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Preface to the September 2021 Issue

The September 2021 issue of Legal Insights Quarterly was prepared to provide an extensive look into the upcoming legal issues, as well as offer insights regarding the foremost contemporary legal agendas and topics in Turkey.

The Competition Law section of this issue comprises six articles in light of the far-reaching developments that have occurred in this field during the last quarter. This section highlights and examines key decisions of the Competition Board, in which the Unilever decision becomes particularly prominent with regards to the remarkable termination of Unilever's individual exemption by the Board. We also discuss the Turkish Competition Authority's recently published Preliminary Report on E-Marketplace Sector Inquiry in this section. Moreover, we discuss the Administrative Court decision that annuls the Turkish Competition Authority's one and only standard essential patent related decision.

Another important matter is assessed under the Capital Markets Law section, in which we address the requirements for amending the articles of association of those companies subject to the CML, which can have both timing and validity consequences.

Finally, the Data Protection Law section provides an all-encompassing outlook on the recent decisions of the Turkish Data Protection Board, and the White Collar Irregularities section guides the readers through the details of how to conduct interviews during an internal investigation.

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 2021

Corporate Law

Turkey: Freeze on Voting Rights in Joint-Stock Companies

I. General Overview

In joint-stock companies, shareholders, personally or through their representatives, vote in the general assembly meetings in proportion to their shares in the company, thereby indirectly contributing to the management, organization, and future of the company. In such general assembly meetings, shareholders decide on various significant matters, such as the appointment/dismissal of board members and auditors, share capital increases/decreases, and dividend distributions. Having said that, the voting rights of shareholders can "freeze" in certain circumstances, where the shareholders are not eligible to exercise their voting rights in the general assembly meetings. Although there are certain circumstances that affect the voting rights of shareholders under Turkish capital markets laws, our aim in this section is to reveal and investigate the cases that cause the blocking of voting rights under the Turkish Commercial Code ("TCC").

II. General Consequences of the Freeze

As a result of the freezing of their voting rights, the relevant shareholders cannot exercise their voting rights deriving from the shares subject to freezing. Although it is not explicitly stated in the TCC provisions regulating such freezes on voting rights, as a natural consequence, such shares are not taken into account in the calculation of general assembly meeting quorums. It is also worth mentioning that the freeze on voting rights has a permanent nature in Turkish law. For instance, if shareholders lack voting rights (*oydan yoksunluk*) due to a certain reason such as a conflict of interest on a particular matter, they cannot exercise their voting rights only in certain general assembly meetings and only for certain meeting agenda items. On the other hand, in case of a freeze on voting rights, the shareholders whose shares have been frozen cannot exercise their voting rights in any general assembly meetings until the underlying issue causing the freeze on voting rights is resolved.

III. Reasons for Freeze

- **Joint-Stock Company's Acquisition of its Own Shares**

Article 379 of the TCC introduces a restricted system for joint-stock companies with respect to acquiring its own shares. In this regard, Article 379 of the TCC does not allow joint-stock companies to acquire their own shares for consideration in an amount exceeding 1/10 of their original or issued share capital, or if this threshold will be exceeded at the end of a transaction. Companies may acquire their own shares only within the abovementioned thresholds and by complying with other rules set out in the TCC, such as the requirement for the authorization of the board of directors by the general assembly. This restriction is also applicable in case of a (i) third party's acquisition of shares on its own behalf but on the company's account, and (ii) a subsidiary's acquisition of its parent company's shares.

Under Article 389 of the TCC, the shares acquired by the company and the shares of the parent company acquired by its subsidiary are not taken into account in the calculation of the quorum requirement of the general assembly meeting of the parent company. In addition, except for the acquisition of free shares, a company's acquisition of its own shares does not grant any shareholding rights to the company. It is also explicitly stated in the TCC that the voting rights of the shares subject to the acquisition and the related rights are frozen in the event that the subsidiary acquires the shares of the parent company.

The main reason underlying the freeze rules on voting rights is to protect the balance between the company's various organs, since the board of directors (as the organ ultimately responsible for management and representation) would be entitled to use the voting rights of the company in case the company acquired its own shares. In Turkish law doctrine, it is generally agreed that the misuse or abuse of the voting rights of the acquired shares by the management of the company may adversely affect the balance of power between the general assembly and the board of directors.[1]

- **Breach of the Notification and Registration Requirements**

A notification must be made to the trade registry, as per Article 198 of the TCC and Article 107 of the Regulation on Trade Registry, once shareholding of a company ("shareholder"), directly or indirectly, exceeds or drops below 5%, 10%, 20%, 25%, 33%, 50%, 67% or 100% of the share capital of another company ("target company"). In such a case, the shareholder (whose direct or indirect shareholding in the target company exceeds or drops below the said thresholds) must notify the target company, in writing, within ten days following the completion of the transaction. Following receipt of this notice, the target company must then notify this to the relevant trade registry within ten days. Such notifications must be registered with the trade registry and announced in the trade registry gazette.

Article 198/2 of the TCC states that all rights arising from the relevant shares, including the voting rights, shall freeze until the registration and announcement processes are completed. The logic behind this notification requirement is explained within the reasoning of Article 198, as to ensure transparency regarding these transactions. The freezing of all rights deriving from the relevant shares, on the other hand, constitutes the sanction to be imposed in case of a breach of this obligation.

The relevant provisions related to an Article 198 notification do not explicitly stipulate whether the shares subject to the freeze on voting rights are taken into account in the calculation of the general assembly meeting quorums. However, commentators have noted that, as a natural consequence of the freeze on voting rights, it can be concluded that such shares are not taken into account in the calculation of the meeting and decision quorums of the general assembly meetings.[2]

- **Cross Shareholding**

Article 197 of the TCC defines "cross shareholding" as stock corporations holding at least 25% of each other's shares. The consequences of cross shareholding are regulated in Article 201 of the TCC. Accordingly, a stock corporation that deliberately becomes part of a cross shareholding arrangement may use only 25% of its total votes arising from the shares subject to participation and its other shareholding rights; all other shareholding rights freeze, except for the right to acquire the free shares. Additionally, these shares are not taken into consideration in the calculation of the general assembly meeting quorums. Under Article 201/2, this restriction does not apply if a subsidiary acquires the shares of its parent company, or if both companies are parent companies of each other.

IV. Conclusion

Under the TCC, there are certain cases that lead to the freezing of voting rights. As a result of such freezes, shareholders whose shares have been frozen cannot exercise their voting rights until the issue causing the freeze has been resolved. In addition, the shares subject to a freeze on voting rights will not be taken into consideration in the calculation of the decision and

[1] Faruk Yeşilyurt, Anonim Ortaklıkta Pay Sahibinin Oy Hakkının Donması, 2017, p. 136.

[2] Yeşilyurt, p. 218.

meeting quorums of the general assembly meetings.

Banking and Finance Law

Regulation on Prevention Plans Prepared by Systemically Important Banks

I. General Overview

The omnibus bill that has come into effect on February 25, 2020, introduced significant novelties to the Banking Law No. 5411 ("Banking Law"). Among other important changes, the omnibus bill introduced new rules regarding the preparation of prevention plans by banks that are deemed to be systemically important. Article 66/A of the Banking Law authorizes the Banking Regulation and Supervision Authority ("BRSA") to determine the rules and principles as to the preparation of such prevention plans. Accordingly, the BRSA prepared the Regulation on Prevention Plans for Systemically Important Banks ("Regulation"), which entered into force on March 16, 2021, upon its publication in the Official Gazette on the same date.

II. Prevention Plans

The second part of the Regulation regulates the required features and contents of such prevention plans. Per Article 4 of the Regulation, (i) prevention plans and the definitions therein should be clear and consistent, (ii) assumptions and assessments in the prevention plans should be explained in detail, (iii) similarly, the documents that are referred to in the prevention plans must be clearly stated.

Moreover, Article 5 of the Regulation stipulates the minimum required content of the prevention plans, which consist of: (i) executive summary, (ii) management processes, (iii) strategic analysis, (iv) communication and public disclosure, as well as (v) preparation measures. The following provisions of the Regulation also discuss and explain each mandatory content item and their scopes.

Additionally, Article 8 of the Regulation provides the definition of "important legal entity" within the scope of the Regulation. Accordingly, those legal entities within the bank's group of companies that are essential in terms of the bank's financial situation, the sustainability of its activities, and/or the stability of the broader financial system, and the determination and implementation of the measures specified in the bank's prevention plan, provided they have at least one of the qualifications specified in the Regulation (such as being important for the stability of the financial system) are defined and considered as "important legal entities" within the scope of the prevention plans.

The following should also be included in the prevention plans of systematically important banks: (i) a general statement about the business and risk strategies of banks and important legal entities, and (ii) a description of their business models and business plans, including the list of foreign countries in which they operate.

III. Prevention Plan Scenarios

Article 19 of the Regulation states that the adequacy, effectiveness, impact and applicability of prevention plans are tested within the scope of various prevention plan scenarios, by taking into account that the validity and applicability of any given prevention plan measures may change under different stress conditions.

The Regulation stipulates three obligatory scenarios: (i) systemic scenario, (ii) scenario that is specific to a bank, and (iii) combined scenario. These scenarios cover the following events: (i) systemic events that may have negative consequences on the financial system or on the non-financial (real) economy, (ii) events that may have negative consequences for the bank, and (iii) a combination of the foregoing two scenarios that occur simultaneously and interactively.

In addition to the foregoing minimum required scenarios, the number of scenarios included in a prevention plan may vary depending on the business model, size, or funding model of the bank, as well as its connections with other institutions and the broader financial system. Additionally, scenarios should be prepared by taking the bank's particular vulnerabilities and weaknesses into account, and in a way that incorporates the bank's business and funding models, its activities, structure, size and its connections with other institutions and the general financial system. The Regulation also provides details regarding the features of the events to be included in these scenarios, such as being exceptional but realizable.

IV. Prevention Plan Indicators

Article 22 of the Regulation obliges banks to determine the quantitative and qualitative indicators and thresholds regarding these indicators. The determined thresholds would then indicate the stage at which the decision regarding the implementation of a prevention plan should be adopted. Banks should also match these thresholds with the specific prevention plan measures to be carried out in case those thresholds are exceeded.

To help with the preparation of the prevention plan indicators and the related thresholds, the BRSA has published an attachment to the Regulation that includes the minimum content for indicators, namely, (i) equity indicators, (ii) liquidity indicators, (iii) profitability indicators, (iv) active quality indicators, (v) market-based indicators, and (vi) macroeconomic indicators. The Regulation further stipulates the necessary features of prevention plan indicators, such as being consistent with the bank's business model and strategy, and being sufficient in terms of the bank's particular risk profile.

In addition, Article 22/7 of the Regulation states that these indicators and thresholds should be revised at least once a year and whenever required. Moreover, these indicators should be continuously monitored in a way that allows the measures that are necessary to improve the financial condition of a bank to be taken and implemented without any delays.

V. Notification Obligations

Article 29 of the Regulation obliges banks to prepare their prevention plans as of the end of each year and to submit them to the BRSA by the end of March of the following year. If necessary, the BRSA is authorized to change the deadlines for the preparation and submission of prevention plans.

If an event occurs that requires the modification of the prevention plan, the prevention plan should be accordingly updated and submitted to the BRSA immediately. The efficiency of the prevention plan is assessed by the BRSA, and if deemed necessary, the BRSA can order a bank to re-draft and re-submit its prevention plan within the period of time determined by the BRSA.

If the thresholds for the prevention plan indicators are exceeded, or are about to be exceeded soon, the BRSA should be immediately informed about this event and the reasons for the occurrence of such an incident, together with the response measures taken or to be taken by the bank in question. In this notification, additional measures taken or to be taken, if any, that are not included in the prevention plan should be listed. If there are any measures that are included in the prevention plan but will not be implemented for any reason, the reasons for not implementing them must be set out in the notification as well.

VI. Conclusion

Turkey has introduced a new set of rules for prevention plans that must be prepared by banks that are deemed as "systemically important" by the BRSA, in order to increase the efficiency of the supervision process so that the resilience of the Turkish banking system can be strengthened.

Capital Markets Law

Approvals Required to Amend the Articles of Association of a Publicly Held Company

I. General

In order for publicly held companies to amend their articles of association, or for non-public companies to amend their articles of association before going public, there are certain requirements that must be fulfilled in accordance with Turkish capital market regulations. Some of the most significant requirements, which would also affect the timing of such actions, are obtaining approvals from the Capital Markets Board ("CMB") and the Ministry of Trade. In this article, we will focus on and elucidate these requirements.

II. Approval of the Capital Markets Board

Some of the primary functions of the CMB are: (i) to audit publicly held companies, and (ii) to ensure the conformity of the publicly held companies' activities and decisions to the relevant legislation and regulations. Furthermore, the CMB aims to protect the rights and interests of investors, and to create and maintain trustworthy and reliable markets for them.

