ISSN 2147 – 558X

ELİG
GÜRKAYNAK
Attorneys at Law

LEGAL INSIGHTS QUARTERLY

March 2022 – May 2022

LEGAL INSIGHTS QUARTERLY

March 2022 – May 2022

March/ Mart, Istanbul

Yayın Türü / Type of Publication
Yerel Süreli / Local Periodical

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

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

ISSN 2147 – 558X

Preface to the March 2022 Issue

The March 2022 Issue of Legal Insights Quarterly was prepared to provide an extensive look on the noteworthy developments in ten different areas of law, as well as the foremost contemporary legal agenda of the first quarter of 2022 in Turkey.

At the outset, the Corporate Law section explains the liquidation procedures of Turkish joint-stock companies through a step-by-step guide and insight on the process.

Competition Law section brings forth summaries and analysis of the Turkish Competition Board's prominent decisions and substantial developments of this quarter through seven articles. The section initially summarizes a landmark decision where the Administrative Court quashes the Competiton Board's decision by setting forth the mandatory legal service requirements as well as shedding light on the economic unity approach by preventing Authority's reliance on the economic unity principle for the request of foreign affiliate information from Turkish subsidiaries. The section continues with a first decision of its kind where the Competition Board terminates a preliminary investigation subsequent to commitments, as well as discussing a notable decision interfering with the structure of undertakings while issuing a monetary fine for price-fixing. Moreover, the section examines the standard of proof in transfer of control prior to Board's approval in light of a recent decision, and discusses the Board's comprehensive analysis in a decision where the acquisition was unconditionally approved. Further, the section focuses on the deletion of documents during on-site inspections and finally addresses the Turkish Competition Authority's recently published Preliminary Report on Financial Technologies in Payment Services.

The Employment Law section sheds light on the "limitation on territory" in non-compete agreements litigation, within the scope of a recent decision of the Regional Court of Appeals.

The Internet Law section discussess the Constitutional Court`s recent pilot-judgment on access bans while the Telecommunications Law section, acquaints readers on the newly introduced amendments on consumer rights in electronic communication sector.

Finally, the White Collar Irregularities section summarizes the enforcement actions and highlights pertaining to the Foreign Corrupt Practices Act in 2021.

This issue of the Legal Insights Quarterly newsletter addresses these and several other legal and practical developments, all of which we hope will provide useful guidance to our readers.
March 2022

Corporate Law

Liquidation of Turkish Joint-Stock Companies

I. Introduction

From a Turkish corporate law perspective, liquidation is a mandatory method for termination of joint-stock companies. In order to liquidate a joint-stock company, the provisions of the Turkish Commercial Code numbered 6102 ("TCC"), the Regulation on Trade Registry and the articles of association of relevant company must be taken into consideration.

Types of liquidation in joint-stock companies can be classified as (i) voluntary and (ii) compulsory. Voluntary liquidation basically refers to the liquidation process that was initiated by shareholders of a joint-stock company without any litigation process, while the compulsory liquidation decision is given by an authorized court upon the lawsuit initiated by the creditors, the Ministry of Trade or certain shareholders, under certain specific circumstances.

In this article, we will briefly explain the voluntary liquidation process along with the relevant legal steps.

II. Voluntary Liquidation Process

There could be several reasons which can lead a joint-stock company to voluntary liquidation. Some of these reasons may be listed as follows: (i) if the joint-stock company has fulfilled its purposes and the shareholders no longer need or desire to maintain their business and legal personality of the company, or (ii) if joint-stock company was established for a limited period of time per the articles of association or (iii) if the shareholders consider that the joint-stock company no longer represents their interests.

To duly commence the liquidation process, first, the general assembly of the joint-stock company shall convene and adopt a resolution on this matter.

The general assembly resolution shall include the appointment of liquidation officer(s) who could be nominated from among the shareholders and/or third parties. It is possible to appoint more than one liquidation officers, provided that at least one officer is a Turkish citizen and resides in Turkey. Liquidation officers shall take all necessary and precautionary measures to protect the best interest of the joint-stock company and are expected to conclude the liquidation process within a reasonable period without any undue delay. Duties of liquidation officers are mainly collecting any unpaid capital contributions of the shareholders, converting assets of the joint-stock company into cash, collecting the receivables of the company and paying all its debts, etc. Liquidation officers can be dismissed at any time by the general assembly. In addition, liquidation officers may be held legally liable for the transactions they have made during the liquidation process.

Unless a higher quorum is required under the articles of association, affirmative votes of those shareholders representing 75% of the total share capital of the company are required for the respective liquidation decision of the general assembly. Once the general assembly resolution is adopted, said resolution shall be notarized, registered with the trade registry and announced in the Turkish Trade Registry Gazette. Upon registration and announcement of the general assembly

resolution, the joint-stock company will automatically enter the liquidation process. During this process, the wording stating that the company is "under liquidation" (*tasfiye halinde*) shall be added to the title of the company. Therefore, it will become public information that the company has entered into liquidation. From that point onwards the company's activities and the authorisations to bind and act on behalf of the company shall be restricted to only those that are necessary for the liquidation.

Upon commencement of the liquidation process, the liquidation officers must prepare the initial balance sheet and inventory, identify the creditors and invite the creditors for collection of their debts from the company. The initial balance sheet and inventory are submitted to the general assembly for shareholders' approval. The invitations to the creditors shall be made with registered mail for those creditors whose addresses are known to the joint-stock company. For creditors whose addresses cannot be identified, three consecutive announcements shall be published in the Trade Registry Gazette with one week intervals, in addition to the notice on the company website and by other means as may have been stipulated in the company's articles of association. In case some of the creditors do not notify their claims within the given time, then the amount owed to such creditors shall be deposited at a bank account to be determined by the Ministry of Trade. Upon the third announcement in the Turkish Trade Registry Gazette, there is a minimum three month waiting-period for the shareholders for the completion of the liquidation. Three months after the date of the third creditors` announcement, any remaining assets the joint-stock company's may be distributed to the shareholders in proportion with their shares in the paid-up share capital.

III. De-registration from the Trade Registry

It is important to note that the joint-stock company will maintain its existence and legal status until the completion of the liquidation process. After completion of all the necessary steps for the liquidation, a separate general assembly meeting shall be held for de-registration of the joint-stock company from the registry records. A resolution approving the final and definite balance sheet shall be adopted by the shareholders at this second general assembly meeting.

Having held the general assembly meeting confirming that all the condition for de-registration of the company are met, the liquidation officers shall apply to the competent Trade Registry Office for de-registration and announcement of it in the Turkish Trade Registry Gazette.

IV. Conclusion

The TCC and its secondary legislation govern the conditions and procedures of the liquidation process for joint-stock companies in Turkey. Since liquidation of a joint-stock company eventually triggers the termination of the company and its legal personality, the lawmaker has primarily aimed to protect the rights and receivables of the company`s creditors and therefore, it has set forth certain announcement requirements and waiting-periods to conclude the voluntary liquidation process.

Banking and Finance Law

Neobanking in Turkey: Digital Banking Regulation Comes into Force

I. Introduction

As the first step for establishing the novel branchless banking model (also known as neobanking) in Turkey, the Banking Law No. 5411 (the "**Law**") was amended to enable banks to conclude contracts in electronic media and remove formalities which require in-person contacts. Subsequently, the Regulation on Operating Principles of Digital Banks and Service Model Banking (the "**Regulation**") entered into force on January 1, 2022. The Regulation sets out the activities of branchless banks which provide services only through online banking services, as well as banking services to be provided to financial technology companies and other enterprises as a service model. In this article, we will focus on some of the most significant points and novelties of the Regulation.

II. Digital Banks

Digital banks are defined under the Regulation as "*credit institutions which provide banking services through electronic banking services distribution channels instead of physical branches*." As per Article 6 of the Regulation, they are required to open at least 1 (one) brick-and-mortar workplace for physical presence (referred to as "physical access points") for the purposes of handling customer complaints.

Digital banks are allowed to carry out all kinds of activities which the credit institutions can, unless otherwise provided in the banking legislation. They are required to publish the continuity percentages for the services they have undertaken to provide, on their websites. Continuity percentage for internet banking and mobile banking distribution channels cannot be below 99.8%. Continuity percentage is defined under the Regulation as "*the mean time between 2 (two) failures or outages divided by the total period of the mean time between 2 (two) failures or outages and the mean time for repairment after such failure or outage*".

In addition, total amount of unsecured consumer cash credit of digital banks cannot be more than four times the monthly net income of the relevant customer (as declared by the customer and confirmed by the digital banks) and in case the monthly net income cannot be determined, the credit loan to be granted cannot exceed TRY 10,000 (ten thousand Turkish Liras), not including the amounts they spend via credit card cash withdrawals, or overdraft accounts.

Credit customers of digital banks can only be comprised of financial consumers and small and medium sized enterprises ("**SMEs**"). However, digital bank transactions which are deemed to be loans under Article 48 of the Law, or for purpose of providing loans to other banks and foreign currency loans to enterprises larger than SMEs, shall not constitute violation of the Regulation. In the event such SMEs grow beyond the SME criteria, digital banks can provide those limited services which they are allowed for the larger enterprises, until such enterprises become SMEs once again.

III. Incorporation of Digital Banks

The Regulation stipulates that incorporation of digital banks shall be subject to the same conditions for incorporation and activity permission of

banks as provided under the Regulation on Transactions of Banks Subject to Permission and Indirect Shareholding (the "**Regulation on Transactions of Banks**"). The Regulation also sets forth additional conditions for digital banks such as requirements on minimum share capital and competency of the directors.

Digital banks are required to provide the Banking Regulation and Supervision Agency (the "**Agency**") with details of their target market to increase financial inclusion, the products and services they will provide to cover the market's needs and marketing strategy, the analysis of the market size and the market gap, pricing policy for the coming 5 (five) years, estimated number of customers and financial projections for competition and to adopt a business model that is sustainable.

IV. Service Model Banking

Service model banking is defined as "*a service model where the customers can make banking transactions by contacting systems of the service banks via open banking services and through the interface provided by interface providers*". Service model banking can only provide its services to interface providers residing in Turkey and only within the scope of their activity permits. Moreover, these banks cannot become interface providers, and similarly, the interface providers cannot create the impression that they are the ones providing payment services or raising funds.

In order for the service bank to provide banking services to the interface provider's customer, a contractual relationship should be established between the customer and the service bank in accordance with Article 76 of the Law.

The interface provider and the service bank are jointly liable to ensure that the mobile application of the interface provider or web browser based interface comply with applicable authentication and process security obligations. Accordingly, service banks cannot provide service model banking or procure support services from interface providers which fail to meet the obligations. Furthermore, service banks are allowed to audit the interface provider to check whether it complies with its obligations relating to authentication and process security.

Service banks are required to provide a scope of their services, listing all of the interface providers and banking services they are using on their website, and send a copy of each of the service contracts concluded between interface providers and any amendments thereto within 1 (one) month from signing date, to the Agency, in writing.

V. Support Services of Interface Providers

Interface providers, in addition to receiving services from service banks, are considered to be support services institution as per the Regulation on Procurement of Support Services by Banks, in respect of their mediation of the establishment of contractual relationship between the service bank and the customer; or enabling service banks to provide banking services to customers through the interface provided within the scope of such contract. Providing support services as an interface provider is subject to approval from the Board of Banking Regulation and Supervision (the "**Board**"). Accordingly, in order for service banks to sign service contracts with interface providers, the interface provider must have obtained permission from the Board.

