specifies the elements to be included in such agreements.

   (ii) **Binding Corporate Rules:** Data controllers and processors must apply to the Authority for approval to transfer of personal data abroad using binding corporate rules. Transfers can begin once approved. Article 13 of the Regulation sets forth the minimum requirements for these rules.

   (iii) **Standard Contractual Clauses:** Standard contractual clauses, as recently published by the Authority, must be notified to the Authority within five business days of their execution. It is mandatory to use the standard contract texts without any revisions or modifications. If the standard contract is concluded in a foreign language, the Turkish version shall be taken as basis. The parties can decide who will handle the notification to the Authority as a contractual obligation. Notifications are also required if there is a change in parties, information, or termination of the standard contract.

   (iv) **Undertaking Letter:** To transfer personal data abroad using an undertaking letter, the data exporter must obtain permission from the Authority, as was the requirement before the amendments.

c. **Occasional Cases in the Cross-Border Transfer:** The Regulation, in line with

the Law, introduces explicit consent as a legal basis for the cross-border transfer, but restricts it to occasional cases. Until September 1, 2024, data controllers can transfer personal data abroad based on the explicit consent they have previously collected. After this date, explicit consent can only be used for "*occasional*" transfers, defined as transfers that are irregular, infrequent, non-continuous, and not part of regular business operations.

II. Standard Contractual Clauses and Binding Corporate Rules are Published by the Authority

The Authority has released four types of standard contractual clauses ("***SCCs***") for the cross-border personal data transfers that take place between (i) controller to controller, (ii) controller to processor, (iii) processor to processor, and (iv) processor to controller, in addition to two types of application forms for binding corporate rules ("***BCRs***") for intra-group data transfers by data controllers and data processors, along with supplementary guidelines on key issues to be addressed in the BCRs. These documents are mostly aligned with those published under the GDPR.

While the SCCs are largely similar to those under the GDPR, there are differences due to variations between the current version of the Law and the GDPR. Such differences can be seen in data breach notifications to the relevant data protection authority and exceptions to transparency obligations. Additionally, the SCCs from the Authority specify that the clauses can only be agreed upon between one data exporter and one data importer, without providing for cases where there may be multiple exporters or importers under a single contract.

III. Conclusion

In summary, the recent amendments to the Law and the introduction of the Regulation mark a significant evolution in the Turkish data protection framework. These changes bring Turkiye's data protection practices closer to the GDPR, through the introduction of mechanisms such as standard contractual clauses and binding corporate rules. The publication of the Regulation and related documents by the Authority provides much clearer guidelines for the transfer of personal data abroad, ensuring that appropriate safeguards are in place. These developments underscore the importance of data protection in an increasingly interconnected world and offer a legal foundation for secure cross-border data transfers.

Internet Law

First Attempt in Turkiye to Regulate Artificial Intelligence

The Artificial Intelligence Law Proposal ("***Law Proposal***")[15] has been submitted to the Presidency of the Turkish Grand National Assembly on June 24, 2024. The Law Proposal includes more general provisions compared to the AI Act (Regulation (EU) 2024/1689, defines Artificial intelligence technologies as computer-based systems that can perform human-like cognitive functions and have abilities such as learning, reasoning, problem solving, perception and language understanding. The Law Proposal aims to maximize the benefits of artificial intelligence systems for society by

[15] https://cdn.tbmm.gov.tr/KKBSPublicFile/D28/Y2/T2/WebOnergeMetni/e50ccc8a-ab90-45fa-a553-76b880c78fb8.pdf (last accessed on July 24, 2024)

ensuring their safe, ethical and fair use. It also seeks to protect personal data, prevent privacy rights violations, and establish a regulatory framework for the development and use of artificial intelligence technologies.

The preamble providing the reasoning of the Law Proposal asserts that artificial intelligence is catalyzing revolutionary changes in critical sectors such as health, education, security and transportation. However, incorrect or malicious use of these technologies poses a threat to individual rights and freedoms. Consequently, it emphasizes the great importance of determining and implementing safe, ethical and fair standards for the development, use and distribution of artificial intelligence systems. Additionally, the Law Proposal aims to minimize potential risks or losses.