According to Article 33/2 of the Capital Markets Law No. 6362 ("CML"), it is mandatory for publicly held companies to obtain prior approval from the CMB to amend their articles of association. Prior approval of the CMB must be obtained before convening a general assembly meeting. The board of directors must prepare the amendment text and submit it to the CMB before presenting it to the general assembly. The CMB is required to review the amended articles of association to check whether they are compliant with the relevant legislation. On the other hand, the CMB is not permitted to further expand the scope of its evaluation.
The CMB may reject the application or request the applicant entity to amend or revise the text without giving any further notice to the applicant entity, in case any provision of the amended articles of association is determined to contravene the relevant legislation or breach the pertinent regulations.

III. Approval of the Ministry of Trade

According to Article 5 of the Communiqué on Determining the Joint-Stock Companies That Require Approval for the Establishment and Amendment of the Articles of Association and for Increasing Capitals of Joint-Stock and Limited Companies to New Minimum Amounts, the companies specifically listed in the relevant article, such as (i) banks, (ii) financial leasing companies, (iii) factoring companies, (iv) consumer finance and card services companies, (v) asset management companies, (vi) insurance companies, (vii) holding companies, (viii) independent auditing companies, and (ix) companies subject to the CML, must obtain the approval of the Ministry of Trade in order to establish or amend their articles of ab ssociation. In case a publicly held company amends its articles of association, the Ministry of Trade`s General Directorate of Domestic Trade ("General Directorate") must determine whether such an entity has obtained an approval from the CMB before applying to the General Directorate for approval.

Once the entity in question receives the approval of the CMB for amending its articles of association, it must then apply to the Ministry of Trade to obtain a secondary approval. This requirement arises from the rules set forth in the Turkish Commercial Code numbered 6102 ("TCC").

According to Article 333 of the TCC, joint-stock companies that are active in certain areas (to be determined and announced in the Communiqué to be published by the Ministry of Trade) shall only be incorporated with the permission of the Ministry of Trade. The amendments to the articles of association of these companies are also subject to the permission of the said Ministry. The inspection of the Ministry of Trade may only be carried out in terms of whether or not there is any contravention in the incorporation or amended articles of association of the company with respect to the mandatory provisions in the law. Apart from this, regardless of the nature, scope of activity or the legal position of the joint-stock company, its incorporation and amendments to its articles of association may not be subjected to the permission/authorization of any authority, except as provided under the laws pertaining to regulated industries such as energy.

Lastly, as with the evaluation of the CMB, the review of the Ministry of Trade is also limited within the scope of the mandatory regulations of the relevant legislation, and cannot be expanded beyond this scope.

IV. Consequences of Failing to Obtain the Approvals of the Relevant Authorities

As per the CML and from a corporate law perspective, obtaining the necessary consents from the CMB and the Ministry of Trade is mandatory, where it is required by the applicable law. Therefore, if such requirements are not fulfilled by the applicant entity, at the time of the registration application, the authorized officer of the trade registry must reject the registration application due to the lack of approval of the relevant authorities.

The result of violating the mandatory provisions of the law, including the requirement for obtaining approvals, is nullity of the incorporation or the amendment of the articles of association. In other words, if the trade registry somehow approves the registration application in relation to the amendment of the articles of association without the prior approval of the CMB or the Ministry of Trade, where it is necessary, a declaratory lawsuit can be filed by all the relevant persons to detect and declare the nullity of the application and the amendment.

Competition / Antitrust Law

The Turkish Competition Board and the Ice Cream War[3]

The Turkish Competition Board (the "Board") decided that several practices of Unilever Sanayi ve Ticaret Türk AŞ ("Unilever") amounted to infringement of Article 4 and Article 6 of the Law No 4054 on the Protection of Competition (Law No 4054). [4]

The Board defined the market as industrial ice cream by separating the ice cream that Unilever produces from artisan ice creams produced by small-scale enterprises market in Turkey. It further segmented the product market to (i) impulse industrial ice cream and (ii) catering (take home) industrial ice cream.

In relation to Unilever's position in the market, the Board noted that Unilever held the highest market share and while the competitors' market shares decreased Unilever maintained its high market share for almost 20 years. Deriving from the high market share, it stated that dominant position may be presumed. In its analysis, the Board referred to *Hoffmann-La Roche* where the European Commission evaluated that the market share which differs between 70%-90% in different relevant product markets, is so high that the share in itself may be considered as an

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[3] This article first appeared in the In-House Lawyer Magazine Summer 2021. (https://www.inhouselawyer.co.uk/legal-briefing/the-turkish-competition-board-and-the-ice-cream-war/)

[4] The Board's *Unilever II* decision dated 18 March 2021 and numbered 21-15/190-80.

evidence of dominance.[5] The Board also considered the characteristics of the market, including barriers to entry (eg advertisement costs associated with branding and cold chain distribution costs) and lack of buyer power. As a result, the Board found that Unilever enjoys a dominant position in the relevant markets.

Subsequently, the Board analysed several practices of Unilever and specifically evaluated (i) the agreement entered with Getir Perakende Lojistik AŞ ("Getir"), a leading e-commerce sector player which serves as Unilever's customer, (ii) the commodatum agreements signed with Unilever's resellers and (iii) the rebate schemes applied by Unilever vis-à-vis its dominant position and the Board's past decision relevant to Unilever.

I. Two Separate Fines and One Conditional Exemption in One Decision

Earlier, the Board had rendered a decision following an investigation initiated ex officio against Unilever concerning its exclusivity practices in the industrial ice cream market. The Board decided that Unilever held a dominant position in the relevant market. Accordingly, the Board prohibited (i) non-compete clauses included in Unilever's agreements, (ii) arrangements that created de facto exclusivity in the market and (iii) rebates inducing loyalty, after evaluating that such practices prevented effective competition in the market.[6] Moreover, the Board reviewed the freezer cabinet exclusivity clauses in the agreements with the sales points, and evaluated that there would not be sufficient demand for competitors' products by sales points even if the clauses were removed – rendering a status quo in the market.

In the current case, first of all, the arrangements with Getir – which have been in force for approximately four years, five months – caught the Board's eye, . The Board found that the agreements entered with Getir included non-compete terms which prohibited Getir from selling competitor products, and evaluated that the terms amounted to exclusivity arrangements preventing effective competition and contradicting with the Board's past decision. Accordingly, the Board decided that the exclusivity arrangements violated Article 4 of Law No 4054 and imposed an administrative monetary fine of TRY205,807,378.83 on Unilever, factoring in the duration of the infringement.

Moreover, the Board evaluated Unilever's rebate schemes. The Board saw that Unilever applied additional discounts to sales points which increased the number/size of Unilever cabinets despite a decrease in Unilever product sales (turnover) in the relevant sales points. The Board assessed that the increase in the number/size of Unilever cabinets in the traditional sales points with limited physical capacity lead to de facto exclusivity and exclusion of competitors from these sales points. The Board also found that Unilever's competitors (in particular, Panda and Golf) were only able to reach a limited amount of the sales points; they were losing a significant amount of their shares as they were forced out of many sales points. Noting that Unilever products were considered as 'must stock' products, the Board stated that, even an exclusivity clause valid for only one year would lead to market foreclosure.

All in all, the Board concluded that the discounts applied in the traditional sales channel had the object and effect of restricting competition, and Unilever abused its dominant position in the relevant markets and infringed Article 6 of

[5] *Hoffman-La Roche*, (85/76/EC), ECR 461, para 38-40 (finding that very large market shares are in themselves evidence of dominance in the absence of exceptional circumstances provided that these market shares existed over a period time)
[6] The Board's *Unilever* decision dated 15 May 2008 and numbered 08-33/421-147.

Law No 4054. As a result, the Board imposed an administrative monetary fine of TRY274,409,838.43 on Unilever. Importantly, under Article 5(3)(a) of the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position, the increase in the ratio of fine differs depending on whether the violation lasted longer than five years. In this regard, the Board stated that the rebates were applied in 2016, 2017, 2018 and 2019 and the undertaking did not submit that it ceased the rebates during the investigation conducted in 2020. Hence, as of the time of oral hearing (9 March 2021), the violation was evaluated to have lasted more than five years and the ratio of the fine was increased accordingly.

Furthermore, the Board assessed the commodatum agreements signed with resellers about the cabinets provided by Unilever. The clauses in the agreements entered with traditional sales points required resellers to use the cabinets only for the preservation of Unilever's products. The Board stated that due to the physical limitations, the sales points may be using only one cabinet for the products and if the relevant cabinet can only be used for only one brand, it may provide exclusivity to Unilever in the relevant sales points. In its assessment, the Board referenced the European Commission's decision whereby a Unilever subsidiary's commodatum agreements concerning the provision of free of charge cabinets to sales points were evaluated to lead to de facto exclusivity, as the resellers were unlikely to install competitors' cabinets since they needed to optimise the space in their outlets.[7]In this light and as a result of an extensive assessment of the sales points and the number of cabinets used in these points, the Board decided that these agreements restricted competition by de facto prohibiting the sales points from selling the products of Unilever's competitors especially in closed sales points which measured 100 square meters or less. In addition to the physical limitations, the Board considered the facts that (i) Unilever products were assessed as 'must stock' products by the re-sellers, (ii) Unilever's market shares have been trending upward in the last four years (which is considered to be indicative of a market foreclosure), (iii) the consumers tend to buy the ice-cream that they find in the sales point and they do not search for other sales points.

Importantly, the Board noted that while Unilever increased its market share vis a vis its competitors in the traditional channel where it imposed the relevant clause, it has lost market share in the discount markets channel where the same cabinet is used for different ice-cream brands. Hence, the Board emphasised that the allocation of space for competitors' products increases the demand for competitors' products. Finally, the Board stated that due to high brand recognition in the traditional channel, the clauses also impacted the potential competition. Therefore, the Board concluded that the said clauses constituted an Article 4 infringement.

Considering the relevant case-law of the Board and other jurisdictions (eg the UK[8]), the Board stated that the commodatum agreements may benefit from an individual exemption under Article 5 of Law No 4054 subject to removal of the exclusivity clauses and restructuring of agreements so that the visible part of the cabinet and 30% of the total volume of the cabinet in closed sales points measuring 100 square meters

[7] *Van den Bergh Foods Ltd* (98/531/EC), Case Nos IV/34.073, IV/34.395, IV/35.436. The judgment is upheld by the Court of First Instance, Case T-65/98, *Van den Bergh Foods v Commission*, judgment of 23 October 2003. The European Court of Justice dismissed the appeal request, *Unilever Bestfoods (Ireland) Ltd v Commission of the European Communities*, Case C-552/03 P, ECLI:EU:C:2006:607.

[8] *The supply of impulse ice cream: A report on the supply in the UK of ice cream purchased for immediate consumption*, Cm 4510, January 2000.

or less is allocated for competitor products, if there is no other ice cream cabinet.

II. Two Sets of Proposed and Rejected Commitments

During the investigation, Unilever provided two sets of commitments in accordance with the newly enacted commitment mechanism under Article 43 of Law No 4054. Both sets of commitments were rejected by the Board.

Firstly, Unilever offered to commit the following: if a sales point notifies Unilever that it would like to install a cabinet for another brand, it would reduce the space its cabinet uses by a certain ratio subject to sales points' approval, unless there are already several cabinets in the sales point. However the Board rejected the commitment since, inter alia, (i) the commitment was offered at a considerably late stage, before the official service of the additional opinion [9], contradicting with benefits of accepting the commitments (eg cost savings), and (ii) adoption and monitoring of the commitment would not be easy given the high number of sales points and the associated costs.

Secondly, Unilever offered commitments concerning not only the cabinet exclusivity but also the non-compete clauses and rebate systems. Accordingly, Unilever offered to (i) allocate space for competitors' products in its own cabinet or install an additional cabinet for competitors' products in the sales points with only one cabinet, (ii) allocate space in the smaller cabinet and in the larger cabinet (if necessary) to the competitor, if there are more than one cabinet, (iii) amend its agreement with Getir and (iv) cease rebates applicable to sales points which record a decrease in sales (turnover). The Board again rejected the commitments since (i) the commitments were offered at a late stage of the investigation, and after the submission of the commitments, (ii) Unilever submitted the third written defence where it rejected all allegations for which it offered commitments, (iii) the commitments were not of such a nature that they can restore the competition that existed in the market before the infringement since Unilever strengthened its dominant position by maintaining the violation related to the non-compete clauses and rebate systems for a certain period. The commitments offered by Unilever were considered to entail merely the termination of the breach – which is already the responsibility of an undertaking.