The service contract between interface provider and customer should include the following and set them out expressly in the provisions:

- that the interface provider is not a bank with relevant activity permissions, or a payment services provider, or a financial institution subject to activity permissions,
- that the banking services are provided by the service bank; what these services and service bank's liabilities are,
- the provisions of the contract between service bank and customer, and
- the website of service banks regarding other service conditions, as well as customer services web page and call centre phone number to be used for consumer complaints or requests.

The transfer of secret data to the interface provider pursuant to customer's instructions can occur only if (i) it is required for establishing the contract between the two, (ii) directly related to its execution, (iii) mandatory for legal obligations, or (iv) for establishing, exercising or maintaining a right. The system where secret data is processed and its data backups must be located in Turkey. Interface provider can use the hardware and software sources allocated to it, or the community cloud service model as approved by the Board.

Moreover, copies of standard contracts to be executed between the service provider and customer, and contracts between the service bank and customer; the logo and name of the service bank(s) which the services are procured from should be provided in the service provider's web site and be accessible from the home page. If a service bank issues a card payment instrument for the interface provider, such instrument should bear the bank's name and logo.

VI. Status of Existing Banks

Banks which already have operation permits will not be subject to the Regulation and they will not be required to make a separate application within the scope of the Regulation if they want to also provide such services within their existing operating permits and through their online banking services channels. Digital banking related provisions of the Regulation will not be applicable for these banks.

Having said this, such banks can close their branches only pursuant to a plan approved by the Agency. Therefore, if such banks decide to carry out activities only through electronic means, they are required to first obtain the Agency's approval regarding adequacy of their information systems.

VII. Conclusion

There is no doubt that digitalization in banking makes life easier but it still necessitates robust statutory regulations behind it to protect its beneficiaries. Accordingly, digital banks (*i.e.* banks without branches) and service model banking have been introduced to Turkey with the Regulation along with a number of novelties. These new regulations have also clarified the status of current banks in terms of digital banking.

Capital Markets Law

Turkey: Protection of Capital Markets from Manipulation Activities

Capital Markets Law No. 6362 ("**CML**") provides that giving orders for the buying or selling capital markets instruments, making and disseminating untrue, false, and misleading information, influencing the prices of such instruments, as well as their valuations and investment decisions, falls within the scope of the offence of manipulation known as "market manipulation." As per Article 107 of the CML, there are two different types of market manipulation: information-based manipulation and transaction-based manipulation. In this article, we will focus on the meaning and types of market manipulation and their penalties within the framework of Article 107 and 108 of the CML.

I. Transaction-Based Market Manipulation

In Article 107/1 of the CML, the criminal act (*actus reus*) of the offence of transaction-based market manipulation is specified as "*buying and selling capital market instruments, giving orders, cancelling orders, changing orders or performing account transactions*". Accordingly, in order for a transaction-based market manipulation to arise, one or more of the following transactions should have been performed in order to create a false or misleading impression regarding the prices, price changes, supply and demand of capital market instruments: to give buying and selling orders, to give orders to change the pending best buy and sell price, and to cancel these orders before they are executed, to give orders and to change the given order in a very short period of time, and to cause a change in the share price in the reverse direction, to change or cancel the orders, to give simultaneous buy and sell orders from the highest or lowest price continuously.

In order for the transaction-based market manipulation to arise, it is not necessary for such transaction to result in the disruption of the functioning of the market or a loss/benefit to the investor. An attempt to manipulate the market by putting an order to do so, transmitting it to the exchange, matching the order with reverse orders, is sufficient for the market manipulation to occur.

In addition, there is no upper or lower limit on the transaction values that create false impressions and indicate a manipulation. While the amount of transaction required for a market manipulation carried out by providing market dominance in the relevant capital market may be very large, a small transaction may also cause the market to be manipulated.

II. Information-Based Market Manipulation

In Article 107/2 of the CML, information-based market manipulation has been defined as giving false, wrong or misleading information, making comments or spreading rumours or preparing /disseminating reports and providing benefits by influencing the prices, valuations, or decisions of investors of capital market instruments. In other words, it is important whether the following matters exist as a material element in the information-based market manipulation:

- whether any information, rumours, comments or reports are available;
- whether the information, rumours, comments or reports are false, wrong or misleading;

- whether the performers get any benefit or not;

- whether the information, rumour, comment or report is intended to affect the price or value of capital market instruments or the investment decisions of investors.

For the information-based market manipulation, the aforementioned matters must be present together. On the other hand, information-based market manipulation may also occur as a result of negligent behaviour.

In addition, as per Article 107/2 of the CML, for information-based market manipulation to arise, there should be a wilful act based on the purposes specified above.

III. Transactions That Are Not Considered As Market Manipulation

According to Article 108 of the CML, following transactions are not considered as market manipulation:

- Applying policies of money, foreign exchange rate, public debt management or realizing transactions aiming to provide financial stability by the Central Bank of the Republic of Turkey or another authorized official institution or persons acting on behalf of them.

- Repurchase programs which are practiced according to regulations of the Capital Markets Board ("**Board**"), share acquisition programs directed to employees or allocation of other shares directed to the employees of the issuer or his/her subsidiary.

- Purchase and sale of capital market instruments or giving or cancelling orders for the purpose of exclusively supporting the market price of these instruments for a pre-determined period, provided that these operations are performed in conformity with the regulations of the Board in the context of this Law regarding the price stabilizing operations and market maker.

IV. Penalties

As per the CML, those who engage in the market manipulation transactions specified above shall be sentenced to imprisonment from 3 (three) years up to 5 (five) years, and imposed a judicial fine from 5,000 (five thousand) days, up to 10,000 (ten thousand) days.

According to Article 107/2 of the CML, those who give false, wrong or misleading information, make comments or spread rumours or prepare reports or distribute them and gain benefits by affecting the prices, valuations, or decisions of investors of capital market instruments, shall be sentenced to imprisonment from 3 (three) years up to 5 (five) years, and imposition of a judicial fine up to 5,000 (five thousand) days.

Under the Turkish criminal code, daily value of judicial fine per day would be determined by the courts. Maximum daily rate is TRY 100 (~ EUR 6.5) and the minimum daily amount is TRY 20 (~ EUR 1.3).

Pursuant to Article 107/3 of the CML, in case the person who commits the offence of transaction-based market manipulation, actively repents and pays twice the amount of the benefits they have garnered through manipulation to the Treasury, which shall not be less than 500,000 (five hundred thousand) Turkish Liras, before the investigation is initiated then no penalty

will be imposed. The sentences shall be reduced by half, if the payment is made during the investigation phase, or by one third, if it is paid during the prosecution phase until the judgment is handed down.

V. Notification Obligation

As per Article 102 of the CML, if there is a matter that suggests or indicates doubt that a transaction constitutes the offences listed under Articles 106 and 107 of the CML, the investment companies and the capital market institutions to be determined by the Board are obliged to notify this situation to the Board or to other institutions and organizations to be determined by the Board. According to the mentioned article, the Board shall determine the principles and procedures of the obligation of notification.

VI. Conclusion

Some of the behaviours in capital markets are deemed as market manipulation. From the perspective of the Turkish capital markets law there are 2 (two) different types of market manipulation: information-based and transaction-based. In transaction-based market manipulation, the person who manipulates the market does not have to gain a benefit, while in information-based market manipulation, a benefit must be gained as a result of the behaviour. Although there are some penalties stipulated for market manipulation, in case of active repentance, these sanctions may be reduced or removed, as the case may be.

Competition / Antitrust Law

Turkish Competition Authority's Request of Foreign Affiliate Data From Their Turkish Subsidiaries Quashed By Court As Unlawful

I. Introduction

Within the scope of the Turkish Competition Authority's (the "***Authority***") preliminary investigation launched against certain banks in Turkey, the Authority requested a set of data possessed by foreign affiliates from their Turkish subsidiaries by relying on the economic unity theory. The Turkish Competition Board (the "***Board***") imposed administrative monetary fines on some of the investigated banks that are located in Turkey for not being able to provide the requested data within the formal deadline ("***Board's Decision***").

Some of the investigated banks, two of which are represented by ELIG Gürkaynak Attorneys-at-Law, requested annulment of the Board's Decision, which emanates from the Authority's unlawful request, by arguing that the economic unity theory is not a procedural rule, but a concept that is related to the essence of competition law, and does not shed light on the notification procedures. Ankara Administrative Court of First Instance ("***Court***") annulled the Board's Decision and explicitly set forth that the Authority's notification to the Turkish subsidiaries for a request of foreign affiliate data cannot be deemed as a duly served notification and the Authority cannot justify it by relying on the argument that they are within the same economic unity.

II. Background

In early 2020, the Board decided to launch a preliminary investigation to determine whether certain banks and financial institutions in Turkey have violated Law No. 4054 on the Protection of Competition ("***Law No. 4054***") through their activities related to deposit, credit, foreign currency, stocks, bonds, bills and brokerage services ("***Pre-investigation***").

Within the scope of the Pre-investigation, the Authority requested the investigated undertakings (i.e. Turkish entities of the banks and financial institutions) to provide certain chat room communications of their various traders who are employed outside Turkey and have the highest Turkish Lira quotation volume among the traders in trading in Turkish Lira. However, since the requested chat logs were not in possession of the Turkish entities, some of the investigated undertakings argued that the Authority should duly serve the notification to the group entities -data holding entities- which are located outside of Turkey. Therefore, the investigated undertakings could not completely comply with the Authority's information request within the formal deadline. Even though some of the Turkish entities of the banks/financial institutions provided the Authority with the requested data constituting of millions of chat logs and hundreds of gigabytes after the formal deadline expired, in July 2020, the Board imposed administrative monetary fines on some of the investigated undertakings for not being able to provide the requested data within the formal deadline pursuant to paragraph (c) of Article 16 of the Law No. 4054.

Subsequently, some of the investigated undertakings appealed against the Board's Decision. Having assessed the merits of the case, the Court unanimously decided to annul the Board's Decision ("***Annulment Decision***").

III. The Court's Annulment Decision

The Court accepted some of the banks' arguments that the Board erred in imposing an administrative monetary fine on the relevant undertakings due to the unlawful notification, and that the chat logs of affiliates in foreign countries cannot be requested from the Turkish entities.

In terms of the assessment regarding the merits of the case, the Annulment Decision indicates that if (i) there are not any bilateral or multilateral agreements regarding mutual legal assistance and cooperation between the Republic of Turkey and other states for the legal service of the notification or (ii) the subject of the legal service falls outside the scope of such agreements, the legal services to be made within the scope of Law No. 4054 should still be pursued in accordance with the provisions of Notification Law No. 7201 ("***Notification Law***") which stipulate legal services to be made to entities domiciled abroad. In this respect, the Annulment Decision remarks that while the Authority's request for information is an administrative act, the scope of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("***Hague Service Convention***") is limited to the legal services of judicial and extrajudicial documents in civil or commercial matters. Based on this, the Annulment Decision concludes that even if Hague Service Convention does not apply to the present case, the legal service should have been made to the entities located abroad in line with the mandatory service requirements set forth under Notification Law.

The Annulment Decision also provides assessments regarding the concept of the single economic unit approach. The Court indicates that the single economic unit approach serves the purposes of competition law and allows the parent entity to be held responsible for a competition law violation conducted by its controlled subsidiaries and/or affiliated entities. Therefore, such principle/concept cannot be utilized with the scope of the legal services to be made by the Authority, which is a procedural issue. Based on this, the Administrative Court decided that the Authority should have requested the chat logs pertaining to the employees that were employed outside of Turkey from the relevant undertakings located in the respective countries, rather than addressing its information requests to these undertakings' entities in Turkey.