It also states that, during the development, use and distribution of artificial intelligence systems, compliance with the specific fundamental principles is mandatory. These principles are listed as security, transparency, fairness, accountability and confidentiality.

The Law Proposal further defines artificial intelligence operators as real or legal persons acting as (i) providers, that develop, produce and market artificial intelligence systems, (ii) distributors and users, who distribute these systems for commercial purposes or use them in their own activities, (iii) importers, which import these systems from abroad, and (iv) distributors that market and sell these systems.

The Law Proposal covers artificial intelligence operators along with those persons who may be affected by artificial intelligence systems. Accordingly, the Law Proposal aims to establish clear and specific rules by clarifying the rights and responsibilities of all stakeholders to ensure the effective implementation of legal regulations and to provide a strong sanctions mechanism. The Law Proposal stipulates that the relevant supervisory authorities will have the necessary powers to monitor compliance with the law and identify any violations.

The Law Proposal also includes penalty provisions for artificial intelligence operators who may violate the proposed law: (i) a fine of 35 million Turkish Liras or up to 7% of the relevant operator's annual turnover for engaging in prohibited artificial intelligence applications, (ii) a fine of 15 million Turkish Liras or 3% of annual turnover for breach of obligations, (iii) a fine of up to 7.5 million Turkish Liras or 1.5% of the annual turnover for providing false information.

According to the Law Proposal, these regulations will contribute to Turkiye's creation of a competitive and innovative environment that aligns with international standards in the field of artificial intelligence. The Law Proposal is currently in the commission evaluation phase, and (in its current wording) it will enter into force on the date of its publication in the Official Gazette once the legislative process is completed.

Telecommunications Law

ICTA's Recent Decisions on Calling Line Identification

Turkish Information and Communication Technologies Authority ("***ICTA***") has

published two decisions[16] [17] relating to calling line identification (CLI) on June 7, 2024.

Calling Line Identification ("***CLI***") is a telephone network signaling capacity that generates data, at the time a telephone call is established, that identifies the calling party's telephone number/s (i.e. the billing telephone number and in some instances also other numbers, such as an extension number in an office).[18] In other words, CLI is a telecommunication feature which allows the recipient of a call to view the caller's phone number before answering the call. CLI technology not only facilitates the identification of callers but also plays a crucial role in reinforcing user convenience, privacy and security. Accordingly, it helps users to make informed decisions about whether to answer a call, thus reducing the risk of unwanted or fraudulent communications.

Under Turkish law, CLI is mainly regulated under Electronic Communications Law numbered 5809[19] ("***Law No. 5809***") and its secondary legislation. The enforcement of Law No. 5809 and its secondary legislation is primarily under the authority of ICTA as the supervisory and regulatory authority for information and communication technologies. Accordingly, ICTA has issued a specific decision on the matter with number 2016/DK-YED/211 entitled "*The Principles and Procedures Regarding the Use of CLI*" [20] ("***Decision numbered 2016/DK-YED/211***"). The relevant decision stipulates certain rights and responsibilities specific to the electronic communication service type, especially bringing liabilities for the operators who are defined as companies who provide electronic communication services and/or who provide electronic communication network and operate its infrastructure under Law No. 5809.

As per Article 7(2) of the Decision numbered 2016/DK-YED/211, while providing message services such as SMS and MMS, the operators may include the senders' name, surname and trade name or business name as alphanumeric characters for CLI, or abbreviated versions of the relevant names or titles to fit in the relevant section. In the same paragraph, ICTA further obliges operators to obtain certain documents from the senders, to confirm whether such sender is authorized to use the requested alphanumeric characters while sending messages. For example, under its sub-paragraph (d) ICTA stipulates that operators are obliged to obtain the document evidencing the trademark ownership in case the alphanumerical characters for a CLI contain a trademark.