With respect to the commitments concerning the cabinets, the Board stated that they cannot be approved as the commitments (i) do not explain whether competitors would be able to place their price boards on the cabinets covered by Algida's logo or not covered at all, (ii) would apply only to the competitor producers of ice creams having their own cold chain and freezer cabinet (and this would constitute a barrier to entry), (iii) do not explain what would happen if the sales point terminated its contract with a competitor whose products are placed in the additional cabinet installed at the sales point. According to the Board, the last point should have been clarified since if the sales point was to use the additional cabinet for Unilever products and subsequently restart working with the competitor, the ratio to be considered for the calculation of the space that would be reallocated to the competitor must be clear, especially, given that the space of Unilever's products that are used as a base for this calculation may have increased.

Also, the Board cast doubt on the requirement that additional cabinets and small cabinets would not be covered with the competitor's logo based on the survey that reveals that the uncovered cabinets were not as attractive as the covered ones. In this regard, the Board noted that it is important that the competitors' products should be placed in the same cabinets as

[9] ie the Investigation Team's last report on the investigation.

Algida products to provide the competitors with equal chances.

The Administrative Court Annuls Turkish Competition Board's One and Only SEP Decision

Back in February 2018, a preliminary investigation was launched against Koninklijke Philips N.V. ("Royal Philips") and Türk Philips A.Ş. ("Philips Turkey") upon Vestel Elektronik Sanayi ve Ticaret A.Ş.'s ("Vestel") complaint. After reviewing the matter, the Turkish Competition Board (the "Board") decided to carry out a full-fledged investigation and consequently concluded that while Philips Turkey did not engage in any infringement practices, Royal Philips infringed Article 6 of the Law No. 4054 on Protection of Competition ("Law No. 4054") and abused the dominant position it enjoyed in the market of subtitling technology for digital video broadcasting in Turkey through its practices vis a vis Vestel ("Royal Philips Decision") .

The investigation concerned the first-ever assessment of obligations and practices of standard essential patent ("SEP") holders, with particular focus on commitment to engage in agreements on fair, reasonable and non-discriminatory ("FRAND") terms. The Board's Royal Philips Decision was expected to set the tone for this first intersection of Turkish competition law and SEPs. However, just when the Turkish antitrust lawyers thought the Board's Royal Philips Decision provided some insight on the matter, the Administrative Court annulled the said decision on June, 2021 ("Annulment Decision") – rendering assessments in the Board's Royal Philips Decision inapplicable.

I. A Recap of the Board's Royal Philips Decision

Royal Philips owns patents (EP393 and EP307) which are essential for presenting subtitles in a television program in compliance with the DVB Subtitling standard. A dispute originated between Royal Philips and Vestel in 2009, as Vestel's televisions were decoding subtitles and as a result infringed IP rights of the relevant patents. The aftermath of the dispute escalated until 2013 when the parties signed a licensing agreement, however after its expiration in 2015 and failure of negotiations, the parties` grievances were once again the subject of legal action before the German courts. Subsequently in December 2017, Vestel brought a complaint before the Turkish Competition Authority (the "Authority") in addition to its IP-related actions.

Vestel's complaint alleged, inter alia, that Royal Philips (i) did not conduct negotiations in good faith and brought actions which were aimed at destroying Vestel's products, (ii) hampered Vestel's business, use of its technology and innovation development, by forcing Vestel to enter into a licensing agreement, which included harsh provisions such as a no-challenge clause concerning the validity of the patents and terms that reversed the burden of proof on Vestel, (iii) set excessive patent fees, and (iv) did not comply with its commitment to license patents under FRAND terms.

The Authority reviewed the allegations and after an elaborate analysis, they concluded that no infringement was found; noting that neither Philips Turkey nor Royal Philips` practices had violated the Law No.4054. Moreover, the Authority evaluated that the license agreement entered between Royal Philips and Vestel does not include any terms that restrict competition and may indeed benefit from the individual exemption mechanism.

This was one of the interesting cases whereby the Board digressed from the findings of the Authority and made a decision contradicting with the conclusion suggested by the Authority, which was also one of the grounds of the arguments brought by Royal Philips and recognized by the Court during the litigation phase, and expanded the assessments made within the scope of the investigation.

Overall, the Board concluded with a majority vote that Royal Philips had abused its dominant position in the market of subtitling technology for digital video broadcasting in Turkey, and imposed an administrative fine corresponding to 0.75% of Royal Philips' 2018 gross annual turnover, mainly based on the following assumptions:

(i) The Board evaluated that Philips` failure to appoint a third party in determining the royalty rates to be applied in its relationship with Vestel, resulted in abuse of dominance. In its assessment, the Board sought to rely on the Huawei/ZTE Decision .
(ii) The Board evaluated that Philips` failure to publish its actual royalty rates on its website amounted to an abuse of dominant position via discrimination. In its assessment, the Board sought to rely on the Sisvel/Haier Decision and IP Bridge/HTC Decision .
(iii) The Board deemed that two of the provisions (regarding the reporting obligation and right to terminate) in the license agreement between the parties were competition restricting terms and concluded that:
    - With the reporting obligation, Philips reversed the burden of proof on Vestel and this restricted Vestel from producing its technology and products; accordingly, the reporting obligation was considered discriminatory and contradicting with FRAND commitments.
    - The right to terminate clause may be considered as an important deterrent factor for the licensee to challenge the validity and function as an implicit no-challenge clause.

One of the Board members, H. Hüseyin Ünlü, delivered a dissenting opinion which supported the no-abuse-of-dominance finding of the Authority and mainly put forward that the Board's Royal Philips Decision (i) wrongly interpreted the third party appointment suggestion under the Huawei/ZTE decision, (ii) mentioned the transparency obligation for the first time ever during the term of the investigation without detailed analysis, (iii) wrongly evaluated the terms of the agreement, which are in fact not competition restricting, but a reasonable reflection of the long-lasting commercial dispute between Royal Philips and Vestel.

II. Summary of the Court's Annulment Decision

In August 2020, Royal Philips brought an action for annulment of the Board's Royal Philips Decision. Overall, Royal Philips pointed out that it had complied with competition law and its FRAND commitments, emphasized that the Board had been erroneous in interpreting the precedents set by the EU courts and certain clauses in the agreement, highlighted that the Board assumed certain requirements to be part of a FRAND commitment. On the other hand, in its defence, the Authority further elaborated on the points it raised in its Royal Philips Decision, and moreover, highlighted the Board's independent decision-making position within the Authority and vis a vis the Authority. Meanwhile, Vestel also intervened in the lawsuit and brought forward certain arguments of its own.

The Ankara 11th Administrative Court carried out a rather long analysis in its decision, addressing almost each and every point raised by Royal Philips and the Authority, whilst also taking into consideration Vestel's submissions as the intervening party. As a result, the judges unanimously decided for the annulment of the Royal Philips Decision.

On the whole, recognizing the non-competing relationship between Vestel and Royal Philips, the Annulment Decision noted that Royal Philips held a dominant position in the relevant market and evaluated, inter alia, the following:

(i) With regard to the arguments that Royal Philips did not engage in practices on FRAND terms: indeed, Royal Philips has not directly brought a lawsuit against Vestel without any notice or a negotiation process and therefore Philips has shown its willingness to enter into a licensing agreement; a dispute arose upon Vestel's submissions on the invalidity of the relevant patents and Vestel's very low offers of fees, which were, in fact, lower than Philips' offer as well as the license fee applied to other TV manufacturers by Philips; Philips did not apply high fees to Vestel,

(ii) With regard to the Authority's conclusion that failure to appoint a third party to determine the licensing fees during the negotiation process amounted to an abuse of dominance: the relevant assessment is erroneous and it contradicts with the wording and the principles adopted in the Huawei-ZTE Decision, which explicitly indicates "the appointment of a third party for determination of licensing fees" as "optional,"

(iii) With regard to the assessment of transparency principle under the abuse of dominance rules: the Authority did not conduct such analysis during the investigation process and Philips was not able to defend itself,

(iv) With regard to arguments on the terms of the license agreement entered between Royal Philips and Vestel: considering the long-lasting dispute between the parties, where no consensus was reached despite years of negotiations, the terms of the license agreement are reasonable; indeed, there is no contradiction in Philips adding clauses in order to restrict Vestel from challenging the validity of the patents, therefore, the dispute between the parties and Philips's exercise of its intellectual property rights may not be interpreted as an abuse of dominance.

Now, the Board has to correct its decision based on the conclusion and reasoning of the Administrative Court's Annulment Decision and pay back the administrative monetary fine imposed on Royal Philips. Moreover, the Authority itself may appeal the Annulment Decision before the Regional Administrative Court. We are yet to see how the next steps of the Authority will unravel.

The Turkish Competition Board's Fertilizer Decision Goes Knee-Deep into Market-Specific Dynamics

The Turkish Competition Board ("Board") has recently finalized its investigation regarding the price increases in the fertilizer industry ("Investigation"), which was conducted against six undertakings active in the fertilizer manufacturing market in Turkey to determine whether the relevant undertakings had violated Article 4 of the Law No. 4054 on the Protection of Competition ("Law No. 4054"). The investigated parties, namely Bandırma Gübre Fabrikaları A.Ş. ("BAGFAS"), EGE Sanayi A.Ş ("EGE"), Gemlik Gübre ("GEMLIK"), Gübre Fabrikaları T.A.Ş. ("GUBRETAS"), İstanbul Gübre Sanayi A.Ş ("IGSAS") and Toros Tarım Sanayi ve Ticaret A.Ş. ("TOROS"), collectively represented 80% of the industry[10].

I. Why Is The Decision Important?

The Board's reasoned decision, which was released in April 2021, included highly detailed analyses of the sector dynamics and the relevant market, as well as the concept of "product substitutability."
This decision is particularly noteworthy in regards to the detailed assessment of economic evidence by the Board, especially in light of its recently published "Handbook of Economic Analyses," setting forth the economic tests conducted by the Board in its investigations and its merger control proceedings.

Moreover, the Turkish Competition Authority ("Authority") has accurately

[10] The Board's decision numbered 20-51/718-317 and dated November 26, 2020.

indicated that, when the source and accuracy of the correspondences are not clear, they may still indicate a violation of the Law No. 4054, so long as they are supported and corroborated by the economic evidence that is collected as part of the economic analyses.

II. The Board's Assessment on the Relevant Product Market and the Characteristics of the Fertilizer Sector in Turkey

In defining the relevant product markets, the Board first made a detailed assessment as to the substitutability of the concerned products, and also took into account various other matters, such as the area of use of the concerned products and seasonality.

The Board first indicated that the fertilizers in question might be categorized as organic fertilizers, chemical fertilizers and microbial fertilizers, based on their physical and chemical structures. The Board then emphasized that, among these three types, chemical fertilizers are the most common type, and thus, conducted its subsequent assessments by taking into account the chemical fertilizers, and disregarding the other two types.

The Board then proceeded to sub-categorize the various types of chemical fertilizers. As such, the Board determined that the chemical fertilizers might be sub-categorized as (i) single-component fertilizers, and (ii) compound (multi-component) fertilizers. With regards to the single-component fertilizers, the Board established that there are nitrogen-based fertilizers, phosphorus-based fertilizers, and potassium-based fertilizers, all of which include a single component (*i.e.*, nitrogen, phosphorus, or potassium). As to the compound fertilizers, the Board found that this sub-type includes two or more of the aforesaid components (*i.e.*, nitrogen, phosphorus, or potassium).

After establishing these sub-categories, the Board assessed the substitutability within the the single-component fertilizer and the compound fertilizer categories, themselves, as well as the substitutability between the single-component fertilizers and the compound fertilizers.

Ultimately, the Board considered the relevant markets to be "nitrogen fertilizers," "phosphorus fertilizers," "potassium fertilizers," and "compound fertilizers," which were thus identified as the segments of the fertilizer product market. Having said that, the Board also made certain assessments regarding base and top fertilizations. The base fertilizations are made prior to planting the crops (*i.e.*, between autumn and spring) with a view to increase the productivity of the soil in the long run, whereas top fertilization is made after the crops are grown, at least to some extent, (*i.e.*, between spring and summer) to enhance the fertility of the crops. The compound fertilizers are used for top fertilizations and the nitrogen-based products are used as base fertilizers.

With regards to the geographical market, the Board found that the market was the entire Turkish Republic. However, it did not choose to provide a definitive product or geographic market definition in this case, as it would not affect or change the result of the case file.

Furthermore, the Board noted that, while Turkey had around 1200 fertilizer manufacturers and importers, the six producers/importers under investigation accounted for almost 80% of the market. Therefore, the Board indicated that, within the fertilizer industry, the majority of trade volume belonged to the six undertakings subject to the investigation, and found that there was minimal brand loyalty within the industry since the products are highly homogeneous.

The Board further established that there was a high level of dependence in the fertilizer sector on imports of raw materials and finished products. The undertakings, including the investigated suppliers, some of which also imported finished fertilizers, purchased their raw material inputs and finished products from the same foreign players. Therefore, the investigated undertakings had similar price and cost structures. In addition, considering that payments for imports require foreign currency, the prices paid by the undertakings were dependent on the prevailing exchange rates.