IV. Conclusion

The Court's Annulment Decision is of great importance as it sheds light on the requirements that should be followed by the Authority for the purposes of notification to the entities located abroad. Even though the Court's Annulment Decision is subject to appeal before the regional administrative courts (i.e. appellate court), it is already a candidate to set a landmark precedent in terms of the mandatory legal service requirements that need to be strictly complied with by the Authority when serving the correct addresses located abroad. For now, it seems that the Authority's reliance on the economic unity principle for the request of foreign affiliate information from Turkish subsidiaries might be blocked in the future cases, if the Court's Annulment Decision would not be appealed -or would be appealed but upheld. All in all, the Court's Annulment Decision is a testament to the fact that the Authority is obliged to comply with the mandatory legal service rules set forth in Notification Law for a lawful service to the foreign affiliates located abroad and there is no legal gap which might give room to discretionary approaches/methods on this front.

Preliminary Investigation Terminated as a Result of a Successful Commitment Process by Şişecam

The commitment mechanism was introduced to the Law No. 4054 on the Protection of Competition ("***Law No. 4054***") with Law No. 7246 on Amendments to the Law on Protection of Competition ("***Amendment Law***"), and entered into force on June 24, 2020. This mechanism allows the parties to offer commitments on a voluntary basis during a full-fledged or a preliminary investigation, in order to eliminate the Competition Authority's ("***Authority***") competitive concerns. With the entry into force of the Communiqué on the Commitments to be Offered in Preliminary Inquiries and Investigations Concerning Agreements, Concerted Practices and Decisions Restricting Competition and Abuse of Dominant Position ("***Communique on Commitments***") there has been a surge in the number of commitment applications to the Authority.

For instance, the investigation initiated against Singer Dikiş Makineleri Ticaret A.Ş. ("***Singer***") [1] has been partially concluded with the Board's approval of the commitment package offered by Singer. In the relevant investigation, the Authority assessed the dealership agreements Singer concluded with its resellers and found that such agreements included a non-compete clause that exceeded the duration set by the

[1] The Board's decision dated 4.3.2020 and numbered 21-11/147-M.

legislation (*i.e.,* 5 years), alongside resale price maintenance practices. During the investigation, Singer applied for both settlement and commitment mechanisms. Accordingly, the Board opted for accepting the commitment that removes the non-compete clause in Singer's dealership agreements and settling the case for Singer's resale price maintenance practices.

Another decision where the commitment mechanism came into play was the Coca Cola decision.[2] The Turkish Competition Board had launched an investigation against Coca Cola Satış ve Dağıtım A.S. ("***Coca Cola***") and found that Coca Cola held a dominant position in the "carbonated drinks", "cola drinks" and "aromatic carbonated drinks" markets, and abused its dominance by way of its rebate system and the refrigerator policies that restricted its competitors' activities in the relevant market. The investigation was again concluded through the commitments offered by Coca-Cola and approved by the Board.

In a more recent case, the Board rendered a decision where it accepted the commitments proposed by Türkiye Şişe ve Cam Fabrikaları A.Ş. ("***Şişecam***") and Şişecam Çevre Sistemleri A.Ş. ("***Çevre Sistemleri***") to remedy the competition concerns relating to abuse of dominance in the glass production market. This decision marks the first time where the Board approved the commitments submitted in the preliminary investigation stage, since the Amendment Law was enacted.

[2] The Board's decision dated 2.9.2021 and numbered 21-11/147-M.

I. Background

The preliminary investigation against Şişecam and its subsidiary Çevre Sistemleri was initiated on 22.10.2020 upon the submission of a confidential complaint,[3] where it was indicated that Çevre Sistemleri included certain clauses in its investment contracts with the recycling facilities which stipulate that a significant amount of products must be supplied to Çevre Sistemleri on an annual basis and if the respective amount is not met, certain penalties would be foreseen. The Authority noted that such clauses could be interpreted as *de facto* exclusive supply arrangements. In addition, the complainant also pointed out that Şişecam's leading position in the flat glass market enabled it to steer all of the raw material in the glass container market to its own factories and Şişecam's powerful position in the glass container market enabled it to determine furnace-ready cullet ("***FRC***") purchase prices unilaterally.

II. Competition Concerns During the Preliminary Investigation

Within the scope of the preliminary investigation, the Authority found that Şişecam held a dominant position in the market for glass containers, while Şişecam's subsidiary Çevre Sistemleri held a dominant position in the market for FRC. The Board indicated that Şişecam has the power to control both the prices of furnace-ready glass in the upstream market and the prices of the input (*i.e.,* waste glass). As result of the aggressive pricing policies of Çevre Sistemleri, the price of waste glass (*i.e.,* the input) increased, which in turn narrowed the margin between the input and output (*i.e.,* FRC)

[3] The Board's decision dated 22.10.2020 and numbered 20-47/642-M.

prices. The Board indicated that through the respective practice, the competitors which supply FRC are prevented from making profits, thereby excluded from the market by means of Şişecam's "price squeezing" practice.

With respect to the *de facto* exclusive supply arrangement, the Board also evaluated that Çevre Sistemleri prevented recycling facilities from procuring waste glass by means of placing bids with high prices in the waste glass tenders. Furthermore the Board found that, Çevre Sistemleri included certain provisions in its contracts with the suppliers, which prevented them from providing waste glass to certain recycling facilities other than Çevre Sistemleri. As a result, the Board concluded that Şişecam violated article 6 of the Law No. 4054 and abused its dominant position in the market.

III. Commitments

The commitments proposed by Şişecam in order to address competition concerns raised during the course of the preliminary investigation included, *inter alia*, the following:

i. For a period of five years, terminating all Şişecam, Çevre Sistemleri and other relevant group companies' (the Şişecam economic unit) procurement of unprocessed flat glass used in FRC from third parties operating domestically,

ii. For a period of two years, terminating all procurement of unprocessed glass container products used in FRC by undertakings within Şişecam's economic unit from third parties operating domestically, and; following the end of this two year period, limitation of glass container product procurement up to 10,000 tons for the first year, 20,000 tons for the second year and 40,000 tons for the third year, provided that there is no limitation for imports.

iii. Terminating procurements of waste flat glass (for five years) and waste glass container (for two years) from undertakings established abroad and outside the scope of Şişecam's economic unit (third parties operating abroad).

iv. Limiting the ratio of FRC procured from a specific third party to the overall procured amount from third parties, to 35% for each financial year, for a period of five years.

v. Avoiding all actions that would render the commitments stipulated under items 1 to 4 above ineffective.

vi. Providing the Authority evidence that relevant third parties are notified via service by public notary that their agreement with Şişecam's economic unit regarding the supply of waste glass has been terminated,

vii. Committing to notify the Authority with respect to transactions such as transfers, leases *etc.* of main elements of recycling activities (*i.e.*, facility, machinery-equipment) over a five year period to enable the Authority to monitor that the transactions comply with the commitments,

viii. Annual submission of independent audit reports monitoring

compliance to the commitments, for the next five years.

IV. Conclusion

All in all, through months of deliberations, the commitments offered by Şişecam were deemed to address the concerns raised by the Authority, and hence, the Board accepted Şişecam's commitments within nine days from the submission of the final commitments proposal. On this note, the Board rendered a landmark decision where the commitments offered by an undertaking were accepted within the preliminary investigation period for the first time.

The Unstoppable Rise of Fintech and the Competing Efforts of Authorities to Catch Up: The Turkish Competition Authority published its Analysis Report on Fintech[4]

On December 9, 2021, the Turkish Competition Authority (***"Authority"***) published its report entitled "Analysis Report on the Financial Technologies in Payment Services" (***"Report"***) which evaluates the effect of the use of financial technologies ("***Fintech***") in the financial sector, the obstacles to innovation and competition in the relevant markets and the entry of big technology ("***Big Tech***") companies (*e.g.,* Facebook, Amazon, Google, Apple) into the market. The Report notes that Fintech includes: (i) innovative products and services that emerged in the financial sector as a result of the radical technological transformation, (ii) new entrants other than the incumbent players that offer these services, and (iii) Big Tech companies which started to offer financial services.

The Report states that its findings reflect the analysis of the information collected from 45 undertakings/undertaking associations and 7 public authorities. Accordingly, the stakeholders include banks, Fintech companies, technology companies, e-commerce marketplaces and various professional associations. It also notes that although the findings mainly relate to the Fintech revolution in payment services, they are also applicable to other Fintech developments such as crowd-funding and crypto-currency to the extent that they are relevant.

The Report first explains the reasons for the emergence of Fintech and their effects on the financial sector, then evaluates the difficulties faced by the new players in promoting their products and services and the obstacles to innovation and competition in the market and subsequently analyses the potential consequences of the entry of Big Tech companies into the market.

I. The Reasons for the Emergence of Fintech

The Report provides that (i) digitalization and differentiated service expectation, (ii) the problems associated with the conventional banking system and the existence of an unbanked population,[5] and (iii) the impact of the customer portfolio are the factors that contribute to the emergence and the development of Fintech.

[4] This article first appeared in Mondaq. (https://www.mondaq.com/turkey/fin-tech/1161498/the-unstoppable-rise-of-fintech-and-the-competing-efforts-of-authorities-to-catch-up-the-turkish-competition-authority-published-its-analysis-report-on-fintech)

[5] Defined as "the population without an account at a financial institution or through a mobile money provider" by the World Bank. Accessed via https://globalfindex.worldbank.org/ on January 4, 2022.

Accordingly, the Report notes that technological developments related to the banking and payment services such as digital identity verification and electronic contracts provide flexibility to undertakings offering financial services and enhances innovative product creation and supply in the market. Moreover, Fintech companies generally provide limited and specialized services - which enable them to produce fast and appropriate solutions meeting different demands of the consumers. All in all, the relevant trend sets the digitalization and differentiated service expectation in the market.

Regarding the conventional banking system, the Report states that the previous 2007-2008 crisis in the banking sector has led to the tightening of the regulations and risk aversion by banks, and, as a result of this, the banking products and services on offer have remained limited. According to the Report, the unbanked population is due to those tight regulations put in place to protect consumers and avoid risks in order to maintain financial stability.

As for the impact of consumer portfolio, the Report notes that Big Tech companies can, and accordingly, have started to offer their existing services along with financial services as a one stop shop to their users.

The Report also reviews statistics on the development of Fintech and notes that as of the first five months of 2021, the majority (505 out of 589) of all Fintech startups established in Turkey are still active in the sector.

II. Obstacles to Fintech Development and Challenges For New Players

The Report finds that there are three main obstacles to Fintech development: (i) exclusionary actions of incumbent undertakings, (ii) problems associated with the regulations and (iii) problems stemming from the market structure.

1. Exclusionary Actions of Incumbent Undertakings

The Report notes that some strategies adopted by incumbent undertakings against Fintech companies may fall under the radar of competition law. These can be (i) unilateral conduct of an incumbent undertaking, (ii) anti-competitive agreements and concerted practices between incumbent firms and (iii) killer acquisitions.

(a) Unilateral Actions

The Report notes that pursuant to the Article 6 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***"), certain actions of dominant incumbent undertakings may be considered as abuse of dominance.

Generally speaking, for an analysis under Article 6 of the Law No. 4054, the relevant market should be defined. Accordingly, the Report notes defining dynamic markets may be difficult, since considering, among others, that (i) new entrants can reach a significant market share in a short time with innovations, (ii) it is difficult to reveal the supply-demand relationship because of the network externalities and multi-sided market structure, (iii) there is not only "competition in the market" but also "competition for the market" as the developing technology leads to radical changes in the products and services that eventually change the market. Accordingly, the Report underlines sensitivities with market definition and notes that a broader or a narrower market definition may lead to wrongful interventions.