The foregoing requirement brought for operators is an important approach for ensuring secure communications as it aims to protect receivers from being defrauded by fake/misleading CLI which contain alphanumerical characters. Accordingly, on June 7, 2024, ICTA published two decisions on the matter, imposing an administrative fine for the operator companies who failed to comply with their

[16] ICTA's decision dated 28.05.2024 and numbered 2024/IK-YED/233 (last accessed on July 23, 2024)
[17] ICTA's decision dated 28.05.2024 and numbered 2024/IK-YED/234 (last accessed on July 23, 2024)
[18] https://www.efa.org.au/Issues/Privacy/cni-technical.html (last accessed on July 23, 2024)
[19] https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=5809&MevzuatTur=1&MevzuatTertip=5 (last accessed on July 23, 2024)

[20] ICTA's decision numbered 2016/DK-YED/211 (last accessed on July 23, 2024)

obligations regulated under the Decision numbered 2016/DK-YED/211.

In its Decision numbered 2024/IK-YED/233, ICTA decided to impose an administrative fine corresponding to 3% of the relevant operator's (*i.e.,* Mobilişim İletişim Anonim Şirketi) net sales revenue in 2022 which was 23,966,137.95 Turkish Liras. ICTA imposed this fine due to the operator's failure to obtain required documents from the subscriber for sending an SMS with the title "*ADABEYAN*". Similarly in Decision numbered 2024/IK-YED/234, the operator (*i.e.,* Gold Telekomünikasyon İletişim Sanayi ve Ticaret Ltd. Şti.) was imposed a fine corresponding to 3% of its net sales revenue in 2022 as well, for sending SMS messages with the title "*INFO*" without obtaining any documentation verifying the sender. In the latter decision, the operator was also fined for %0,003 of its net sales revenue in 2023 which was 4,771,702 Turkish Liras, for failing to submit to ICTA the documents it is obliged to deliver on request or regularly, on time.

To conclude, ICTA's close monitoring of the relevant actors in the telecommunications sector and enforcement of the legislation are crucial for ensuring the security of communication. With its foregoing decisions, ICTA implements the measures as per its statutory authority, thereby safeguarding the integrity of information exchange, protecting individuals from highly common telecommunication frauds and promoting a culture of responsibility and accountability.

White Collar Irregularities

Implications of the Law on Crypto-Assets on Anti-Money Laundering Regulations

Turkiye's new regulations on crypto asset service providers ("***CASPs***") which were brought into force with Law No. 7518 on Amending Capital Markets Law ("***Amendment Law***"), as published in the Official Gazette of July 2, 2024, with number 32590, has introduced crypto-asset trading platforms into the regulatory scope of capital markets instruments, by also stipulating comprehensive definitions for essential cryptocurrency trading concepts.

It must be noted that the legislative framework that existed prior to the Amendment Law had already mandated CASPs to comply with several diligence requirements under anti-money-laundering regulations ("***AML***") since CASPs were already stipulated as "*obligated parties*" as per Law No. 5549 on the Prevention of Laundering of the Proceeds of Crimes ("***Law No. 5549***"). However, prior to the Amendment Law, essential operational features of CASPs were in a regulatory ambiguity, as such, even though the obligations were set forth, regulatory groundwork for implementation of such obligations were unclear.

In this scope, the Amendment Law has introduced stringent requirements on the corporate structure, regulated crimes, and penalties for failure to provide transparency in operations, in order to fill the prior regulatory vacuum. As such, the Amendment Law introduces mandatory licensing requirements and continuous diligence requirements for operation of CASPs.

I. Regulatory Authorities

According to the Amendment Law, the Capital Markets Board ("***the Board***") is authorized to introduce secondary legislation which regulates the trading of crypto assets. The Board may require crypto assets to be integrated into the Central Registration Authority ("***MKK***"), but the Board may also set forth principles that allow crypto assets to be traded within the electronic medium that is provided by the CASP. In the event that capital markets instruments are traded as crypto-assets, the records on the electronic medium in which the crypto-assets are stored will be taken into account when monitoring the rights against third parties in the transfer and exercise thereof. As such, the Board may require the electronic medium of CASP to be integrated with the Central Registration Authority.

Another authorized body that is introduced with the Amendment Law is TUBITAK (Scientific and Technological Research Council of Türkiye). According to the Amendment Law, TUBITAK is empowered to designate criteria for the Board's evaluation of the applications of CASPs, specifically with respect to sufficiency of CASPs' information systems and technological infrastructures for their internal control units and systems.