The Board found out that 62% of all sales in the relevant markets was conducted through dealers, and that the dealers' operational system was mostly non-exclusive, meaning that a dealer could get products from as many suppliers as it desired. Therefore, the dealers would get to know the prices charged by various suppliers, and would then use this information as leverage in their negotiations with the suppliers. In addition, the competitors could also act as regular supplies of each other. As a result, the suppliers indirectly learned the prices of the other suppliers, which increased the level of transparency in the market.

Furthermore, based on the prevalent agricultural products in Turkey, the Board emphasized the seasonality of the products and stated that fluctuations in the prices might be observed due to such seasonality as well.

Thus, in light of the above explanations, the Board finally determined that the products were homogenous and that the market in question was transparent and easily traceable.

III. The General Assessment of the Board

During the preliminary investigation phase, the Authority had gathered evidence indicating that BAGFAS and EGE might have been exchanging information on their future price strategies. That evidence (referred to as "Evidence-20" in the reasoned decision), which seemingly consisted of an internal reporting of market intelligence by BAGFAS, was in the form of an e-mail. That e-mail was forwarded from BAGFAS to EGE (which is part of the same group of companies). Within the e-mail in question, it was noted that one of the employees of BAGFAS had informed EGE that IGSAS (a competitor subject to the same investigation) had reportedly told GEMLIK (another competitor under the same investigation) that IGSAS was planning to increase its prices, and so GEMLIK would, in turn, increase its prices, too.

However, the Board was not able to identify the source of that market intelligence regarding the alleged price increases. In addition, the Board emphasized that, since Evidence-20 was in the form a market intelligence report, which was prepared by a third party, such evidence may not be sufficient, in and of itself, to establish that there was an information exchange between the parties. Thus, the Board proceeded to compare the prices of the undertakings. It re-emphasized here that such prices were highly dependent on price fluctuations abroad, as well as on the foreign currency exchange rates. The Board therefore established that the costs and prices remained similar among the undertakings, at least within the same segment.

In the next step of its investigation, the Board then compared the prices of GEMLIK and IGSAS. Although it observed a certain amount of parallelism between their prices, the Board noted that this could have resulted from the nature of an oligopolistic and transparent market, where the product is homogenous and the competitors' prices can easily be discovered or estimated (or even tracked daily), thanks to the non-exclusive dealership system of market, as explained above.

After also assessing the undertakings' market shares, the Board stated that it had found some evidence indicating that an information exchange had taken place between GEMLIK and IGSAS. The evidence in question was in the form of a market intelligence report prepared by a third-party competitor (*i.e.*, BAGFAS), which was discovered on another competitor's premises (*i.e.*, EGE). However, the Board did not consider this to be an exchange that raised competitive concerns as EGE and BAGFAS are controlled by the same family and therefore deemed to be a single economic entity. Ultimately, the Board concluded that the mere statements of third parties and the price parallelism that had been observed between the undertakings were not, in and of themselves, sufficient to establish that an information exchange had actually occurred between the undertakings.

IV. The Economic Analysis of the Authority

The case handlers requested that the Economic Analyses and Research Department of the Authority ("EARD") conduct further economic analyses on the prices in the relevant market in order to determine whether the investigated undertakings had violated Article 4 of the Law No. 4054, including examining price correlations and evaluating the effect of cost shocks on prices in the relevant market.

The Board explained in its decision that shock analysis is commonly used in defining the relevant market and evaluating the unilateral effects of a particular event/shock (*i.e.*, a new product or brand, innovation, special promotions, advertising campaigns, instant exchange prices, cost and sales in case of exchange rate changes, etc.), and the various fluctuations it causes with respect to the undertakings' variables, such as changes in the sales and cost volumes resulting from an uncertainty in prices. Subsequently, the competitive conditions of the relevant market would be determined based on the findings of these shock analyses.
The Board also noted that one of the most frequently used tools for uncovering cartels is a behavioral analysis known as the "structural break test," which aims to uncover structural breaks in prices. The structural breaks, if established, may indicate the existence of an agreement that restricts competition, which cannot be explained as resulting from cost shocks.

It is important to mention that the Board clearly indicated that these tests are not seen or treated as providing conclusive evidence. Rather, such economic evidence is useful in shedding light on which sectors require a more in-depth analysis to unearth and identify the violation, if any exists. In this context, the EARD found the "OLS-CUSUM test" ("Ordinary Least Square Based Cumulative Sum") to be the most appropriate structural fracture test, due to its high compatibility with the relevant market in the case at hand, along with the uncertainty as to the existence and the timeframe in which the suspected cartel had taken place.

The EARD took into account the market-specific dynamics of the case file and determined the following to constitute the variables in the relevant market: (i) foreign exchange rates, (ii) producer price index (for energy), (iii) international FOB prices for urea and ammonium (which are inputs for the fertilizer), and (iv) seasonality. The EARD included (i) top fertilizers, (ii) base fertilizers, and (iii) urea fertilizer in its analysis. The first two types were picked mainly because this distinction yielded healthier results under observed seasonal effects on prices. The urea fertilizer was included in the analysis because it was explicitly mentioned in Evidence-20.

The EARD went on to analyze the price series on a monthly basis by taking into account the previous 71 months, and concluded that the test had not revealed any structural breaks in the prices, which would otherwise indicate an explicit or tacit agreement between the investigated undertakings. Afterwards, the EARD ran another test called the "Ramsey Regression Equation Specification Error Test" ("RESET") with a view to confirm the accuracy of the models subjected to the OLS-CUSUM test. The EARD then confirmed that the changes in the prices of the undertakings could be satisfactorily explained with the variables listed above, and concluded that the prices did not indicate any potential violations of the Law No. 4054.

V. Conclusion

As a result of the economic analyses conducted and the documentary evidence gathered by the Competition Board, it was established that the investigated undertakings were not in violation of the Law No. 4054.

The explanations of the Board regarding the value of the economic evidence in the investigations are of particular importance for providing a potential roadmap to the Authority's future investigations. As such, the Board indicated that, where the Authority was not able to collect documentary evidence to prove a violation, economic evidence could be utilized instead to find out and determine whether the undertakings under investigation had potentially violated competition law rules.

The Turkish Competition Authority Publishes a Preliminary Report on its E-Marketplace Sector Inquiry

The Turkish Competition Board initiated a sector inquiry on e-marketplace platforms, as per its decision dated June 11, 2020, and numbered 20-28/353-M ("Sector Inquiry"). The announcement published on the Authority's official website regarding the Sector Inquiry emphasized the rise of e-marketplaces, and named them as the prominent actors in the field of online retail, which shape and determine the competitive order of the new economy with the business models and market behaviors that they adopt. Therefore, the Sector Inquiry was launched to investigate and understand the (possible) competitive and anti-competitive effects of e-marketplaces, and to construct effective policies based on these findings. The Sector Inquiry seems to be part of the Authority's wider legislative/regulatory efforts with regard to digital markets, which would also include the Authority's ongoing sector inquiry into the online advertisement sector, which was launched by the Board on January 21, 2021.

After an examination period of almost a year, the Authority published its 364-page Preliminary Report on the E-Marketplace Sector Inquiry ("Preliminary Report") on May 7, 2021. The Preliminary Report is based on documents and information collected from undertakings active in the e-commerce sector and related markets, as well as studies conducted with consumers and third-party sellers operating through e-marketplace platforms.

The Preliminary Report suggests that the Authority sought to follow the EU's legislative efforts in the digitalization era while conducting a market study specific to Turkey. For instance, the Preliminary Report seems to pick up the European Commission's proposal for the Digital Markets Acts in suggesting the imposition of ex-ante obligations on undertakings that would be deemed to hold a "gatekeeper" status. On the other hand, the Preliminary Report's suggestion for the implementation of a "Platform Code of Conduct" seems to be modelled after the EU Platform to Business Regulation 2019/1150.

I. Definitions and Market Characteristics

The Preliminary Report defines e-commerce as "products and services that are bought and sold electronically." This definition includes goods and services that are digitally ordered and/or digitally delivered. E-marketplaces are defined as "online intermediary e-commerce platforms that host sellers and buyers on their platforms and that facilitate transactions between these groups." The Preliminary Report then divides e-marketplaces into two categories: (i) pure marketplaces, which are solely facilitators, and (ii) hybrid marketplaces, which also act as sellers on the same platform.

The Preliminary Report also includes and elucidates the basic economic characteristics of e-marketplaces and the operational features that contribute to their significant market power, such as (i) network externalities, (ii) multi-homing, (iii) economies of scale and scope, (iv) multi-sidedness, and (v) data-based functionality. The Preliminary Report then refers to certain structural market failures, such as high entry and expansion barriers, as well as the "tipping" tendency in favor of a single platform that may result from the specific economic characteristics of e-marketplaces.

Some remarkable findings of the Preliminary Report can be summarized as follows:

- The concentration ratio of the market increased in terms of both market share and CR2 [11] /CR4 [12] ratios, and the tight oligopoly structure became stronger and the market share asymmetry became increasingly evident.
- Within the framework of the survey findings, multi-category e-marketplaces diverge both from physical stores and from other online sales channels. Although this divergence was evident in all age groups, it was observed that it increased even more as the survey moved to the lower age groups.
- Consumer multi-homing is weak, particularly due to consumer inertia, which further increases the market-power enhancing effects of network externalities.
- Even though the sellers identified certain "unavoidable trading partner" platforms, competition between the marketplaces is found to protect the sellers from the possible negative effects of asymmetric bargaining power, and accordingly, multiple-homing on the seller side is strong.

II. The Preliminary Report's Key Concerns

The Preliminary Report reveals three key areas of potential concern in the e-marketplaces: (i) inter-platform competition, (ii) intra-platform competition, and (iii) consumers. It should be noted that these concerns are only hypothetical, and do not rely on concrete findings.

(i) **Inter-platform Competition**: The Preliminary Report's main discussion topics on inter-platform competition are the Most-Favored Customer ("MFC") clauses and exclusivity clauses implemented by e-marketplaces.

- *Broad MFC Clauses:* The Preliminary Report concludes that broad MFC clauses may (i) remove the incentive of sellers to apply different prices and conditions to different channels, (ii) remove e-marketplaces' incentives to enter into competition with rival platforms, and (iii) lead to price rigidity and facilitated collusion. The Preliminary Report adds that the use of broad MFC clauses by the so-called "gatekeepers" would likely lead to irreparable harm in the market, but the efficiencies generated by MFC clause practices of non-gatekeepers should also be taken into consideration.
- *Narrow MFC Clauses:* The Preliminary Report considers that narrow MFC clauses may have the same impact as broad MFC clauses, to the extent that the marketplace *is* "indispensable" for the sellers and substitute for the

[11] CR2, the two-firm concentration ratio, stands for the combined market shares of the two largest firms in a market expressed as a percentage.
[12] CR4, the four-firm concentration ratio, stands for the combined market shares of the four largest firms in a market expressed as a percentage.

sellers' direct sales channels for the majority of consumers. The Preliminary Report concludes that it is not possible to clearly foresee the competitive effects of narrow MFC clauses, including for the so-called "gatekeepers" with extensive market powers, and should therefore be subject to a case-by-case analysis.

- *Exclusivity/Non-compete Clauses*: The Preliminary Report considers that exclusivity/non-compete clauses may lead to increased competition in the market, and therefore, a more conservative approach needs to be adopted in *terms* of limitations based on efficiency claims compared to traditional markets. The Preliminary Report concludes that the rules on platform exclusivity practices should be clarified through amendments in the secondary legislation.
- *Practices Reducing Incentives for Multi-homing*: The Preliminary Report regards multi-homing as an effective way to mitigate the adverse effects of network externalities, and therefore states that the markeplaces' practices reducing the incentives for multi-homing could potentially damage effective competition in the market. However, the Report also notes that, because of the positive impact that platforms may have on consumer welfare, the practices along with the efficiency claims need to be analyzed on a case-by-case basis. The Preliminary Report notes, however, that platforms' efficiency claims should be proven by the undertakings and that the analysis should not be limited to the current situation of the market, as these practices may have an impact during the evolution phase as well.

(ii) **Intra-platform Competition**: As regards to the key concerns on intra-platform competition, the Preliminary Report highlights (i) discrimination among vendors operating in the e-marketplace to the advantage of the marketplaces' own products and services, (ii) engagement in some unfair commercial practices against the vendors through their asymmetric bargaining power (in other words, superior bargaining power), and (iii) the potential of marketplaces to lead to horizontal agreements (*i.e.*, hub and spoke cartels), through parallel vertical restraints.
The Preliminary Report observes that it is critical to establish a trade environment in which fair competition is seen and treated as an essential component, where every entity undertakes a fair share of the costs and benefits arising from commercial activity, and for the marketplace to operate in accordance with the principles of "objectivity," "transparency," "openness," and "predictability." Furthermore, it was emphasized that the simultaneous/dual role of e-marketplaces, which has developed due to their presence as sellers on their own platforms, causing the platforms to become a competitor against their own third-party sellers, raises competition concerns on the axis of 'self-preferencing,' especially in terms of gatekeeper marketplace(s).