Usually, subsequent to the determination of the relevant market a dominant position analysis is made. In this respect, the Report states that considering the number of institutions holding banking licenses in Turkey and the market shares of these institutions, no single or joint dominant position could be considered for the operation of the banking infrastructures. However, it also notes, by referring to the findings of the Authority for Consumers & Markets (in Netherlands), that each bank may be considered to hold a dominant position in terms of owning its own customer data since, for example, for the provision of the account information services to a customer, the bank where the relevant customer has her payment account will be in a dominant position as it would be the only undertaking holding the relevant account information needed for the provision of the relevant service.

In this regard, the Report explains the commercial relationship between Fintech companies and incumbent undertakings in providing payment services and notes that although Fintech companies can provide services directly to customers, they are mostly positioned between banks and consumers/businesses in providing their services. Accordingly, Fintech companies need the existing banking infrastructure at some point in the provision of payment services and the infrastructure needed for Fintech companies may vary depending on the nature of the service provided. This creates a vertical relationship where Fintech companies, on the one hand, receive services from the banks that are active in the upstream market, and on the other hand, compete with these banks in the downstream market.

The Report notes that, therefore, similar to the telecommunication, retail and port services sectors, the undertakings that are active in the upstream market may abuse their dominant position by margin squeeze and refusal to supply.

Thereafter, the Report lists the conditions that need to be met for condemning certain unilateral conducts (*i.e.*, refusal to deal and margin squeeze) of an undertaking in a dominant position by referring to the Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position.

In relation to the abuse of dominant position by margin squeeze, an undertaking that is active in vertically related markets and holds a dominant position in the upstream market sets the margin between the prices of the upstream and downstream products at a level that does not allow even an equally efficient competitor in the downstream market to trade profitably on a lasting basis.[6] The undertaking which is dominant in the upstream market may engage in margin squeeze by increasing the price for the product it supplies in the upstream market or decreasing the price for the product it supplies in the downstream market or by doing both simultaneously. This enables the dominant undertaking to transfer its market power over the upstream product to the downstream market and leads to the restriction of competition.[7] Moreover, refusal to supply, a typical example of abuse of a dominant position, can take the form of halting an ongoing supply relationship concerning the goods, services

[6] G. Gurkaynak, *Turkish Competition Law*, 2021, p. 225.

[7] Margin squeeze definition in the Guidelines is based on the Board's decision *Türk Telekom/TTNET* (19 November 2008, 08-65/1055-411).

or inputs,[8] or it can be in the form of refusing the demands of potential customers for supply.[9]

Accordingly, as noted above, the Report notes that Fintech companies do not have the necessary infrastructures for their activities due to both regulatory rules and market dynamics, making it imperative for these companies to obtain the relevant services from banks to provide their own services. Therefore, the new entrant Fintech companies are in need of using the infrastructure of the banks. Hence, banks are active in both the upstream market and the downstream market. This creates the risk that the incumbent undertakings may exclude the Fintech companies via refusal to supply and margin squeeze. Indeed, in case the incumbent undertakings that dominate the upstream market refuse to supply to Fintech companies, it may result in the latter being largely excluded from the market. However, the Report also notes that, when analyzing the allegation of refusal to supply, it should not be overlooked that the incumbent undertaking may have a legitimate justification since the financial system is built on trust and the relevant Fintech company may not be meeting the security standards required by the incumbent undertaking to allow access to its infrastructure.

Consequently, the Report underlines that for the assessment of exclusionary behaviors under Article 6 of the Law No. 4054, the Turkish Competition Board ("***Board***") conducts an effects-based analysis. The Report then states that, within the scope of such an analysis, factors such as the position of the dominant undertaking, barriers to entry and growth in the relevant market, economies of scale/scope, network effects, and the location of competitors, customers or suppliers should be taken into account.

(b) Anti-Competitive Agreements and Concerted Practices

The Report analyzes the strategies developed by competitors through agreements or concerted practices with the aim of restricting competition in the relevant markets whilst reminding that such conducts are considered as restriction by *object* under Article 4 of the Law No. 4054. It assesses that with respect to payment services where associations of undertakings are active and coordination among competitors is relatively easy, it is necessary to closely examine whether the standards adopted by undertakings and the conditions imposed on Fintech companies are based on anti-competitive agreements or concerted practices. The Report also notes that the recent decisions of the competition authorities such as the German Competition Authority ("***Bundeskartellamt***") show that the decisions of the associations of undertakings or the bilateral agreements between the undertakings are designed in a way to exclude new players in the market.

The Report highlights that the issue that may come to the fore in terms of Article 4 of the Law No. 4054 in the context of Fintech, would be the vertical agreements between undertakings that operate in financial markets. It notes that such vertical agreements which are common in the financial sector due to various business

[8] *Maysan* (18 February 2016, 16-05/107-48); *Roche* (n.612); *Volkan/Öz Edirne* (n.921); *Novartis* (n.614).

[9] Guidelines on Abuse of Dominance, p. 9; *Tüyap* (25 October 2018, 18-40/644-314). For the EU case law, please see, e.g., Case C-7/97 *Oscar Bronner GmbH & Co KG v. Mediaprint* [1998] ECR I-7791; *Clearstream* (Case COMP/38.096) Commission Decision [2009] OJ C 165/5 (upheld Case T-301-04).

models used in the supply of payment services may include provisions that may make entry into the market more difficult, cause price rigidity or facilitate coordination between competitors, and ultimately restrict competition in the market.

The Report also provides that exclusionary actions taken jointly by incumbent undertakings against new players through vertical or horizontal relations, such as demanding unreasonable prices for the input provided to Fintech companies, unjustified disruption of services provided to Fintech companies, or boycotts against these companies are considered as agreements that restrict competition by *object*. In this regard, the incumbent undertakings may be held liable for engaging in a by-object restriction, without making any analysis on the effect of the conduct.

The Report also summarizes the Board's decisions[10] where it was found that certain conditions imposed in agreements between banks have the *effect* of excluding from the market certain undertakings such as other payment and e-money institutions. The Report finds that in the decisions concerning the exemption applications in the market, the Board makes an effects-based analysis. It evaluates that, in accordance with the effects-based approach embodied in the Board's decisions, in order to assess the effects of the standards and conditions imposed by the incumbent undertakings on Fintech companies, it should be examined whether the relevant standards and conditions are objectively necessary. Accordingly, standardization or commercialization agreements concluded by the incumbent undertakings may increase the efficiency in the market in some cases,[11] while in some cases these agreements include conditions that do not serve for a reasonable purpose or are of a discriminatory nature, which results in complicating the activities of new players in the market.

(c) Killer Acquisitions

The report also remarks that there are frequent instances where incumbent undertakings chose to acquire Fintech companies rather than directly compete with them. As a result of the acquisition of the Fintech companies by the incumbent undertakings, the technologies developed by these Fintech companies may fail. Such acquisitions may lead to a significant impediment to effective competition as they restrict innovation and create exclusionary effects in the relevant market.

By referring to the practices of foreign competition authorities, such as United Kingdom Competition Authority ***("Competition and Markets Authority" or "CMA")*** [12] the Report states that it is possible for the Board to intervene in such acquisitions under the "significant impediment to effective competition" doctrine pursuant to the Article 7 of the Law No. 4054. In particular, the CMA argues that an interventionist approach should be applied to acquisitions that are likely to result in consequences such as

[10]The Board's *SBM Payment Gateway* decision dated 24.12.2020 and numbered 20-55/769-341. The Board's *Bonus* decision dated 07.09.2017 and numbered 17-28/462-201; the Board's *BKM Card Data Storage* decision dated 12.06.2018 and numbered 18-19/337-167; the Board's *Money Transfer* decision dated 08.08.2018 and numbered 18-27/442-212.

[11] The Board's *Joint ATM* decision dated 22.05.2018 and numbered 18-15/284-142.

[12] https://www.gov.uk/cma-cases/experian-limited-credit-laser-holdings-clearscore, Accessed on: 04.01.2022

ending the activities of the acquired undertaking and preventing potential innovation.

The Report states that, as a reflection of the interventionist approach regarding transactions in Turkey, in 2020, Article 7 of the Law No. 4054 has been amended so that not only the transactions leading to the creation or strengthening of dominant position but also the transactions that significantly impede effective competition can be prohibited. Therefore, the acquisitions of Fintech companies will also be examined in terms of whether they cause a significant impediment to effective competition by restricting innovation.

2. Regulatory Framework

(a) Regulatory Interventions against Exclusionary Actions

The Report remarks that it is important to impose general and inclusive *ex-ante* rules that prevent exclusionary actions as opposed to relying on existing competition law instruments in this area since, among others, (i) for competition law interventions, certain conditions must be met and it is not easy to determine whether these conditions are met in every case, (ii) competition law interventions may only have an effect on the individual case and (iii) the competition law interventions are used *ex-post* (*i.e.*, after the infringement has been made).

In this regard, the Report notes that many countries implement regulations that encourage open banking or make open banking even mandatory. According to the Report, open banking, in a broad sense, means that access to different banking infrastructures and customer data from banks are granted to players in the downstream market so that these players can provide value-added services in the downstream market.

To that end, the Report explains the regulations regarding open banking in different countries and Turkey, and states that the developments in Turkey indicate that the scope and depth of applications for direct access of non-bank financial institutions to payment systems will increase. The Report also remarks that the Fintech companies' access to various infrastructures and data pools under the uniform banking standards as determined by the regulatory authorities will contribute to the development of competition in the market by reducing the operational costs of Fintech companies and enabling interoperability between different systems.

(b) The Problems Associated with the Regulatory Framework

According to the Report, the problems associated with the conventional regulatory framework that hinders the development of Fintech may be grouped under three main headings: (i) the lack of rules governing the new products and services, (ii) the rules not being suitable for new types of services and products, and (iii) the rules being too restrictive and costly for Fintech companies.

With respect to the lack of regulation, the Report states that most new products and services offered by Fintech companies are out of the scope of the rules designed to govern the conventional banking services. This situation makes it difficult for the incumbent undertakings, which bear the cost of complying with the regulatory rules, to compete in the downstream market with new players operating on different business models without being subject to the regulatory rules.

Nevertheless, the operations of Fintech companies also create some risks about consumer protection and financial stability which calls for regulation. Following that, the Report points out that, in Turkey, the activities of payment institutions and electronic money institutions as non-bank financial institutions have been regulated and rules protecting consumers and financial stability were designed specific to these activities.[13]

Regarding the suitability of the rules to new technologies, the Report emphasizes that the rules should be updated so that they do not prevent the Fintech companies from offering new products and services, and notes that new rules should be adopted to enable the use of blockchain and cloud technologies in the financial sector in Turkey.

Finally, the Report underlines that heavy and intense regulatory rules ultimately create barriers to entry into financial markets, particularly in the payment services area. Indeed, the Report states that Fintech companies that have limited activities and thus create lower risks on the financial stability and the economy of the countries should not bear the cost of the rules designed to avoid the huge macroeconomic risks stemming from the operation of banks that are *too big to fail*.

Against this background, recognizing the delicate balance between promoting competition and innovation in the sector and ensuring financial stability and consumer protection, the Report suggests that there should be an asymmetric regulatory framework considering the risks posed by different undertakings on the financial sector so that new players can compete with the incumbent undertakings under fair conditions. For example, the Report states that Fintech companies providing payment services should have direct access to the payment settlement system under a licensing regime which is not as rigid as the regime applying to the banks, so that they would not be dependent on banks for the access to the settlement system.