Finally, the Amendment Law also foresees that banks who apply for licenses for crypto-asset services must obtain the approval of Banking Regulation and Supervision Agency ("***BRSA***").

II. Provisions to Control Anti-Money Laundering

The Amendment Law reiterates that CASPs are obligated to perform know-your-customer checks as per Law No. 5549. To record these checks, as well as other diligence efforts, Amendment Law requires CASPs to maintain secure, accessible and traceable records where customers' crypto asset transfers are made and the accounts where fund transfers are made, in order to ensure transparency in accordance with the regulations of the Board and the Financial Crimes Investigation Board. CASPs are required to provide such records upon request of the Board, or any other relevant Authority.

Amendment Law stipulates that CASPs are obliged to ensure that the transactions carried out through their platforms are transparent, fair and competitive. Thus, platforms are required to establish a surveillance system in order to detect and prevent market-distorting actions and transactions.

Most notably, the Amendment Law introduces detailed provisions for the crime of embezzlement in a particularized manner if committed during the operation of CASP, by introducing a personal liability regime, as well as a specialized investigation procedure for the crime of embezzlement.

In this scope, embezzlement is defined as directly or indirectly endangering the secure operation of a CASP in a way that harms the provider's or customers' assets for a person's own or third-party's benefit, made by the individual partners of a crypto-asset service provider whose

operating license has been revoked, and who have legally or de facto controlled or managed the entity.

III. Penalties

CASPs that fail to perform know-your-customer due diligence obligations shall be subject to administrative monetary fines with the Amendment Law. Accordingly, an administrative monetary fine from 20,000 Turkish Liras up to 250,000 Turkish Liras may be imposed on those CASPs that fail to perform know-your-customer checks. The administrative monetary fine may be increased in case there are any third-parties which have been harmed by the CASP's actions and any personal benefit garnered as a result of these actions, and amount of the fine will be calculated based on the CASPs annual profit, as per Article 103 of Law No. 6362 on Capital Markets.

Where a CASP is found to have embezzled currency or any deeds or instruments that are deemed as currency, or other assets that it has been entrusted with, for its own benefit or for the benefit of third-parties will be subjected to imprisonment from eight years up to fourteen years and a judicial monetary fine of up to five thousand days.

The Amendment also extends liability to the chairman and members of the board of directors and other members of the crypto asset service providers who embezzle money or tokenized securities, other goods or crypto-assets entrusted to them as crypto-asset service providers. These individuals will also be required to indemnify the damage incurred by the crypto-asset service provider in question.

Moreover, any conduct which conceals the above crimes is also punishable by imprisonment from fourteen to twenty years and a judicial fine up to twenty thousand days. The amount of the judicial fine may not be less than three times the damage suffered by the crypto-asset service provider and its customers. The Amendment Law envisages that if the crime of embezzlement is deemed to be committed by a legal entity, that legal entity will also be subject to administrative monetary fines.

Finally, specialized criminal investigation procedures are stipulated for investigation of embezzlement in CASPs as per Article 115 (A) of the Amendment Law. Accordingly, the Board may notify the public prosecutors' offices to start an investigation for embezzlement, however public prosecutors may also initiate ex officio investigations on CASPs in non-delayable circumstances. If the criminal investigations proceed into a lawsuit, then the Board may also be a party to the lawsuit that is filed against the CASP.

Intellectual Property Law

Turkish Constitutional Court Affirms that Previous Registration Does Not Provide a Definitive Protection for Industrial Property Rights.

I. Introduction

Industrial Property Law No. 6769 ***("IPL")*** entered into force on 10 January 2017. Article 155 of the IPL states that *registered holders of a trademark or patent may not use the previous registration as a defense in claims of breach brought forward by those who claim to have right of priority or previous application date.*

Prior to the IPL's promulgation, intellectual and industrial property rights were regulated under the Decree no. 551 on Protection of Patent Rights, Decree no. 554 on Protection of Industrial Designs and Decree no. 556 on Protection of Trademarks. The prohibition set forth in Article 155 of the IPL was also present in Article 78 of the Decree no. 551. At the time, this prohibition only applied to patents as the other Decrees did not have similar clauses.