(iii) **Consumers**: The Preliminary Report reviews consumer-related concerns from three separate angles: (i) price-related concerns, (ii) loyalty-inducing practices, and (iii) data collection. The Preliminary Report declares that excessive data collection and privacy violations can reduce the quality of the service provided in the marketplace, and notes that "quality" has become an important dimension of competition, especially in terms of free services. The Preliminary Report also states that consumers may fall into the 'free service illusion' because, while consumers do not pay for these services, the platforms collect consumer data that they then monetize through various opaque practices. In order to minimize the risk of "manipulation" with respect to consumer preferences, and to encourage consumers to make informed choices, the Preliminary Report suggests "open," "transparent," "easily accessible," and "customizable" consumer policies. The Preliminary Report also recommends the implementation of a monitoring process for user reviews by the platforms for greater transparency concerning the process of collecting user reviews. Finally, the Preliminary Report focuses on the implications of the innovative incentives of the platforms and sellers for the consumers. As part of its discussion of a potential reduction of the undertakings' incentives to innovate, the Preliminary Report makes reference to so-called "killer acquisitions" (in which the acquiring firm's strategy is "to discontinue the development of the targets' innovation projects and pre-empt future competition"), [13] and suggests that acquisitions made by the so-called gatekeepers should be scrutinized, especially considering the possibility for these transactions not to meet the notification thresholds.

III. The Preliminary Report's Policy Recommendations

The Preliminary Report's policy recommendations are provided in three main categories: (i) reviewing and revising secondary legislation in order to eliminate the uncertainties in the application of the existing competition law rules in terms of MFC and exclusivity clauses, as well as zero-priced markets and data collection policies, (ii) implementing the "Platform Code of Conduct" to serve as a reference in bilateral relations targeting the asymmetric bargaining power that dominates the sector in general, including the establishment of "transparent," "open," and "predictable" agreement terms, (iii) identifying the gatekeeper undertakings and implementing an ex-ante regulation concerning the behaviors that the mentioned undertakings should avoid.

The Preliminary Report's specific suggestions for the so-called gatekeepers include the following:

- The gatekeepers should not impose contractual or de facto broad MFC clauses;
- The gatekeepers should not limit the ability of sellers to reach out to public authorities for the problems they may experience with the marketplace;
- The gatekeepers should not use non-publicly available data collected through the sellers for their own competing products;
- The gatekeepers should not advantage their own products while ranking the results;
- The gatekeepers should allow free, efficient, high-quality and real-time performance tools to allow sellers to monitor their profitability;
- There should be no barrier against data-portability to other platforms;
- The sellers should be allowed free, efficient, high-quality and real-time access to the data provided by the seller and the ensuing data derived from this initial data;
- The gatekeepers' acquisition transactions should be subject to a merger control filing before the Board, irrespective of whether the notification thresholds are met.

It is significant to note that the Preliminary Report does not identify any actual competition or market concerns that would potentially justify the request for the

[13] OECD, Directorate for Financial and Enterprise Affairs, Competition Committee, "*Start-ups, Killer Acquisitions and Merger Control – Background Note*", 10-12 June 2020, available at https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf (Last accessed August 16, 2021).

implementation of an ex-ante regulation. Rather, the Preliminary Report paints the picture of a healthy competitive environment in terms of the e-commerce sector in Turkey.

The Preliminary Report's policy suggestions are of a complementary nature, and the Authority subsequently opened a public consultation to discuss these suggestions. The policies are intended to be finalized by taking into consideration the opinions of the public and other stakeholders. On July 6, 2021, the Authority held a workshop on the Preliminary Report with the participation of e-marketplace platforms, third-party sellers and their representatives. We are now awaiting the Authority to finalize the report along with its policies. Finally, upon the finalization of the Authority's digital legislative framework, the thresholds for a "gatekeeper" status designation will be determined and the e-marketplace(s) meeting these thresholds will be obliged to follow the specific set of rules that would be set out in the final report.

The Turkish Competition Board Granted an Unconditional Approval to the Formation of a Joint Venture between Transnet and MHP after a Detailed Assessment of Any Potential Effects on the Turkish Markets

The Board published its reasoned decision [14] on the formation of a full-function joint venture between TransnetBW GmbH ("Transnet") and MHP Management & IT-Beratung GmbH ("MHP") in Germany, for the purpose of rendering smart energy systems services to third parties.

In its review of the notified transaction, the Board stated that the formation of a full-function joint venture was deemed as an "acquisition" under Article 5/3 of the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("Communiqué No. 2010/4"), provided that the joint venture was (i) jointly controlled by the parent companies, and (ii) an independent economic entity (*i.e.*, full-function joint venture).

The Board first evaluated the joint control criteria and indicated that joint control is deemed to exist when two or more undertakings or persons have the possibility of exercising decisive influence (*i.e.*, the power to block decisions on the strategic commercial behavior of an undertaking) over another undertaking. Furthermore, the Board referred to the Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control ("Guidelines on Control") (paragraphs 50 ff.), which list the primary joint control scenarios as: (i) parent companies equally sharing the voting rights, and (ii) the joint exercise of voting rights or having veto rights related to strategic decisions. Accordingly, the Board examined the contemplated shareholding structure of the joint venture, as well as the provisions of the joint venture agreement, and concluded that Transnet and MHP would indeed exercise joint control over the joint venture.

The Board then assessed the full-functionality criteria. Upon evaluating the information provided by the parties, the Board stated that the joint venture would (i) indeed have its own management, which would handle its day-to-day operations, (ii) possess sufficient resources, including its own capital, personnel and assets, to carry out its operating activities on a permanent basis, and (iii) have its own market access and market presence. Additionally, the Board indicated that the joint venture aimed to ultimately provide its services to third parties and that the joint venture's parent companies planned to sign framework agreements that did not differ in any way from agreements to be signed with third parties. In light of the foregoing, the Board concluded that the joint venture satisfied the full-functionality criteria.

[14] The Board's *Transnet/MHP* decision dated January 21, 2021, and numbered 21-04/43-18.

The Board further indicated that (i) the joint venture would operate solely in Europe, mainly by way of initially focusing on the German market, and (ii) there were no plans for the joint venture to operate in Turkey in the short- or medium-term. To that end, the Board assessed that there were no horizontal or vertical overlaps between the parent companies' activities in Turkey and the activities of the joint venture.

That being said, the Board nevertheless evaluated the potential effects of the proposed transaction in Turkey, in the event that the joint venture were to start conducting its activities in Turkey. The Board stated that the joint venture, including the EnBW group, which ultimately solely controls Transnet, was projecting to initially provide its services to the energy sector. Therefore, it was possible to consider a potential vertical overlap between the activities of EnBW and the joint venture. However, the Board also considered that: (i) the activities of the joint venture did not constitute a direct input for EnBW's activities in the energy sector, (ii) the said hypothetical overlap would be negligible, even on a global scale, and (iii) EnBW's market share in the renewable energy market in Turkey is very small, according to every possible relevant product market definition. Additionally, the Board also indicated that the technology consultancy services market in Turkey (both in the renewable energy market—in which EnBW operates—and in the energy market, where the joint venture is targeted to mainly operate) was indeed competitive.

Upon evaluating the relationship between the activities of the joint venture and the VWAG group, which ultimately solely controls MHP, the Board found that the joint venture did not have any plans to provide information technology consultancy and management services specifically for the automotive sector; instead, the joint venture would provide information technology consultancy services to all kinds of potential customers from a number of different markets.

In light of the foregoing analysis, the Board declared that the activities of the joint venture did not constitute the main component or a direct input of the services provided by the parent companies. Thus, the Board concluded that there was no global vertical overlap between the activities of the joint venture and the activities of the parent companies. Moreover, the Board concluded that the transaction would not cause any anticompetitive concerns, considering that (i) there were various competitors active in the relevant product market in Turkey, in which the joint venture was projected to operate, and (ii) VWAG's market share (both on a global level and in Turkey in terms of the automotive market) was very low, which alleviated competition law concerns even if a potential vertical overlap were to be assumed.

Moreover, the Board also considered another joint venture, established in 2020 between MHP and a third-party undertaking, for the purpose of rendering information technology consultancy and ancillary services for digital and flexible production solutions to third parties. The Board evaluated that a global horizontal overlap indeed existed between the activities of the said joint venture and the activities of the joint venture subject to the proposed transaction. However, the Board once again determined that the aggregate market share of both joint ventures was very low, and therefore, the transaction would not restrain or negatively affect the competitive structure of the global markets.

All in all, the Board found that there were no affected markets in Turkey with regard to the proposed joint venture transaction. Moreover, the Board indicated that, even if it were to be assumed that potential horizontal/vertical overlaps could arise in Turkey (and on a global scale) as a result of the proposed transaction, the transaction would still not significantly impede effective competition, considering the low market shares of the parties and the competitive structure of the relevant markets. Accordingly, the Board unconditionally approved the proposed transaction.

Conglomerate Effects Revisited in the Chemical Industry: The Competition Board Unconditionally Approved Ak-Kim Kimya A.Ş.'s Acquisition of USK Kimya A.Ş.

In a recently published decision, the Turkish Competition Board ("*Board*") unconditionally approved the acquisition of sole control over USK Kimya A.Ş. ("*USK*") by Ak-Kim Kimya A.Ş. ("*Akkim*"). [15] The decision of the Board provides valuable insights in terms of the assessment to be made on conglomerate mergers and acquisitions, in which the relationship between the parties to the concentration is not purely horizontal (*i.e.*, as competitors in the same relevant market) or vertical (*i.e.*, as supplier and customer).

In this decision, the Board specified the affected markets where the activities of the transaction parties overlapped, as the markets for (i) sodium carboxymethyle cellulose ("*CMC*"), (ii) sodium percarbonate, (iii) sodium hydroxide ("*caustic*"), and (iv) acetic acid. Accordingly, the Board indicated that acetic acid was imported and then sold by Akkim, while USK utilized the respective product as an intermediate input for the production of CMC. Similarly, caustic, which was supplied (and also produced) by Akkim was being used as a raw material input in USK`s production of CMC. Lastly, CMC is also characterized as an intermediate input in the production of sodium percarbonate, by Akkim. That being said, the Board refrained from ultimately defining the relevant product markets for the purposes of its merger control assessment, by way of underscoring that, even under the narrowest market definition, the transaction would not restrict the effective competition.

In terms of the competitive assessment regarding this transaction, the Board first indicated that the transaction would only give rise to vertical overlaps between the activities of the merger parties. The Board further remarked that vertical mergers and acquisitions may have positive effects, such as the reduction of transaction costs, efficiency gains, the reduction of prices, and enabling consumers to benefit from "one-stop shopping." On the other hand, the Board underscored that vertical concentrations may lead to anticompetitive market foreclosure in cases where the combined entity has the ability and the incentive to prevent the access of its competitors to the supply. Accordingly, the Board remarked that the most significant aspect of the assessment regarding a non-horizontal concentration concerns the determination of input and customer foreclosure effects.

Following this line of reasoning, the Board evaluated the transaction parties' market shares in the affected markets, and scrutinized whether the combined entity would have the ability and incentive to refuse to sell input (*i.e.*, acetic acid and caustic) to USK's competitors in the market for CMC. The Board ultimately determined that the combined entity would not have the ability to induce input foreclosure, given that Akkim's market share in terms of acetic acid and caustic was at a moderate level, and that there were several competitors that enjoyed a greater market share than Akkim.

The Board further observed that there was both a vertical relationship and also a complementary relationship between CMC and sodium percarbonate, (which were being produced by Akkim and USK, respectively) as they are both used in the powder detergent industry, but are not substitutable products for each other. To that end, the Board concluded that there

[15] The Board's decision numbered 21-08/120-52 and dated February 18, 2021.

was a complementary relationship between these products, and decided that they could be deemed as weak substitutes for each other.

Following from the above analysis, the Board referred to "conglomerate concentrations" as concentrations that are "implemented between the providers of complementary products, products which are weak substitutes for each other, or products in the same series," in parallel with the definition provided in the Guidelines on the Assessment of Non-horizontal Mergers and Acquisitions ("*Guidelines*"). The Board further remarked that the main concern in conglomerate concentrations is the possibility that the combined undertaking proceeds to engage in market foreclosure by way of bundling or tying. Accordingly, the Board assessed the transaction parties' market shares in the markets for CMC and sodium percarbonate, and concluded that, despite Akkim's high market share in the sodium percarbonate market, the complementary relationship between CMC and sodium percarbonate would not impede the effective competition in the relevant market, given that there were various competitors in the CMC market. Additionally, the Board pointed out that there were numerous buyers (*i.e.*, powder detergent producers) in the relevant market; thereby, any potential tying or bundling conduct would not be likely to have foreclosure effects. Additionally, in consideration of the fact that the combined entity would not be the sole supplier of the respective products and that there would be alternative suppliers in the market, the Board concluded that the possibility of impediment of the competition in the market was far-fetched in this case. Lastly, the Board also evaluated the efficiency gains that might stem from the conglomerate concentration and remarked that the combination of CMC and sodium percarbonate activities might reduce the cost to customers, who could take advantage of a "one-stop shop" regarding the respective products following the completion of the transaction.