3. The Problems Stemming from the Market Dynamics

According to the Report, Fintech companies face certain entry barriers arising from market dynamics. Firstly, Fintech companies need to gain the consumer's trust in order to compete with incumbent banks that have strong ties with consumers. Second, there are barriers arising from the market structure. Accordingly, since there is no mechanism whereby the data about the sector can be pooled and shared with the possible investors, the cost of capital for Fintech companies is high. Also, one of the possible obstacles that Fintech companies encounter arises from the business models that utilize network effects. For example, in payment systems where the settlement system is not used and the payments are made from the bank account of the user, both the payer and the payee must be registered in the payment system. Hence, the increase in the number of registered payees increases the network effects, which creates a barrier to entry for Fintech companies. Finally, incumbent undertakings may provide various services that commonly share their main costs and this may put them in an advantageous position in reaching the economies of scale, which may also create an entry barrier. The lack of interoperability among devices and different payment platforms and the fact that financial institutions other

[13] *See*: e.g. the Law No. 6493 on the Payment and Securities Settlement Systems, Payment Services and Electronic Money Institutions

than banks do not own the information about the financial status of the customers may be listed as other entry barriers.

III. The Entry of Big Tech Companies into the Financial Sector

In the final part, the Report discusses the potential effects of the entry of Big Tech companies into the financial sector. It first notes that, while entering into the market, Big Tech companies may benefit from the advantages stemming from their loyal customer portfolio, easy access to capital, the customer data they hold, economies of scale and scope, brand recognition and the lobbying power. Indeed, they will be able to provide financial services at low costs to their current customer portfolio in addition to existing services by utilizing the data they hold.

The Report then analyzes Super Apps offered by Big Tech companies which provide multiple services (*e.g.*, from financial services to ordering meals) and collects consumer data in relation to all services offered through the relevant app. The Report notes that the entry of Big Tech companies may have a more serious effect on competition in the financial sector given their data advantages. On the other hand, the Report also remarks that Big Tech companies have disadvantages over Fintech companies as consumers have doubts about the extent their privacy is protected by the former.

Having recognized the pro-competitive effect of Big-Tech companies' entry into the market (*i.e.*, the end of the oligopolistic structure in the payment services), the Report discusses the potential exclusionary conduct of such companies in the market. In this respect, the Report states that in case where the Big Tech company provides the multi-sided platform as the online marketplace for the supply of Fintech services, it may (i) provide the financial services of different undertakings to the users, (ii) become a gatekeeper, for example, in the provision of payment services through its own platform, (iii) enter into the markets concerning the most profitable service of the incumbent undertakings and (iv) leverage its market power in the provision of marketplace to the provision of the relevant financial service.

IV. The Report's Final Recommendations

The Report concludes and recommends, *inter alia*, the following;

i. The common competitive concern regarding Fintech companies is the their possible exclusion from the market by the incumbent undertakings' refusal to grant access to existing infrastructures, hence the rules should be designed in order to prevent this. Also, the rules should be differentiated for different players so that Fintech companies would not bear the costs that would prevent them from entering into market.

ii. The intervention by competition authorities should address atypical problems in the markets arising as a result of the effect of digitalization (*e.g.*, holding data). Accordingly, since each data set is unique and a customer's data can be considered as key for providing service to the relevant customer, it may be concluded that the undertaking holding the relevant data is in a dominant position.

iii. Regulatory sandboxes may be used where new Fintech products and services can be tested in a limited market without being subject to regulatory rules so that the regulator may grasp a better understanding for the optimal regulation in relation to these products.

iv. To encourage the development of Fintech companies, there may be certain state aids and tax incentives. Moreover, a public data repository may be established which may help investors in making their decisions about whether to invest in Fintech companies.

v. Public authorities should cooperate to establish a holistic policy in relation to Fintech.

V. Conclusion

The Authority's Report shows its willingness (i) to take active part in encouraging the development of Fintech in Turkey and (ii) to intervene in any practices that may exclude the Fintech companies from the market.

Accordingly, the Authority identifies possible practices that incumbent undertakings may engage for excluding Fintech companies from the market and explains the competition law framework that will provide a basis for intervention in such cases. Moreover, it discusses how the current regulation may create an obstacle to Fintech Development and explains possible solutions by providing examples for a regulatory design that woud be fit for purpose. Finally, it analyzes the possible consequences of Big Tech companies' entry into the financial services market. It finds that such entries may be more effective than the entries of small Fintech companies in increasing competition in the relevant markets but, at the same time, create additional competition law concerns as Big Tech companies may leverage their market power in the markets for provision of their own platforms to the markets for the provision of financial services.

The Turkish Competition Board Imposed Structural Remedies in its Recent Decision Concerning the Hot Air Balloon Market

I. Introduction

The Turkish Competition Board ("***Board***") has recently published its reasoned decision [14] regarding its investigation initiated *ex officio* against the hot balloon/paragliding operators and tourism agencies [15] located in Pamukkale ("***Pamukkale Hot Air Balloon Operators***").

As a result of the investigation, the Board (i) fined some of the investigated undertakings[16] due to their price-fixing and

[14] The Board's decision dated 25.03.2021 and numbered 21-17/209-87.

[15] The investigated undertakings included Anadolu Balonculuk Havacılık Turizm Reklamcılık Danışmanlık Ltd. Şti. ("***Laodikeia Balon***"), Denizli Havacılık Turizm Ticaret Ltd. Şti. ("***Aphrodisias Balon***"), Eylül Havacılık Turizm Ticaret Ltd. Şti. ("***Hierapolis Balon***"), Elis Balonculuk Havacılık ve Eğitim Turizm Ticaret Ltd. Şti. ("***Hera Balon***"), Pamukkale Balonculuk Havacılık Turizm Reklamcılık Organizasyon Petrol San. ve Tic. Ltd. Şti. ("***Pamukkale Balon***"), Pamukkale Birlik Online Turizm ve Ticaret A.Ş. ("***Pamukkale Birlik***"), Hürkuş Havacılık Turizm Ltd. Şti. ("***Hürkuş***") ve Turizm Taşımacılık Seyahat Acenteliği ve Ltd. Şti. ("***T4T***").

[16] The fined undertakings include Laodikeia Balon, Aphrodisias Balon, Hera Balon,

customer allocation activities in the hot air balloon flight services (ii) and ordered that the structural ties between three of the investigated undertakings (Laodikeia Balon, Hera Balon and Aphrodisias Balon) be terminated.

Pamukkale Hot Air Balloon Operators are of particular importance since it is one of the few decisions of the Board, where the Board interfered with the structural ties between the investigated undertakings within the scope of an investigation. As such, the Board imposed structural remedies on Hera Balon to eliminate the concerns stemming from the cross shareholdings between the said undertakings. On that front, it is also worth noting that the reasoned decision does not refer at all to Article 9 of the Law No. 4054, where the conditions of imposing structural remedies are laid out. In this regards, the decision is not clear as to whether the Board did not consider the concerned remedy as a structural remedy within the scope of Article 9 of the Law No. 4054 or whether the Board in fact concluded that the conditions laid therein are met.The decision is also interesting since it was the outcome of another investigation initiated against hot air balloon operators and tourism agencies in Cappadocia, [17] in which the Board has obtained certain evidence indicating that the concerned undertakings in Pamukkale had established an association in order to jointly manage their operations, where they also fixed the prices of their services and allocated customers through a joint sales channel.

Hierapolis Balon, Pamukkale Balon and Pamukkale Birlik.

[17] The Board's decision dated 25.03.2021 and numbered 21-17/208-86.

Throughout this article, we will first briefly explain the facts surrounding the *Pamukkale Hot Air Balloon Operators* and then move onto discussing the other decisions in which the Board found the necessity to interfere with the structural ties between undertakings.

II. Facts of the Pamukkale Hot Air Balloon Operators

Due to the characteristic differences of the services, the Board defined two separate relevant product markets within the scope of the investigation: "*hot air balloon flight services*" and "*paragliding flight services*". In addition, by taking into account the location of the undertakings, the relevant geographic market was defined as "*Pamukkale Region*".

The Board noted that many of the undertakings organizing hot air balloon flights were established in 2014-2015 and the balloon flights obtained particular visibility within the last few years. The evidence gathered by the Board suggested that Pamukkale Birlik, which is a company rather than an association of undertakings despite what it name suggests,[18] organized a joint sales channel with the intention of collecting booking requests under a pool-like system to later distribute those requests among undertakings providing air balloon flight services, depending on their capacity. The Board emphasized that Pamukkale Birlik has acted as an association between certain hot air balloon operators ("***Association***"), where the competitors pooled together the booking requests received, and allocated customers among the participants to this system.

The Board further established that the shareholders of Pamukkale Birlik were the

[18] The word "birlik" in Turkish means "association".

also the shareholders of one or more of the following balloon service providers: Laodikeia Balon, Hera Balon, Aphrodisias Balon, Pamukkale Balon and Hierapolis Balon. Pamukkale Balon and Hierapolis Balon have later on ceased their structural ties with Pamukkale Birlik after they have transferred their shares to other participants of the Association. After Pamukkale Balon and Hierapolis Balon left the Association in November, the pool continued its practices with Hera Balon, Aphrodisias Balon and Laodikeia Balon. Later, during the course of investigation, the Association ceased its activities, announcing this decision through a notice sent on behalf of Pamukkale Birlik, Hera Balon and Aphrodisias Balon.

With a view to deep dive into the structure of the hot air balloon services market, the Board requested 2017-2019 sales data of the investigated undertakings. The mentioned data was compared with the information indicating number of passenger sales made through Pamukkale Birlik, in order to conduct a cross check control. Following the comparison the Board noticed serious discrepancies between two independent data. In addition, the Board remarked that the statements made by the investigated undertakings regarding booking procedures brought to light some serious inconsistencies with each other.

Subsequently, the Board determined that the analysis cannot be conducted solely based on the information showing the number of flights, as there were also some unrecorded activities in the region. The Board concluded that analyzing the concrete conditions concerning the number of the active balloons and capacity rates together with number of passengers will lead to a more realistic outcome while defining circumstances surrounding the market. Following the examination of the mentioned data sets, the Board determined that the final estimations provided a more consistent result. Within this scope, the Board concluded that estimated numbers of passengers were effective in outlining a clear view on the size and general conditions defining the market.

Based on the findings obtained and explanations above, the Board concluded that investigated undertakings have organized meetings between November-December of 2018 and actively worked together to put into effect the agreements concerning price fixing practices and customer-sharing. The Board further highlighted that investigated undertakings carried out their sales activities through the Association and therefore prevented customers from accessing alternative pricing options. In the light of foregoing, this joint sales agreement was defined as a cartel. From the findings obtained through on-site inspections, the Board also underlined that investigated undertakings have shared sensitive information about their businesses by estimating share profits through tracking each other’s flight numbers. The Board remarked that this exchange of information have facilitated the operation of the cartel and therefore also evaluated it within the scope of cartel activities.

With regards to findings on paragliding sector, the Board concluded that two undertakings operating in the paragliding sector (Hürkuş and T4T) did not get involved in any kind of anti-competitive practices, neither with nor separately from Pamukkale Birlik.

In the light of the evidence collected and the related evaluations, the Board finally determined that investigated undertakings have engaged in activities that restricted

competition by determining prices and sharing customers through the jointly established Association. Thus, the Board concluded that the mentioned actions of six undertakings (Laodikeia Balon, Aphrodisias Balon, Hera Balon, Hierapolis Balon, Pamukkale Balon and Pamukkale Birlik) constituted a violation of Article 4 of the Law No. 4054.

III. Shareholding Structures of the Undertakings and Their Part in the Board's Decision

One of the main concerns of the Board revolved around the shareholder structure of Hera Balon, Aphrodisias Balon and Laodikeia Balon. The Board evaluated whether the fact that Pamukkale Birlik has terminated its activities would be sufficient enough to ensure a competitive field in the balloon service market when Hera Balon was still operating within the same sector.