With the IPL, the prohibition mentioned above has been implemented for all types of intellectual and industrial properties, including patents, trademarks and designs.

II. Background

In a lawsuit initiated before Ankara 4th Court of Intellectual and Industrial Property Rights *("**the Court**")* in respect to a request for preventing the breach against intellectual rights arising from a trademark registration, the Court has applied to the Constitutional Court with the claim that Article 155 of the IPL violates the Constitution, especially the principle of equality before the law (Article 10 of the Constitution), right to property (Article 35 of the Constitution), and right to seek legal recourse (Article 36 of the Constitution) and requested the Constitutional Court to annul the provision of*"... the previous registration cannot be used as a defense for the right to property…"* under Article 155 of the IPL.

In its application, the Court claimed that where there is a dispute in respect to the ownership of the industrial property right, barring the current proprietor from relying on its current ownership as a defense violates the principle of equality before the law, right to property and right to seek legal recourse. The Constitutional Court has evaluated the claim with its decision E. 2023/95, K. 2024/34, T. 01.02.2024, which was published in the Official Gazette on 20.05.2024.

III. The Constitutional Court's Decision

The Constitutional Court, while evaluating the claim, first delves into the Article 155 of the IPL and determines the scope of the *"right to priority"* and *"previous application date."* As for the right to priority, the Constitutional Court relies on the definitions provided in the IPL, the Paris Convention and the Agreement Establishing the World Trade Organization. As for the previous application date, the Constitutional Court relies on the definitions and explanations provided within the IPL.

Following on, the Constitutional Court evaluates the claim in line with the "*right to property*" and whether Article 155 of the IPL is a violation of that right. The Constitutional Court indicates that, in line with Article 13 of the Constitution, a right may be limited by the law provided the essence of the right is not violated. To determine whether a limitation is justifiable or not, the Constitutional Court considers the following three elements of the principle of proportionality: (i) suitability, (ii) necessity and (iii) proportionality. In accordance with the Constitutional Court, *suitability* means whether the measure implemented by the law is suitable to realize the purpose of the limitation, *necessity* means whether the measure implemented by the law is necessary for the realization of the purpose, and *proportionality* means whether the measure implemented by the law is proportional in its limitation of the right.

The Constitutional Court indicates that the provision in Article 155 of the IPL aims to limit the right to property and the defenses that may arise in conjunction with the right. The Constitutional Court indicates that in cases where the current registration holder can rely on its own registration, it is possible that the lawsuit will be concluded against those who claim a breach based on their priority right or previous application date. Therefore, the Constitutional Court indicates that since the provision is aimed at preventing such instances, it is suitable for and necessary to limit a fundamental right. Evaluating proportionality, the Constitutional Court indicates that it is a State's positive obligation to prevent a breach against a party's industrial and intellectual property rights. Therefore, with a view to provide an equitable ground for those who claim that their right to priority or previous application date has been breached by the current registration holder, the limitation imposed by the provision is proportional.

The Constitutional Court further indicates that the current registration holder may defend its right to property with any other evidence but their status as the "*registration holder*" and determines that this requirement is not a disproportional limitation on the right to property. Having evaluated the provision within the scope of the right to property (Article 35 of the Constitution), the Constitutional Court did not deem it necessary to evaluate the provision further with respect to the right to seek legal recourse (Article 36 of the Constitution).

As a result of the evaluation, the Constitutional Court unanimously decided that the provision in Article 155 of the IPL is in line with the Article 35 of the Constitution, and the limitations it brings on a fundamental right are in compliance with the Article 13 of the Constitution. Therefore, the Constitutional Court has dismissed the claim brought by the Court.

IV. Conclusion

The Constitutional Court's decision of E. 2023/95, K. 2024/34, T. 01.02.2024 published in the Official Gazette dated 20.05.2024, reaffirmed the legitimacy of Article 155 of the IPL, which indicates that the mere fact of a previous registration cannot be used as a defense in cases where the claimant alleges that there is a breach of their industrial and intellectual property rights, based on their right to priority of previous application date.

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