As regards the vertical relationship between CMC and sodium percarbonate, the Board remarked that an assessment was necessary as to whether it would be rational and possible for the combined entity to restrict CMC sales to its competitors in the sodium percarbonate market, considering that both USK and Akkim maintained significant market shares in the markets for the respective products. Within the scope of its ensuing assessment, the Board found that negligible amounts of CMC are used in sodium percarbonate production, and also determined that USK had a production capacity far exceeding its CMC demand and that Akkim had no domestic competitors producing sodium percarbonate in Turkey. Therefore, the Board evaluated that these factors would support the conclusion that Akkim would have no incentive to implement input foreclosure in terms of CMC. Additionally, the Board concluded that it was not likely for the competitors to be excluded from the relevant market, given that potential competitors willing to produce sodium percarbonate in Turkey could easily purchase CMC from suppliers other than USK.

Finally, in terms of the customer foreclosure effects regarding the combination of CMC and sodium percarbonate activities, the Board indicated that the combined entity could not induce customer foreclosure. In other words, the combined entity could not viably refuse to purchase CMC from competing CMC suppliers, given that CMC is utilized as an input in many products and industries, such as powder detergents, drilling chemicals, mining industry, paper industry, ceramics industry, batteries and dyes, and thus, there would always be alternative customers for competing suppliers of CMC.

In light of the foregoing, the Board ultimately concluded that the transaction would not significantly impede the effective competition in the markets, and decided to approve the transaction unconditionally. The Board's reasoned decision provides a thorough analysis and constitutes a valuable resource for competition law practitioners, given that it is a recent assessment with regards to the concentrations that involve conglomerate effects.

Employment Law

The High Court of Appeals in a Recent Decision [16] ***Clearly Acknowledged and Recognized Corporate Separateness as a Valid Criterion for the Obligation of Equal Treatment***

Turkish labor law dictates that employers are obliged to treat their employees who are working under the same conditions equally, regardless of the type of employment, professional capability, or gender, among others. This is one of the most important foundations of Turkish labor law and one of the fundamental principles of labor law practice in Turkey, especially when it comes to employment-related receivable claims.

This equal treatment obligation for employers was recently used as the legal basis for a claim brought by an employee against its employer. In the said dispute, the plaintiff (*i.e.*, the former employee of the defendant) claimed that, after the defendant employer had been acquired by a group company, several types of compensation that were being paid to the employees of the group company had not been paid by the defendant employer to its own employees, and accordingly argued that: (i) tenure incentive premiums, (ii) executive compensation, (iii) additional duty compensation, (iv) allowance for employee accommodation, (v) duty compensation, (vi) performance bonuses, (vii) fuel allowance, (viii) leave travel allowance, (ix) religious holiday allowance, and (x) allowance for education expenses, should be paid by the defendant employer. After the case was brought before the labor court of first instance, the above claims of the plaintiff were partially accepted and the Court only ruled in favour of the claims pertaining to (a) performance bonuses, and (b) executive compensation.

The decision of the first instance court was appealed by both parties. Subsequently, the Regional Court of Appeals rejected the objection/appeal of the defendant employer, while the objection/appeal of the plaintiff, which pertained to the payment of the remaining types of compensation (*i.e.*, all other payments except for performance bonuses and executive compensation), was partially accepted. The Regional Court of Appeals pointed out that the group company had made an announcement that the additional types of payments or allowances of any kind were to be combined under the name of "job compensation," and accordingly, concluded that the plaintiff had fulfilled the requirements for receiving this "job compensation." It was also indicated by the Regional Court of Appeals that the plaintiff had satisfied the requirements of receiving tenure incentive premiums as well, since the employment relationship had lasted more than 20 years after the acquisition of the defendant employer. In conclusion, the Regional Court of Appeals decided that, since the workplace practices of the parent company had generated an entitlement for the plaintiff, the plaintiff was also eligible to claim the allowance for education from the affiliate (defendant) company. So, the Regional Court of Appeals' reasoning for this assessment was that the defendant, which was the affiliate company employing the plaintiff, was obliged to pay an allowance for education to its employees, due to the workplace practices of the parent company. It should be noted that this particular interpretation of the Regional Court of Appeals with respect to the obligation of equal treatment might create an obligation for every affiliate company to align itself with the

[16] The decision of the High Court of Appeals, dated March 23, 2021, and numbered 2021/2786 E. 2021/6672 K.

workplace practices of its parent company or group companies. This decision of the Regional Court of Appeals was then further appealed by the defendant employer.

As a result of the appellate review, the High Court of Appeals determined that, even though the parent company (which was not a party to the legal proceedings) had acquired the defendant employer, the parent company and the defendant employer were nonetheless separate and independent employers, and thus, there was no obligation to grant the rights of the employees of the parent company to the employees of the defendant/affiliated company. In its reasoning, the High Court of Appeals stated that the employers (*i.e.*, the parent company and the affiliated company) were different and separate corporate persons; thus, they would be considered separate employers as well, and it therefore follows that it is not possible to compare the employees of different employers to one another with respect to the obligation of equal treatment.

Simply put, the High Court of Appeals ruled that it was not legally permissible for the employees of the affiliated company to claim for themselves the additional rights that were provided to the employees of the group companies of the employer. Accordingly, the High Court of Appeals reversed the decision of the Regional Court of Appeals with respect to the education allowance payments.

The High Court of Appeals clearly sets forth, through this recent decision, that the fundamental criterion in the assessment of the limits of the obligation of equal treatment is "corporate separateness." It can be reasonably deduced from this precedent that, even if separate corporate employers have the same shareholders, or even if one such employer is acquired by the other, as long as corporate separateness is maintained, the obligation of equal treatment of employees will not extend to separate employers, regardless of the fact that these companies may be group companies or share a parent company.

Litigation

Consequences of Initiating Execution Proceedings notwithstanding the Arbitration Clause in an Agreement under Turkish Law

I. Introduction

Under Turkish law, the preliminary objections lodged in commercial court proceedings play a significant role in determining the outcome of such cases. These objections are exhaustively listed in the Civil Procedure Code ("CPC") Article 116, and can only be set forth in the response petition, as per Article 117. These preliminary objections comprise:

1. Objection to the jurisdiction, and
2. Objection as to the requirement of arbitration, meaning that the dispute in question must be resolved by way of arbitration.

Preliminary objections are to be considered and resolved before the court delves into the merits of the case. However, what would happen if one of the parties initiated an execution proceeding instead of filing a lawsuit, notwithstanding the arbitration clause in the agreement entered into between the parties?

II. Opinions in the Doctrine

The opinions in the doctrine on this subject diverge into two different directions: Kuru is of the opinion that, "*the arbitration agreement prevents the parties from filing a lawsuit before the court. Since the execution proceeding without judgment is not a lawsuit, the creditor can initiate an execution proceeding without judgment despite the arbitration agreement.*"[17]

[17] Kuru, B., *Civil Procedure Law,* Vol. 6, Istanbul 2021, p. 5981.

Yeşilova, on the other hand, maintains that, "*since the arbitration agreement excludes the state jurisdiction (not just courts) in terms of adjudication on the merits of the dispute between the parties; in that case, under Turkish law, the initiation of execution-bankruptcy proceedings without a judgement should not be possible due to a given arbitration agreement, which is seen as a compulsory enforcement institution at first glance and especially in terms of the place where it is regulated, but in fact, the existence-absence of money receivables is the subject of adjudication.*"[18]

III. Case Law

In a case where parties entered into a sales agreement containing an arbitration clause to be administered by the International Chamber of Commerce, the claimant asserted that an advance payment had been made to the defendant, the defendant had failed to deliver the good in question, the claimant had waived its request for delivery and requested for the return of the advance payment, and upon non-payment of the refund of the advance payment, it had initiated an execution proceeding against the defendant. The defendant objected to the execution proceeding and the claimant filed a lawsuit arguing that the alleged objection was unfair and that it should be removed so that the execution proceeding could continue.

In opposition to these claims, the defendant expressed the view that the agreement entered into by the parties contained an arbitration clause which should be enforced, and therefore, the case should be dismissed.

During the adjudication before the court of first instance, the Court found that the elements of the arbitration clause (partaking in the general conditions annexed to the sales agreement) fulfilled the validity criteria prescribed by the applicable law, and therefore, dismissed the request of the claimant. The claimant appealed this decision before the Regional Court of Appeal.

As a result of the examination of the Regional Court of Appeal, the Court approved the decision of the court of first instance, and thus dismissed the case.

Finally, the claimant appealed the decision before the High Court of Appeals, which is the last course of ordinary remedies under Turkish law. In its decision dated March 11, 2021, the 11th Civil Chamber of the High Court of Appeals found that the legal examination conducted by the lower courts was on point, and dismissed the case by affirming the decision of the Regional Court of Appeal.[19]

IV. Conclusion

According to the Execution and Bankruptcy Law No. 2004, the parties are given a general right to initiate execution proceedings without a judgement, and there is no limitation with respect to the arbitration clause in terms of the exercise of this right. As a natural consequence of this, the parties can simultaneously resort to arbitration and execution proceedings without a judgement. However, it should be noted here that, by concluding an arbitration agreement, the creditor and debtor of the proceedings are considered to have demonstrated their will to finally resolve their disputes through arbitration.

Therefore, in a given lawsuit within the scope of the CPC, defendants will be entitled to assert their arbitration objection as a preliminary objection, which will result in the dismissal of the case without reaching its merits, provided that the

[18] Yeşilova, B., *With Respect to (Preliminary) Arbitration Objection - In Regards to the Jurisdiction of Arbitrators - Examination of Courts and Its Consequences,* Izmir 2009, p. 534.

[19] The decision of the 11th Civil Chamber of the High Court of Appeals, dated January 10, 2019, and numbered 2020/2958 E. 2021/2325 K.

arbitration agreement in question is in compliance with the relevant provisions of Turkish law.

Data Protection Law

Recent Decisions of the Turkish Data Protection Board

The Turkish Data Protection Board ("***Board***") has released two sets of decisions on June 21, 2021, and on July 5, 2021. Below are brief summaries of these decisions in chronological order:

I. Decisions Published on June 21, 2021

These decisions touch upon various legal topics, but are mainly related to data security issues.

Decision dated April 27, 2021, and numbered 2021/426[20]

This decision concerned a data breach that occurred as a result of an erroneous authorization that was granted to a partner company, which enabled it to access the notifications opened by other companies in the help-desk panel that was used by the e-commerce website. The Data Protection Board ("Board") stated that the data controller had failed to fulfill its obligation to take sufficient technical and administrative measures, and to inform the Board within 72 hours, and thus imposed 400,000 Turkish Liras in total administrative fines to the data controller.

As the data controller in question provided information technology services, the Board indicated that it would be expected that the data controller would be more diligent in information systems security. The Board pointed out that the data controller had carried out the update in a live environment, which caused the relevant breach, whereas software development processes should be conducted in a test platform.

The Board also instructed the two other data controllers (one public and one private institution) related to the incident to pay due care and attention to the Board's information requests, as they had failed to respond to them in the past.

Decision dated April 27, 2021, and numbered 2021/427[21]

The decision involved the access of a partner company on an e-commerce site to the data of third parties on a customer service panel, once again due to authorization being incorrectly granted to unauthorized parties. The Board noted that it is not possible to retrospectively eliminate the data breach that has occurred, through the subsequent signing of a non-disclosure agreement. Therefore, the Board decided to impose an administrative fine in the amount of 800,000 Turkish Liras to the data controller for failing to fulfill its obligation with regard to implementing appropriate technical and administrative measures, and for not informing the Board and the affected parties in time.

Decision dated May 6, 2021, and numbered 2021/470[22]

This decision concerned the additional security measures implemented while providing information to a data subject, within their right to request information and access to their own data, partly due to the fact that the data subject's e-mail address was part of a third-party e-mail service.

In this case, the data subject submitted a request to a meal-card operator company, which was the data controller, to transmit the details of the account transactions in the meal-card that had been allocated to

[20] See https://kvkk.gov.tr/Icerik/6980/2021-426 (Last accessed on August 16, 2021).

[21] See https://kvkk.gov.tr/Icerik/6981/2021-427 (Last accessed on August 16, 2021).

[22] See https://kvkk.gov.tr/Icerik/6982/2021-470 (Last accessed on August 16, 2021).

him by his employer. The data controller then requested additional information to verify the data subject's identity, and ultimately asked the data subject to call a specific number to obtain the password to gain access to the data that was delivered to the data subject's third-party e-mail account.