Upon the examinations it was determined that Hera Balon constituted a joint venture and its shareholder structure consisted of equal distributed shares between Aphrodisias Balon and Laodikeia Balon. In addition to having a shared management structure with its parent undertakings, the Board also noted that Hera Balon was active in the same market as its parent undertakings. The Board also referred to the findings obtained through the Turkish Trade Registry Gazette, which demonstrated that none of the parents of Hera Balon was granted decisive votes over the strategic decisions of Hera Balon. Therefore, the Board concluded that Hera Balon was jointly controlled by Aphrodisias Balon and Laodikeia Balon's shareholders. Additionally, the Board found that Hera Balon, Aphrodisias Balon and Laodikeia Balon also shared their employees within these periods. The Board concluded that current structure of Hera Balon and its activities in the sector may cause a coordinative effect between Laodikeia Balon and Aphrodisias Balon, which essentially expected to operate as rivals.

In the light of foregoing explanations, considering the competitive concerns stemming from its shareholding structure the Board decided that Hera Balon constituted an anti-competitive impact upon the market within the meaning of Article 4 of Law no. 4054 and therefore decided upon termination of its existing shareholding structure.

IV. The Legislation Surrounding the Structural Remedies

The precedent body of the Board includes very few decisions in which the Board felt the need to order that the structural ties between the undertakings be dissolved. Up until June 2020, the Law No. 4054 did not include any provision regulating as to when and under what conditions the Board may order structural remedies to do away with the competitive concerns in a given market. As such, before June 2020, the Board was not bound with any statutory criteria established in the form of a legislation that would regulate the structural remedies. With the amendment brought into Article 9 entitled "Termination of Infringement", there now appears to be a path the Board is required to follow when imposing remedies. In this regard, the Board may only impose structural remedies where previously imposed behavioral remedies have been ineffective. As such, it is understood that in order for the Board to impose structural remedies, it should first try to do away with the concerns by imposing behavioral remedies.

However, in *Pamukkale Hot Air Balloon Operators*, the Board did not refer to Article 9 of the Law No. 4054 and it is not clear whether the Board even took into account the conditions laid down in the said article. Indeed, the Board in *Pamukkale Hot Air Balloon Operators* does not make it clear whether it had previously tried to eliminate the concerns stemming from the structural ties between Hera Balon, Aphrodisias Balon and Laodikeia Balon. Indeed, one could argue that the concerns stemming from the structural ties cannot be eliminated with behavioral remedies and that might be the reason why the Board did not imposebehavioral remedies in the first place. That said, the reasoned decision does not clarify the justification of the Board in choosing the structural remedies over the behavioral remedies in this case.

As it has been previously expressed, the Board would have first imposed behavioral remedies to Hera Balon before imposing structural remedies, had the Board considered that Article 9 is applicable to the case at hand.

Furthermore, considering the Board's previous decisions, it can be stated that the Board refers to the structural remedies in cases involving an anti-competitive agreement, where such anti-competitive agreement did not meet the conditions of and therefore would not be eligible for an individual exemption.

The Board adopted a similar approach regarding the implementation of structural remedies in *Pamukkale Hot Air Balloon Operators*. Although the Law No. 4054 explicitly sets out the conditions of imposing structural remedies, the Board seems to be following its traditional approach, where it directly imposes structural remedies in cases where the anti-competitive agreement at stake cannot be granted an individual exemption.

V. The Board's Precedent Body Regarding the Structural Ties

As explained above, before June 2020, the Board was not bound by any legislative regulation regarding criteria for structural remedies. However, in a few of its cases the Board had imposed structural remedies over the investigated undertakings to do away with the identified concerns within the scope of its investigations.

In *Borçelik,*[19] after considering the effects it may bring upon flat steel market the Board ordered Erdemir (who held minority shares of ArcelorMittal and Borçelik) to sell off the shares it had in Borçelik (which was jointly controlled by Borudan Group and ArcelorMittal) within 12 months following the Board's decision.

In *OYSA Cement,*[20] the Board evaluated whether OYSA Çimento, Adana Çimento and Çimsa were carrying out anti-competitive practices through collusion. The Board considered the structural ties between these investigated undertakings while deciding upon whether the parties have violated the competition. The Board concluded that such structural relations have facilitated and enhanced coordination between the competitors and determined that the said relations must be terminated within 6 months following the decision as per Article 9 of the Law No 4054.

In *Türk Ytong,*[21] where the Board assessed whether Gaziantep Ytong and Türk Ytong, among others, were carrying out anti-

[19] The Board's decision dated 16.06.2009 and numbered 09-28/600-141.
[20] The Board's decision dated 24.04.2007 and numbered 07-34/350-130.
[21] The Board's decision dated 30.05.2006 and numbered 06-37/477-129.

competitive practices through collusion, Gaziantep Ytong indicated that it has been taking steps forward to eliminate its structural ties with Türk Ytong. The Board took this positive action into account in determining the fine to be imposed on Gaziantep Ytong.

VI. Conclusion

The Board has enhanced its precedent body regarding its approach towards structural ties in investigations, with the *Pamukkale Hot Air Balloon Operators*. That said, the reasoned decision of the Board does not refer to Article 9 of the Law No. 4054, which regulates the conditions of imposing structural remedies. Therefore, the specifics of the Board's reasoning or the lawful basis of the structural remedy imposed upon Hera Balon was allowed by law are not very clear.

Since the amended wording ofArticle 9 regarding structural remedies has only been in force since June 2020, it is expected that the Board's future decisional practice will shed further light over the conditions of imposing structural remedies.

"Premature" Change of Control Caught a Break from the Turkish Competition Board's Administrative Monetary Fine due to Lack of Evidence

The Turkish Competition Authority ("***Authority***") published the Turkish Competition Board's ("***Board***") reasoned decision[22] regarding the acquisition of all shares in and sole control over Doğanay Gıda Tarım ve Hayvancılık San. ve Tic. A.Ş. ("***Doğanay***") by Taxim Capital Partners I Limited Partnership ("***Taxim Capital***") where the Board decided that there was no sufficient evidence verifying that the change of control had occurred before the Board's approval to the Transaction and thus, there was no need to impose an administrative monetary fine.

Pursuant to the notification that was submitted before the Authority on July 22, 2020, the Board unconditionally approved the notified transaction concerning the acquisition of sole control over Doğanay by Taxim Capital on September 10, 2020.[23] On March 19, 2021, approximately six months after the Board's unconditional approval decision, the Authority conducted an on-site inspection at Doğanay's premises within the scope of the preliminary investigation initiated against thirteen undertakings acting as manufacturer/supplier in the fast-moving consumer goods sector. During the on-site inspection, the Authority case handlers collected certain information and documents that seemed to indicate that a change of control over Doğanay had occurred prematurely before the Board's unconditional approval decision. For background information, under Turkish merger control regime, there is an explicit suspension requirement (*i.e.*, a transaction cannot be closed before obtaining the approval of the Board), which is set out under Article 11 of Law No. 4054 and Article 10(5) of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***"). Under Article 10(8) of Communique No. 2010/4, a transaction is deemed to be "realized" (*i.e.*, closed) on the date that the change in control occurs. Therefore, if such change of control or closing had taken place before the Board granted its approval for the transaction, this would constitute an

[22] The Board's decision dated 29.04.2021 and numbered 21-24/280-125.

[23] The Board's decision dated 10.09.2020 and numbered 20-41/566-251.

express breach of the Communiqué No. 2010/4.

The documents seized during the on-site inspection contained certain WhatsApp conversations dated August 10, 2020, in a group chat titled "*Doganay CEO+Taxim*" and another correspondence dated September 1, 2020, among the executives/employees of Taxim Capital and employees of Doğanay. The correspondence between the executives/employees of Taxim Capital took place one month before the Board's unconditional approval decision, and the discussions amongst them were pertinent to the sales prices of certain Doğanay-branded turnip juices, potential price increases for such products, and the level of prices to be applied for the traditional sales channel.

Accordingly, the Board scrutinized whether Taxim Capital had been able to exercise decisive influence over the decisions concerning the determination of the prices of Doğanay's products (*i.e.*, whether a change in control over Doğanay had occurred prior to the Board's approval decision). In this respect, the Board requested information on the price changes of Doğanay branded turnip juices between August 1, 2020, and September 30, 2020 from certain groceries in various cities, and found that in line with the discussions between the executives/employees of Doğanay and Taxim Capital, the prices of the relevant products were increased on September 8, 2020, and remained the same as of September 30, 2020.

Furthermore, in response to the Authority's request for information from Taxim Capital as to whether Taxim Capital had acquired control over Doğanay as of the date of the relevant WhatsApp correspondences, Taxim Capital explained that (i) none of the members of the WhatsApp group chat had any duties concerning Doğanay and they were only associated with Taxim Capital and they were not hired by Doğanay; (ii) the price increase in question was decided solely by the management of Doğanay without the influence and/or direction of Taxim Capital; (iii) Taxim Capital was only informed of such price increases; (iv) and one of the attendees in the group chat was assigned as the "Interim Period Observer" who was authorized to monitor Doğanay's day-to-day management within the Share Purchase Agreement and the sole purpose this observation was to maintain the current financial power of the target company (*i.e.*, Doğanay) to be invested in.

As a result, although the Board has detected a price increase of the products in question subsequent to the relevant correspondence, the Board also remarked that the findings are not enough to reach a conclusive outcome as to whether Taxim Capital was able to exercise decisive influence over Doğanay's prices. Eventually, the Board concluded that the conversations did not evidence the violation of the suspension requirement and there was not sufficient evidence that could prove that a premature change of control over Doğanay has occurred prior to the Board's approval decision. Based on this, the Board decided that there was no need to impose an administrative monetary fine on Taxim Capital, even though the Authority case handlers determined that the actions of the employees could be deemed as a violation of the suspension requirement and suggested to impose an administrative monetary fine on Taxim Capital.

The Board's decision is of significant importance as it constitutes an essential contribution to the decisional practice of

the Board as to whether certain types of actions taken by the transaction parties would amount to change of control, and thus a violation of the suspension requirement (*i.e.*, exercise of decisive influence/control prior to the approval decision of the Board).[24] The decision is also important as it reconfirms that the Board conducts thorough examination within the scope of its review processes and links its findings with its previous review and decision processes.

Can You Truly Delete It? The Turkish Competition Board's Recent N11 Decision on Hindering On-Site Inspections

The Turkish Competition Board (***"Board"***) published its reasoned decision[25] about the hindering of the on-site inspection conducted at the premises of Doğuş Planet Elektronik Ticaret ve Bilişim Hizmetleri A.Ş. ("***N11***") on April 9, 2021. The Board had launched a full-fledged investigation[26] to determine whether undertakings including N11 violated Law No. 4054 on Protection of Competition ("***Law No. 4054***") by conducting gentlemen's agreements in the labor market.

On April 9, 2021 starting at 10:49, the case handlers of the Turkish Competition Authority ("***Authority***") conducted an on-site inspection at N11's premises. After informing N11 employees on possible sanctions for hindering or complicating the inspection, the case handlers proceeded to collect correspondences and documents from devices of N11 employees. During the inspection of an employee's mobile device, the case handlers encountered certain issues which raised suspicions that some correspondences were deleted during the on-site inspection.

Accordingly, with the help of forensic software the case handlers retrieved the deleted messages from the mobile device of an employee in the human resources department. These messages indicated that certain correspondences were deleted on April 9, 2021 during the course of the on-site inspection. Retrieved correspondences included statements such as: "*Shall we delete personal conversations?; "Delete this, I have deleted it.*"; "*there are tons of things to delete (...)*" and "*I'm deleting, [but] you keep texting something*".