After determining that the security measure in question did not impose a disproportionate burden on the data subject, the Board referred to its decision of May 31, 2019, numbered 2019/157, and stated that, depending on whether or not the relevant e-mail service is used, the sent and received e-mail messages would be stored in a number of data centers located in various parts of the world. Therefore, the Board found that the data controller's additional security measures did not violate the Turkish Data Protection Law; on the contrary, the Board concluded that the data controller's actions were a diligent application of it, and decided not to take any action against the data controller.

II. Decisions Published on July 5, 2021

All of the decisions published on July 5, 2021, are related to data breaches. The Board frequently refers to the Data Protection Authority's ("DPA") Guidelines for Personal Data Security, and some of those include references to a security measure recommendation of the DPA that is similar to privacy by design/by default, mostly in the form of providing earlier risk assessments and the development and maintenance of information technology systems.

Decision dated March 12, 2020, and numbered 2020/216[23]

This decision concerned a data breach that had occurred as a result of a cyberattack on an IT company. The Board imposed 450,000 Turkish Liras in total administrative fines to the data controller on the grounds that the data controller had not fulfilled its obligation to provide a privacy notice for a certain processing activity, and had failed to implement the necessary technical measures by not employing sufficient control and identification mechanisms, by not remedying system vulnerabilities, and by not erasing credit card data that were no longer necessary.

Decision dated June 16, 2020, and numbered 2021/464[24]

This decision is related to a data breach that occurred, due to e-mail messages (including the payroll information of certain employees) being sent to the personal e-mail addresses of other employees. The Board stated that the data controller had not fulfilled its obligation to implement the necessary technical and administrative measures, and as the privacy notice was not sufficiently informative, decided to impose an administrative fine of 60,000 Turkish Liras on the data controller.

The Board also pointed out that the data controller had failed to evaluate the relevant risks, as indicated in the Guidelines for Personal Data Security and emphasized that, when data controllers do not obtain a business e-mail service and use the personal e-mail addresses of employees for sending business related e-mail messages, this can lead to the storage of employee/business data in servers in various countries around the world and the subsequent loss of control over the data.

Decision dated June 16, 2020, and numbered 2020/466[25]

This case entailed a data breach that had taken place as a result of unauthorized access to the data processor's systems in

[23] See https://kvkk.gov.tr/Icerik/6992/2020-216 (Last accessed on August 16, 2021).

[24] See https://kvkk.gov.tr/Icerik/6994/2021-464 (Last accessed on August 16, 2021).

[25] See https://kvkk.gov.tr/Icerik/6995/2020-466 (Last accessed on August 16, 2021).

an insurance agency. The Board declared that the data controller had not satisfied its obligation to provide the necessary technical and administrative measures, and to inform the data subjects within shortest possible time of the data breach, and consequently imposed 172,000 Turkish Liras in total administrative fines on the data controller.

The Board highlighted the data controller's shortcomings on employee training, the lack of antivirus software, and its failure to ensure that the data processors maintained at least the same level of security as the data controller. The Board also mentioned that, since it had been announced that Windows 7 Professional x64 would be dropping Microsoft Security Essentials installations as of January 14, 2020, continuing to use that operating system indicated a lack of adequate security measures.

Decision dated June 30, 2020, and numbered 2020/511[26]

This decision is related to a data breach that happened in an insurance company, in which a data file including the identity and drug use information of patients was accidentally made available to 11 of its health insurance customers. The Board remarked that the data controller had failed to provide adequate technical and administrative measures, including those related to the protection of special categories of data (in this case the health data), and penalized the data controller in the amount of 100,000 Turkish Liras in total administrative fines.

The Board focused on the failure of the data controller to provide regular controls and documentation of the personal data security policy and procedure practice, as well as its shortcomings with respect to regular vulnerability scans, cryptographic storage, and additional protection of special categories of data, and the development and maintenance of security systems.

Decision dated September 29, 2020, and numbered 2020/744[27]

This case concerned a data breach that occurred in a bank, as a result of an employee sending an e-mail message to a third party that included the data of the bank's customers. The Board determined that the data controller had failed to satisfy its obligation to provide adequate technical and administrative measures, and to inform the Board within 72 hours of such data breaches, and therefore imposed total administrative fines of 275,000 Turkish Liras on the data controller.

The Board remarked that, although employees related to the breach had completed the "Data Protection Law" training over a year ago, they still caused the breach and noted that this raised doubts about the effectiveness and sufficiency of the training. Although the bank possessed a Data Loss Prevention (DLP) system, it did not prevent the breach either, and the administrative and technical measures that the bank had implemented appeared to be insufficient, as the bank personnel could still transfer the personal data of 346 customers to inappropriate and unauthorized third parties.

Decision dated February 25, 2020, and numbered 2021/154[28]

This decision was related to a data breach that took place in an insurance company as a result of a former employee sending e-mail messages that included customers' data to his corporate e-mail address belonging to his new employer. The Board determined that the data controller had not satisfied its obligation to provide sufficient technical and administrative measures, and

[26] See https://kvkk.gov.tr/Icerik/6996/2020-511 (Last accessed on August 16, 2021).

[27] See https://kvkk.gov.tr/Icerik/6997/2020-744 (Last accessed on August 16, 2021).

[28] See https://kvkk.gov.tr/Icerik/6998/2021-154 (Last accessed on August 16, 2021).

penalized the data controller with 150,000 Turkish Liras in total administrative fines.

The Board mentioned several failures related to the operation of the DLP system and the inadequacy of the personal data protection training provided to the employees.

Decision dated March 4, 2021, and numbered 2021/187[29]

The decision involved a data breach that had occurred as a result of a system error in the data processor's system that provided the data controller with information system support services. The Board found that the data controller had failed to provide the necessary technical and administrative measures, including testing and regular controls, and therefore imposed 125,000 Turkish Liras in total administrative fines on the data controller.

The Board highlighted the failure of the data controller to provide development and maintenance of information security systems, regular controls and timely audits, and the identification of unwanted penetrations or unauthorized actions in the information technology systems.

Decision dated March 4, 2021, and numbered 2021/190[30]

The decision concerned a data breach that was a result of an employee reviewing a customer`s ID information, taking a photo of the reviewed data, and exceeding his authorization by sharing it with a third party. The Board declared that the data controller had not fulfilled its obligation to provide the necessary technical and administrative measures, as the data controller's call center team leaders were able to access customer data through limitless inquiries, and thus imposed an administrative fine of 100,000 Turkish Liras on the data controller.

The Board shone a light on the data controller's failure to provide awareness for the roles and responsibilities of its employees, adequately delineate the limitations of their authorizations, and use a warning system before the data breach.

Decision dated March 25, 2021, and numbered 2021/311[31]

This decision was related to a data breach that stemmed from making customer data available to others while copying a website, in case the website stopped functioning properly due to high levels of access demand. The Board once again noted that the data controller had not implemented satisfactory technical and administrative measures, and fined the data controller in the amount of 200,000 Turkish Liras.

The Board focused on the failures of the data controller with respect to the development and maintenance of information technology systems, the requirement of using encryption and masking systems, and the identification of risks.

Decision dated April 20, 2021, and numbered 2021/407[32]

This decision emerged from a data breach that occurred as a result of a doctor removing patient files from the hospital's archive and taking them out of the hospital with the assistance of other employees. The Board concluded that the data controller had failed to fulfill its obligation to provide adequate technical and administrative measures, and to inform the Board within 72 hours of such data breaches, and consequently imposed

[29] See https://kvkk.gov.tr/Icerik/6999/2021-187 (Last accessed on August 16, 2021).
[30] See https://kvkk.gov.tr/Icerik/7000/2021-190 (Last accessed on August 16, 2021).
[31] See https://kvkk.gov.tr/Icerik/7001/2021-311 (Last accessed on August 16, 2021).
[32] See https://kvkk.gov.tr/Icerik/6993/2021-407 (Last accessed on August 16, 2021).

600,000 Turkish Liras in total administrative fines on the data controller.

In its decision, the Board also touched upon the failure of the data controller to mitigate the risks, to provide regular employee training for the protection of special categories of personal data, to maintain and pursue personal data security policies and procedures, to prevent unauthorized physical access to personal data, to provide consistent and accurate policies and procedures and to identify risks and threats.

Internet Law

Constitutional Court Sets Precedent on Freedom of Expression for a Politician's Social Media Posts Regarding Terrorist Activities

The Turkish Constitutional Court recently issued a decision concerning the violation of a politician's freedom of expression, due to his criminal conviction as a result of his retweet of a news article on Twitter about a terrorist organization's (Kurdistan Workers' Party or "PKK") statements.[33]

I. The Facts

Ömer Faruk Gergerlioğlu ("Applicant") is a member of parliament from the Peoples' Democratic Party ("HDP"), and he was convicted in 2018 upon retweeting a news article from 2016 about a statement from the PKK about peace talks and adding a comment that read, "*This call should be evaluated properly. There is no end to this matter. They say that it will happen if Ocalan* [PKK's imprisoned leader] *steps in.*" He was sentenced to imprisonment for 2 years and 6 months on the grounds of propagandizing in favor of a terrorist organization.

The news article in question, whose headline is "*PKK: If the government takes a step, peace will come in 1 month*" is still accessible on the news portal "T24." The relevant news article also includes a photo of three people who are holding rifles, whose faces are not visible and who are considered to be members of a terrorist organization by the public authorities in Turkey. The Applicant's membership to the parliament was terminated and he was removed from public office after his conviction was finalized; with the relevant decision read out loud at the General Assembly of the Turkish parliament. Upon the revocation of his parliamentary immunity, the Ankara Public Prosecutor's Office enforced the sentencing decision and the Applicant was imprisoned in a penal institution on April 2, 2021.

II. The Claims of the Applicant

The Applicant argued in his application that his "right to be elected and to engage in political activities" under Article 67 of the Constitution and his "freedom of expression" under Article 26 of the Constitution had been violated by his conviction, sentencing and removal from office.

III. The Evaluation of the Court

- In terms of the infringement of the right to be elected to public office and to engage in political activities:

After finding that the case was admissible, the Court determined that, as per Article 83/2 of the Constitution, "*A member of parliament who is alleged to have committed an offense before or after election shall not be detained, interrogated, arrested or tried unless the Assembly decides otherwise. This provision shall not apply in cases pertaining to Article 14 of the Constitution, provided that the member is caught in the act of committing a crime requiring severe penalties, and, an investigation had been initiated before the election. (…)*"

[33] The Constitutional Court's Decision numbered 2019/10634, published in the Official Gazette of July 8, 2021.

According to the Court, Article 83 (protecting parliamentary immunity) and Article 14 (prohibiting the abuse of fundamental rights and freedoms) of the Constitution can only function on the condition that they are interpreted within the context of safeguarding the democratic system. Accordingly, the first degree courts have not interpreted such constitutional provisions in a way that would favor these freedoms, and the legal system actually lacks substantive or procedural safeguards that would allow the courts to make such interpretation. Therefore, the Court decided that the continuation of the prosecution of the Applicant despite his parliamentary immunity and his status as a member of parliament was in violation of his "right to be elected and to engage in political activities," which are protected by Article 67 of the Constitution, and this infringement stemmed from the absence of constitutional or legislative regulations ensuring certainty and predictability, which provide fundamental guarantees for the rights listed under Article 67 of the Constitution.

- In terms of the infringement of the freedom of expression:

According to the Court, such an expression cannot be excluded (and thus, criminalized) categorically by evaluating it without giving proper consideration to its content, context or objective meaning, even if such utterances are made by a terrorist organization or a member of a terrorist organization. The Court highlighted that the mere fact that the statement was made by an illegal terrorist organization does not automatically justify or legally validate an interference with the freedom of expression.

Accordingly, the Court assessed the case in question and determined that the relevant comment or the news article (on which it was based) did not encourage or incite violence that could directly or indirectly lead to the commission of criminal/terrorist acts. The Court examined the photograph beside the retweet within the scope of its purpose, style and context, and ultimately concluded that the relevant photo had been used in order to draw the attention of its intended audience and to add credibility to the news article as a journalistic reporting technique, which is a method that is also widely used by national broadcasters.

The Court concluded that, since the statement in question did not include any encouragement to violence, interfering with the expression merely because it was uttered by an illegal or criminal organization infringed on the freedom of expression of the Applicant. Reporting or commenting on newsworthy statements from a terrorist organization, which included the opposing views of politicians as well, could not be interpreted or regarded as advocating for the legalization of a terrorist organization; otherwise, the freedom of the press would be infringed and engaging in journalistic activities would be constrained, if it did not become completely impracticable. Moreover, the relevant news article is still accessible to the public, and it has not been prosecuted or investigated by the public authorities, but the Applicant was convicted due to the fact that he shared this (apparently legal) content. Therefore, the Court concluded that an infringement of the Applicant's freedom of expression had occurred, on the grounds that the conviction decision did not comply with the requirements of a democratic society.