Additionally, the case handlers also found that certain correspondences in WhatsApp groups were also deleted on the day of the on-site inspection from the mobile device of the same employee as well as from the mobile device of another employee. The case handlers also found another deleted correspondence which revealed that an employee asked another employee to retrieve his/her notebook which was on a desk in the office and bring it to his/her home. The same correspondence also indicates that the N11 employee was successful in taking the notebook out of N11's premises without informing the case handlers.

N11 demanded that the Board should not impose administrative monetary fines through the following arguments;

- Due to the nature of inspecting WhatsApp correspondences, it is possible to access the personal

[24] For instance; the Board's Boyner/YKM decision dated 20.09.2012 and numbered 12-44/1359-M; Tekno Ray decision dated 23.02.2012 and numbered 12-08/224-55; Ajans Press decision dated 21.10.2010 and numbered 10-66/1402-523; Cegedim decision dated 26.08.2010 and numbered 10-56/1089-411.

[25] The Board's Doğuş Planet decision dated 27.05.2021 and numbered 21-27/354-172.

[26] The Board's investigation initiated through the decision dated 01.04.2021 and numbered 21-18/213-M.

conversations of employees in addition to the conversations on the operations of N11,

- The deleted correspondences between employees were retrieved and examined through forensic methods and these correspondences were personal conversations that did not relate to N11's commercial activities,

- In addition to retrieving the correspondences in the WhatsApp groups through forensic methods, these messages could also be seen during the examinations conducted on the devices of other employees in the relevant WhatsApp group, and

- The case handlers who conducted the on-site inspection did not make any determinations regarding hindering or complicating the onsite inspection within the on-site inspection affidavit.

Despite the above arguments, the Board determined that N11 deleted correspondences from four separate WhatsApp groups after the beginning of the on-site inspection. The Board also referred to the Board's settled precedents and indicated that (i) whether or not the deleted data can be retrieved or (ii) whether or not they directly indicate a competition law violation are not considered as parameters to affect the outcome of hindering on-site inspection. Thus, the recovery of the aforementioned correspondences through forensic software does not affect the evaluation on N11. Moreover, the Board stated that it was unable to assert whether the case handlers obtained all the deleted correspondences as there is a possibility that not all correspondences may be obtained despite employing the forensic software. In a similar vein, whether or not the retrieved correspondences included statements raising violation suspicions was not important in terms of hindering or complicating the on-site inspections.

The Board further determined that the correspondences were directly between N11 employees or in WhatsApp groups of N11 employees that were not personal correspondences. Thus, the Board stated that it was not of importance whether or not there was an indication of hindering on-site inspection within the on-site inspection affidavit since the lack of such an indication did not remove the existence of such actions. The Board also determined that taking a notebook away from the on-site inspection premises without the knowledge of the case handlers constituted hindering of on-site inspection.

As a result, the Board found that N11 hindered and complicated the on-site inspection and accordingly imposed an administrative fine under Articles 16 of Law No. 4054, in the amount of 0.5% of N11's 2020 turnover.

N11 decision is not the first decision of the Board on hindering on-site inspections. In its *Pasifik* decision,[27] the Board found that Pasifik Tüketim Ürünleri Satış ve Ticaret A.Ş. ("***Pasifik***"), hindered and complicated the on-site inspection, even though Pasifik stated that due to the "in-placehold" feature in the Office 365 software that Pasifik uses, the original data cannot be deleted in any way by the users from the servers and all the deleted correspondences were retrieved from the servers and analyzed by the Authority.

[27]The Board's Pasifik decision dated 29.4.2021 and numbered 21-24/279-124,.

According to the Board's *Eti* decision,[28], Eti Gıda San. ve Tic. A.Ş.'s National Key Account Manager deleted correspondences during the inspection. The technical review revealed that the date and time of the only message on the correspondence "*Messages to this chat and calls are now secured with end-to-end encryption. Tap for more info.*" exactly matches the date and time of the deletion.

Furthermore, in its *Unmaş* decision,[29] the case handlers were unable to access some of the Whatsapp correspondences during the quick-look and it was determined that the correspondences were deleted during the on-site inspection, after accessing the messages via forensic tools. The Board then imposed an administrative fine on Unmaş Unlu Mamuller Sanayi ve Ticaret A.Ş. ("***Unmaş***") due to the fact that one of the employees deleted two WhatsApp correspondences on his/her own initiative, despite Unmaş's own stance. Again, the Board also underlined that, the fact that deleted data can be accessed with the help of forensic tools does not have an effect on the nature of the violation and an acceptance of the contrary argument may result in rewarding Unmaş for deleting the aforementioned messages in a way that cannot be detected.

After the N11 decision, the Board maintained its position with its hardline approach for hindering and complicating on-site inspections with two other decisions[30] on the same day with N11 and five decisions[31] afterwards in 2021.

In its *Çiçek Sepeti* decision,[32] the Board did not consider the argument that correspondences were deleted because they were sent to the wrong person by mistake, to be reasonable. Also, the case handlers found a screenshot of a backdated e-mail message asking Çiçek Sepeti İnternet Hizmetleri A.Ş. ("***Çiçek Sepeti***") employees to delete the WhatsApp correspondence and such correspondence was completely deleted from the mobile device of one of the employees. This single incident was enough to find that Çiçek Sepeti had hindered and complicated the on-site inspection.

In the *İGSAŞ* decision,[33] the case handlers noticed that one of the employees' mobile devices did not contain any WhatsApp correspondences. When it was asked, the employee stated that he/she usually communicates via phone calls and does not use the WhatsApp much. However, when another employee's mobile device was inspected, it was noticed that the employee left a WhatsApp group at the time of the on-site inspection. Thus, the Board found that İGSAŞ hindered and complicated the on-site inspection.

[28] The Board's Eti decision dated 29.04.2021 and numbered 21-24/278-123.

[29] The Board's Unmaş decision dated 20.5.2021 and numbered 21-26/327-152.

[30] The Board's Sahibinden decision dated 27.5.2021and numbered 21-27/354-174, The Board's Çiçek Sepeti decision dated 27.5.2021 and numbered 21-27/354-173.

[31] The Board's Medicana decision dated 17.6.2021 and numbered 21-31/400-202, The Board's Procter and Gamble decision dated 8.7.2021 and numbered 21-34/452-227, The Board's Savola decision dated 8.7.2021 and numbered 21-34/451-226, The Board's Fatih Romorkörcülük decision dated 29.7.2021 and numberred 21-36/486-254, The Board's İGSAŞ decision dated 12.08.2021 and numbered 21-38/544-265.

[32] The Board's Çiçek Sepeti decision dated 27.5.2021 and numbered 21-27/354-173.

[33] The Board's IGSAŞ decision dated 12.08.2021 and numbered 21-38/544-265.

In conclusion, it seems like the increase in the number of decisions on hindering and complicating on-site inspection will continue in 2022, as the Authority carries on conducting on-site inspections even more frequently than ever.

In light of the Board's N11 decision as well as the recent precedents, it is clearly seen that the Board does not tolerate any type of deletion. With the help of its forensic tools, the Board can retrieve the correspondences at almost every instance. Therefore, deletion of any correspondence, independent from its substance, during the on-site inspection carries the risk of an administrative monetary fine by the Board for hindering or complicating the on-site inspection, which would almost be rubbing salt into the wound, taking into account the administrative fine that might arise from the original violation.

Turkish Competition Board Unconditionally Approved VDW's Acquisition of Savio After a Detailed Analysis of Conglomerate Effects

The Board has published its reasoned decision[34] on the acquisition of sole control of Savio Macchine Tessili S.p.A ("***Savio***") by Vandewiele NV ("***VDW***") by way of share purchase.

As per the notification, all shares of Savio would be transferred to VDW within the scope of the Share Purchase and Sale Agreement signed between the parties on December 31, 2020.

Before delving into substantive analysis, the Board first evaluated in detail the activities of the parties, both of which offer products for textile sector. Accordingly, Savio is active in textile winding machines and also offers software and hardware solutions for the textile dyeing market in Turkey. On the other hand, VDW is a machinery and equipment manufacturer for carpet weaving in Turkey. In its relevant product market analysis, the Board noted that customers of the products offered by Savio and VDW differ significantly and concluded that there is no overlap in terms of demand substitution as the product ranges of Savio and VDW pertain to different areas of use.

In terms of supply substitution, the Board assessed technical knowledge and production technology required to manufacture products offered by Savio and VDW. The Board compared VDW's machines for carpet industry and Savio's textile winding machines and found that productions of these machines require different technical knowledge. Accordingly, it stated that manufacturers of the relevant products are not able to easily switch from producing one product to another under low additional costs due to significant differences in the required technical knowledge and production technologies. The Board also noted that such a switch would require manufacturers to switch to new production lines and to adapt their existing assets accordingly, inferring that there is no supply-side substitutability between the products offered by Savio and VDW.

In terms of relevant product markets where the parties are active in Turkey, no horizontal or vertical overlap has been found by the Board. That said, the Board conducted an analysis as to the conglomerate effects of the transaction bearing in mind that the products offered by Savio and VDW are interrelated and concern the same industry. In this regard, it noted that different products belonging to separate relevant product markets may

[34] The Board's *Savio/VDW* decision dated 29.04.2021 and numbered 21-24/285-128.

affect demands to each other due to their complementary nature or the low level substitutability between them. In this regard, the Board referred to the definition used by the Organization for Economic Co-operation and Development ("***OECD***") to define the portfolio effects which may stem from conglomerate transactions and stated that "portfolio effects (…) refer to the pro- and anti-competitive effects that may arise in mergers combining branded products (i) in which the parties enjoy market power, but not necessarily dominance, and (ii) which are sold in neighboring or related markets."[35] To that end, the Board highlighted that the main competition concern which may stem from conglomerate transactions is the likelihood of market foreclosure through tying and bundling practices and conducted an analysis as to whether it would be viable for VDW to engage in tying and bundling practices after the completion of the transaction.

Accordingly, the Board pointed out that in this case the machinery used in different stages of textile production process serves different functions and uses different technologies. It also emphasized the existence of specialised firms specifically focusing on the textile winding and weaving as a factor inferring that the products target different customer groups. The parties' explanations that products belonging to different stages of textile production are rarely bought by same customers (which are mostly vertically-integrated undertakings) have also been taken into consideration on that front. Moreover, the Board noted that there is a very limited number of customers buying both Savio and VDW products and these sales were not conducted in the form of tying or bundling. In this regard, VDW stated that while VDW and Savio's products are manufactured and sold separately; some of its products may be sold together depending on the customers' demands in exceptional situations. However, based on the parties' foregoing explanations, the Board found no collective sale tendency/practice in terms of the products manufactured by VDW and Savio.

The Board then assessed the parties' market shares in the relevant product markets and emphasized the existence of strong players in these markets as well as numerous undertakings from all scales. In this regard, despite having considerably low market shares in terms of software and hardware solutions, Savio has been found to enjoy volatile market shares varying significantly over years depending on customer demand. However, the Board noted that the parties' global market shares do not significantly differ from their market shares in Turkey and found that it would not be economically viable for VDW to engage in tying or bundling sales in terms of Savio's products based on the considerations set out above. Moreover, the existence of financially strong customers has been considered by the Board as a factor that may eliminate such practices.

In connection with the assessment of market shares of undertakings, the Board also conducted an analysis in terms of the production capacities of undertakings operating in the relevant markets to determine as to whether production capacities would allow switching to other manufacturers. Since the parties do not have any manufacturing activity in Turkey and their sales consist solely of export sales to Turkey, the Board evaluated the

[35] "*Portfolio Effects in Conglomerate Mergers*", OECD, Policy Roundtables, 2001. p. 22-23.

parties' global production capacities in 2020. In this regard, the Board concluded that undertakings generally operate with unutilized capacities, which are capable of satisfying potential demands that may occur after the transaction.