Consequently, the Court unanimously decided that: (i) the continuation of the prosecution of the Applicant despite his parliamentary immunity was a violation of his "right to be elected and to engage in political activities," and (ii) the conviction of the Applicant on the grounds of propagandizing for a terrorist organization due to retweeting a news article (along with adding a comment) infringed on his rights to "freedom of expression."

Telecommunications Law

The New Regulation on the Identity Verification Process in the Electronic Communications Sector

The Regulation on the Verification Process of the Applicant's Identity in the Electronic Communications Sector ("Regulation") was published in the Official Gazette of June 26, 2021, and will enter into force on December 31, 2021.[34] The Regulation introduces new methods and standards for identity verification in the electronic communications sector. Accordingly, the Regulation sets out the procedures and principles to be applied to the identity verification process of those who make requests on their own behalf or on behalf of a real or legal person as its representative ("Applicant"), during the creation of documents ("Transaction Documents") in an electronic medium for the following transactions: (i) subscription contracts, (ii) mobile number porting and mobile operator change applications, (iii) qualified electronic certificates and registered e-mail ("KEP") applications, and (iv) SIM-card change/transfer applications in the electronic communications sector.

The Regulation will be applicable for (i) the operators that provide electronic communications services and/or electronic communications networks and operate their substructure in scope of the authorization, and (ii) the service providers for the qualified electronic certificate and registered e-mail services.
The general principles to be considered during the implication of the Regulation are as follows: (i) ensuring that the Applicant's transactions indicated in the Regulation are carried out with safe and effective methods, (ii) preventing suspicious transactions that pose a security risk (*i.e.*, forgery, fraud), (iii) considering national and international standards, (iv) utilizing national resources to the fullest extent possible, (v) observing national security, public order, and emergency requirements, and (vi) observing consumer rights and interests.

I. Identity Verification Methods

The Regulation adopts four different methods for identity verification, which are as follows: (i) identity verification through the e-Government System, (ii) identity verification through artificial intelligence or a representative, (iii) identity verification via the Turkish Republic Identity Card by creating PAdES-LTV (which stands for "PDF Advanced Electronic Signatures and Long-Term Validation") in face-to-face applications, and (iv) identity verification through video recording in face-to-face applications.

(i) *Identity verification through the e-Government System:* In this method, the Applicant must sign into the e-Government system with one of the following methods: (i) secure electronic signature, (ii) Turkish identity card, (iii) Internet banking, or (iv) mobile banking. In order to verify the identity of the Applicant, relevant information regarding the transaction and the Transaction Documents is provided to the Applicant and the approval of the Applicant is received. Upon the receipt of approval, the Applicant's verified identity, as well as the verified contact number and e-mail address, are conveyed to the operator or service provider.

(ii) *Identity verification through artificial intelligence or a representative:* In this method which utilizes video conference technology, the verification must be conducted in real time and without interruption through end-to-end secured communication. The single-use password or link must be sent to the Applicant's mobile number or e-mail address to confirm the contact information. The identity information, including the identity card

[34] See https://www.resmigazete.gov.tr/eskiler/2021/06/20210626-21.htm (Last accessed on August 16, 2021).

photo of the Applicant, is received via near-field communication method ("NFC"), enabling wireless communication between two adjacent electronic devices (*i.e.*, within a short distance to each other), as indicated in Annex-1 of the Regulation and in accordance with the stipulated standards. The validity and authenticity of the received identity information are verified as part of the process. Comparing the applicant's identity card photo with their real-time image is made through artificial intelligence as per Annex-2 of the Regulation, or through an authorized representative of the operator or service provider, as per Annex-3 of the Regulation. According to Annex-3, the identity verification through a representative must be checked through artificial intelligence as well; otherwise, the verification through a representative without artificial intelligence will be deemed invalid.

In terms of the protection of personal data, the Regulation sets forth that an Applicant's explicit consent must be obtained in scope of the Law on the Protection of Personal Data No. 6698 ("Law No. 6698"). Before the verification through artificial intelligence or a representative with video conference, operators and service providers must fulfill their obligation to inform the Applicant under the Law No. 6698, separately from obtaining their explicit consent. While obtaining the explicit consent of the Applicant, it must be clearly indicated that the identity verification process in an electronic medium can also be conducted through the e-Government system or via face-to-face applications.

(iii) *Identity verification via the Turkish Republic Identity Card by creating PAdES-LTV in face-to-face applications:* In this method, the identity of the Applicant may be verified by creating an enhanced PDF electronic signature ("PadES") with a long-term validation ("PadES-LTV") with the Applicant's Turkish Republic Identity Card, in accordance with Annex-4 of the Regulation.

(iv) *Identity verification through video recording in face-to-face applications:* In this method, as an alternative to verification by creating a PadES-LTV, the identity of the Applicant may be verified by video recording of the Applicant specifically dedicated to the transaction, along with their Turkish Republic Identity Card or other identity card. The requirements in scope of the Law No. 6698 explained in the foregoing section regarding identity verification through artificial intelligence or a representative are also applicable for this type of verification method. In this method, the Regulation prohibits operators and service providers from obtaining an Applicant's biometric data through pressure, acceleration or similar methods, except for statistical data, such as a two-dimensional figure of the Applicant.

In the face-to-face applications of methods (iii) and (iv), the single-use password or link must be sent to the Applicant's mobile number or e-mail address in order to confirm the contact information.

II. Obtaining Biometric Data Electronically

The Regulation prohibits operators and service providers from obtaining the biometric data of Applicants electronically by using an electronic pen or similar methods, save for Article 7 and Article 8 of the Regulation, and TS 13678 Electronic Identity Verification System standard (such as the statistical data exception, *e.g.*, obtaining a two-dimensional figure of the Applicant).

Adopting a similar approach in terms of biometric data, the decision of the Turkish Data Protection Board (dated August 27, 2020, and numbered 2020/649), [35] states that (i) biometric signatures are considered as biometric data, which is categorized as sensitive/special category data under the Law No. 6698, and thus, (ii) biometric signatures can only be processed after obtaining explicit consent, or if it is clearly prescribed by law, (iii) as the provisions under the Turkish Code of Obligations No. 6098 do not meet the requirement of being prescribed by law, biometric signatures cannot be processed without explicit consent. The decision of the Board disallowing the processing of biometric signatures without explicit consent is in parallel with the Regulation prohibiting the procurement of biometric data electronically.

When comparing the Regulation and the relevant European Union legislation (European Union Electronic Identity and Trust Services - "eIDAS Regulation" (EU) 910/2014 on electronic identification and trust services for electronic transactions in the internal market),[36] we observe that the eIDAS Regulation does not include any provisions specific to biometric data, and that it defines electronic signatures more broadly, as it might cover biometric signatures as well. As per Article 3(10) of the eIDAS Regulation, "*electronic signature' means data in electronic form which is attached to or logically associated with other data in electronic form and which is used by the signatory to sign.*"

III. Data Security

Pursuant to the Regulation, the operators and service providers must take certain measures for storing the identity verification information of the Applicants by ensuring the privacy, security, and integrity of the transaction records. The operators and service providers are also responsible for taking the necessary security measures with respect to the use of video conferencing technology in identity verification through artificial intelligence or through a representative.

Moreover, the transactions conducted within the scope of the Regulation must be recorded and the data obtained must be used solely for the purposes of identity verification of the Applicant and the administrative and judicial authorities' processes. According to the Regulation, such data must be stored for the period of time that is stipulated under the relevant legislation.

The operators and service providers must take all technical and administrative measures stipulated under the relevant legislation, including the Law on Electronic Communication No. 5809 and the Law No. 6698, as well as acting in accordance with the applicable national and international standards.

IV. Administrative Sanctions

In case of failure to comply with the Regulation, the administrative fine sanctions regulated under the Law on Electronic Signature No. 5070 and the Regulation on the Administrative Sanctions of the Information and Communication Technologies Authority will be applicable. Operators and service providers bear the burden of proof in all transactions, including objections to the administrative or judicial processes.

V. Transition Period and Enforcement

The Regulation will enter into force on December 31, 2021. The burden of proof regarding the Transaction Documents including biometric signatures will be on the operators and service providers. Operators and service providers must take necessary measures in order to prevent the use of three-dimensional signature design. Within 3 months as of the entry into force of the Regulation, the operators and

[35] See https://www.kvkk.gov.tr/Icerik/6815/2020-649 (Last accessed on August 16, 2021).
[36] See https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0910&from=EN (Last accessed on August 16, 2021).

service providers are required to submit information indicated in the Regulation to the mobile electronic communication operators and the e-Government information system.

VI. Conclusion

The Regulation introduces new methods and standards for the identity verification process, including the use of artificial intelligence as a new technological improvement in such processes. The principles defined under the Regulation are expected to strengthen the security of the processes that are applied in the electronic communications sector. Operators and service providers might prepare an action plan and take necessary measures and steps as stipulated under the Regulation, in order to ensure that they will be able to comply with the Regulation within the transition period.

White Collar Irregularities

An Introduction to Internal Investigations: Conducting Interviews

In the context of internal investigations, a small but rather significant step to be taken—which should preferably be also included in the investigation plan—between the stages of designing an effective investigation plan and moving onto the interview and document review phases, is the gathering and preservation of documents and files, including e-mails, databases, spreadsheets, and graphics that may contain information related to the subject matter of the investigation.

As soon as practically feasible, the investigation team can start to notify and instruct the persons that might be potentially affected by the subject matter, to hold and preserve any documents and files that might be relevant to the investigation. It would be beneficial for this notice to sufficiently identify and specify the issue being investigated, while also preserving the confidentiality of the investigation, in order to ensure that all relevant documents are preserved by the employees.

Since an effective internal investigation would naturally be required to comply with all the applicable laws in order to eliminate any risk of fines, penalties or lawsuits against the company, international companies (in particular) have the responsibility to ensure that their investigation complies with all local laws, especially in terms of the collection and use of employee data. Regardless of the country that the company operates in, strong documentation is always beneficial for dealing with any potential scenarios in which the company might be required to prove its compliance or defend itself against compliance-related claims. Thus, the company would greatly benefit from always recording the source, date, and the file from which documents are obtained.

While a considerable amount of information may be gathered through documents, and the document review process might prove very fruitful, interviews to be conducted with employees (or other relevant individuals) inside or outside the company are also very important sources of information, especially for interpreting and understanding the contents of the documents and directing the investigation team toward key information.

It is usually most beneficial for the investigation team to begin conducting the interviews at an early stage, even before the document review, as this ensures that the investigation team can quickly gather a better understanding of the situation and provides an opportunity to talk to the witnesses before they are influenced by the strains of the ongoing investigation. However, as the document review process also offers a great deal of insight into the matter being investigated, a second round of interviews following the document review stage can always be considered in order to shed further light on the information gathered so far. The investigation team should carefully consider this strategy if they are able to get more than one chance to conduct interviews with the witnesses.

As witnesses might be in possession of valuable information that could help the investigators to fill in the blanks in their understanding of the case, the interview stage is of the utmost importance. It should also be kept in mind that witnesses might not always relay accurate information. Therefore, the investigation team must meticulously plan, prepare, and conduct the interviews by: (i) collecting and reviewing the relevant documents beforehand, (ii) preparing their opening and closing statements, and (iii) having a detailed but also flexible draft of the questions to be directed at the witnesses, tailored to the information that a specific witness might provide.

An effective interview should also be executed strategically, where the witnesses must be approached in a manner that comports with their personal position with respect to the matter under investigation. For instance, intimidating a witness in a critical position might lead to unfruitful exchanges with the relevant witness and a missed opportunity for advancing the investigation.

Another vital component of a successful investigation is interviewing the witnesses in accordance with their knowledge, involvement and relationship to the matter being investigated. By engaging with witnesses in this way, the investigation team could gather information in the most effective manner before interviewing the more important category of witnesses, and could determine the specific information that they need to obtain from those individuals. It would also prove advantageous to interview witnesses who might have information on similar subject matters in parallel with each other, in terms of the timing of the interviews and determining and organizing the questions to be asked.

In addition to the foregoing, face-to-face interviews are more likely to yield clearer communications and better insights as to the credibility of the witness, compared to a telephone interview or written communications. Furthermore, such interviews could also prove more effective if conducted and attended by at least two individuals, to facilitate recollection of the witness statements and to enable one individual to focus on conducting the interview while the other interviewer takes notes. If possible, it would be preferable to have the same individuals interview all witnesses that are likely to provide information related to similar/related subjects.

Lastly, it is advisable for one of the interviewers to prepare the minutes of the interview (*e.g.*, in a memorandum) as soon as possible after the witness interview is completed, and the memorandum should contain all pertinent information, such as the date, time, and location of the interview, the names of the persons in attendance at the interview and witness statements noted during the interview, including the required warnings regarding confidentiality.

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