All in all, even though global and Turkish market shares of Savio (textile winding machines) and VDW (certain machinery) have been found to be relatively high in certain markets, considering the fact that they focus on different areas of textile production, the Board has found no horizontally affected market or vertical overlap between the parties' activities. Consequently, the Board considered the transaction as a conglomerate concentration realized in the form of product expansion and stated that it would not create any restrictive effects in the relevant markets. Accordingly, it unconditionally approved VDW's acquisition.

Together with *Siemens/Varian* [36] and *EssilorLuxottica/HAL* [37] decisions, the Board's *Savio/VDW* decision once again reveals that the Board does not confine itself to the mere assessment on whether there exist any horizontally or vertically affected markets and is keen to make comprehensive analyses for conglomerate mergers, which are generally found to be less problematic in terms of competition law.

[36] The Board's decision dated 4.3.2021 and numbered 21-11/145-60

[37] The Board's decision dated 10.6.2021 and numbered 21-30/395-199.

Employment Law

The Regional Court of Appeals Rules regarding "Limitation on Territory" in Non-Compete Agreements

I. Introduction

Turkish labor law allows the regulation of post-employment non-compete obligations for employees, either in their employment agreement or by a separate agreement, per Article 444/1 of Turkish Code of Obligation No. 6098 ("TCO") and Article 23 of Turkish Civil Code No. 4721 ("TCC"), subject to certain conditions. In this regard, first of all, this agreement must be in writing. Also, pursuant to Article 444/2 of the TCO, a non-compete agreement is only valid if there is legitimate interest of the employer that is worth protecting, *i.e.*, if the employment relationship enables the employee to have access to information on the customer portfolio of the employer, its production secrets or the works conducted in the workplace, and there is the possibility that the employee may harm the employer by using this information.

Since non-compete clauses restrict the scope of future employment for employees, and thereby their economic freedom, there are certain limitations that need to be observed for a non-compete stipulation to be valid. For this purpose, Article 445 of the TCO regulates that a non-competition agreement cannot set forth any limitations with respect to geographical location, time period and type of works that may jeopardize the economic future of the employee; and in any event cannot be longer than two years barring special circumstances or a fundamental and valid reason.

The Regional Court of Appeals recently rendered a decision regarding determination of the scope of non-compete obligation of an employee and adjudicated that the limitation based on territory, *i.e.*, the geographical area of employment must be understood in consideration of the employee's *de facto* workplace, instead of the employer's headquarters.

II. General principles regarding limitations

In accordance with the provisions of the TCO, regulation and execution of non-competition agreements are subject to limitations based on time, territory and type of work. To elaborate;

"*Limitation on time*" criterion pertains to the period of time that employees can be restricted for under the non-complete obligation. As per Article 445 of TCO, this time cannot exceed two (2) years.

"*Limitation on type of work*" criterion pertains to the specific type of work (product, service et cetera) that the employee must refrain from engaging in, due to a non-compete obligation. The restricted type of work must pertain to the work that the employer is *de facto* involved in, as well as the nature of the work that the respective employee conducts.[38]

"*Limitation on territory*" criterion pertains to the geographical area that the non-compete obligation shall be in effect. In that regard, the parties must specify a location for the non-compete territory. The High Court of Appeals' precedents show that this area can cover certain cities, or a certain geographical area. In this regard, the crucial point in the territory limitation is the location in which the employer operates, in other words, where the employer is engaged in effect.[39] In that sense, the restricted territory cannot be extended beyond the geographical area where the employer operates. Also, it is suggested that limitation of territory can also be determined by referring to the impact area of the employer's business activity.[40]

The High Court of Appeals does not have an established case law regarding the non-compete clauses covering foreign countries. However the High Court deems the non-compete clauses that cover Turkey as a whole, to be excessive.[41] Also, some judges of the High Court of Appeals and some scholars argue that it is not fair to have the non-compete clauses cover those territories that are the most dynamic areas for a certain sector, such as areas that are

[38] 11th Civil Chamber of the High Court of Appeals, E. 2015/5612 K. 2015/13054, dated December 7, 2015.

[39] Büşra Uysal Tuna, "*İş Hukukunda Rekabet Yasağı Sözleşmeleri*", Dokuz Eylul University/Institute of Social Sciences / Department of Private Law/Private Law Programme, Master's Thesis, Izmir, 2019, p. 69; Ahmet Koyuncu, "*İşçinin Sadakat Borcu ve İşverenle Rekabet Yasağı*", Sicil İş Hukuku Dergisi, Sayı: 15, September 2009, p. 91; Polat Soyer, "*Rekabet Yasağı Sözleşmesi (TBK m. 348-352)*", Dokuz Eylül Üniversitesi Hukuk Fakültesi Döner Sermaye İşletmesi Yayınları, Ankara, 1994, p. 66.

[40] Neslihan Büyükdillan, "*İşçinin Rekabet Etmeme Borcu*", KTO Karatay University/Institute of Social Sciences / Department of Private Law/Master Programme, Master's Thesis, Konya 2019, p. 120; Sarper Süzek, "*İş Hukuku (Genel Esaslar-Bireysel İş Hukuku)*", Beta Basım Yayım Dağıtım A.Ş., 14th edn, Istanbul 2017, p.348; Sarper Süzek, "*Yeni Türk Borçlar Kanunu Çerçevesinde İşçinin Rekabet Etmeme Borcu*", İÜHFM, C.72, S.2, 2014, p. 461; Sevil Doğan, "*İşçinin Rekabet Yasağı İş Sırrının Korunması*", Seçkin Yayıncılık, 1st edn, Ankara 2017, p. 105.

[41] 11th Civil Chamber of the High Court of Appeals, E. 2016/2351 K. 2017/1598, dated March 16, 2017; 11th Civil Chamber of the High Court of Appeals, E. 2014/6893 K. 2015/4615, dated March 2, 2015; 9th Civil Chamber of the High Court of Appeals, E. 2010/45564 K. 2013/6289, dated February 20, 2013.

the most densely populated region and have the highest trade volume.[42]

III. The background of the dispute which is evaluated by the Regional Court of Appeals

The subject matter dispute concerned the plaintiff employer's claim for the payment of the penalty amount in accordance with the penalty clause under the non-competition agreement signed with the employee.

According to the non-competition agreement concluded between the plaintiff employer and the defendant employee, a non-compete obligation was imposed on the employee, restricting them from working for other companies operating in the same field of activity with the plaintiff employer in Ankara and Istanbul, for a period of two years as of the end of their employment agreement. Thereafter, before the lapse of two-year period, the employee started to work at a company, whose headquarters were supposedly in Ankara ("New Employer").[43] The employer argued that the fact that the employee started to work at the New Employer is in violation of their non-compete obligation and requested them to pay the penalty amount as per the non-competition agreement.

Ankara West Commercial Court of First Instance, by taking into account that the New Employer has a branch in Ankara and it also carries out its operations in Ankara (*even though the published text of the relevant judgment indicates that the defendant employee claimed that the New Employer's headquarters was not in Ankara*), adjudicated that the defendant employee's employment at the New Employer had breached the employee's non-compete obligation and ruled for the payment of the penalty amount, in favor of the plaintiff employer ("Local Court Decision"). This decision was appealed by the defendant employee.

IV. The decision of 20th Civil Chamber of the Ankara Regional Court of Appeals

In its decision numbered E. 2020/582 K. 2021/1638 and dated December 23, 2021, regarding the defendant employee's appeal of the Local Court Decision, 20th Civil Chamber of the Ankara Regional Court of Appeals ("Regional Court") assessed whether or not the employee's employment at the New Employer violated their non-compete obligation in terms of "limitation based on territory".

The Regional Court noted in its decision that it is a known fact that many companies aim to grow their businesses endeavor to move their headquarters to Istanbul, which is considered the "economic" capital of the country, or to other big cities such as Ankara and Izmir, where commercial relations are more easily established and conducted. The Regional Court hereupon evaluated that, accepting those employees, who work in enterprises such as factories, manufacturing sites or salesrooms of a company, to be working in big cities like Istanbul, Ankara and Izmir wherein the respective company has its headquarters, and thereby concluding that they breached their non-compete obligation towards their previous employers, would be a violation of the principle of freedom of work and equitable standards, which are guaranteed by the provisions of the Turkish Constitution and other legislation.

[42] Dissenting Opinion, 9th Civil Chamber of the High Court of Appeals, E. 2006/31990 K. 2007/18182, dated June 6, 2007.

[43] The plaintiff employee asserted that the headquarters of the New Employer was in Ankara. However, it is derived from the Regional Court's decision that the defendant employee argued that the New Employer's headquarters in another city.

Consequently, the Regional Court decided for the removal of the Local Court Decision, considering that in this particular case the defendant employee did not *de facto* work in Ankara wherein the plaintiff employer's commercial center was located, therefore the employee did not breach their non-competition obligation in terms of "territory".

V. Conclusion

This decision is of great importance as it scrutinizes the scope of non-compete obligation imposed on employees in terms of "limitation on territory". It is pointed out by the Regional Court that moving companies' headquarters to cities such as Istanbul, Ankara and Izmir is quite common and because of that when an employee, who does not *de facto* work in these cities but works in an organization or venture of a company that has its headquarters in these cities, gets employed in these cities, it would be a disproportionate interference with the respective employee's freedom of work to accept that this employment breaches their non-compete obligation covering these cities.

In conclusion, this decision suggests that while evaluating an employee's compliance with or violation of their non-compete obligation in terms of territorial limitation, the location where the employee *de facto* works must be taken into account, instead of simply considering all the locations where the new employer operates, especially the location of its headquarters.

Litigation

The General Assembly of the High Court of Appeals Sets an Additional Criterion for Lawsuits with Unquantified Receivable Claims

I. Introduction

Under Turkish Law, the concept of an "unquantified receivable claim" has been embraced in 2011, when the Turkish Code of Civil Procedure numbered 6100 ("TPC") was enacted. Before this concept was introduced, the plaintiffs were obliged to specify their pecuniary claims when initiating an action. However, the obligation of setting forth a definite claim amount might create serious issues when it is impossible for the plaintiff to calculate the amount precisely. Thus, this obligation had resulted in plaintiffs not being able to exercise their rights, in practice.

Due to the above-mentioned issues, Article 107 of TPC now provides that in cases where it is impossible to ascertain or cannot be expected for the plaintiff to accurately and precisely determine the amount or value of the debt receivable on the date the lawsuit is filed, the claimant may file an action for an unquantified claim by specifying the legal relationship and a minimum amount or value. Recently, the General Assembly of High Court of Appeals rendered a decision[44] that brings an additional criterion to unquantified receivable lawsuits.

II. The unquantified receivable claim under Turkish Law

Before the concept of the unquantified receivable claim, the settled practice was filing the lawsuit for part of the claimed amounts (*i.e.*, as a "partial lawsuit") with a

[44] 2021/485 E. 2021/971 K. 7.7.2021

lower claim amount and then submitting a request to adjust the claim and amending the lawsuit, once the amount somehow becomes specifiable, for instance after the relevant calculations are made in expert report(s). However, this used to put the plaintiff in a disadvantageous spot, because, for instance, the statute of limitations kept running for the part of the receivable/compensation that was not claimed in the case from the beginning: in addition to postponing the date that interest could accrue from, in certain cases.

The unquantified receivable claim is aimed to assist the plaintiff who is unable to precisely determine the amount of its pecuniary claim at the time the lawsuit is filed, to be able to make the claim during the litigation proceeds. By doing so, the plaintiff may increase their claim without enforcing their right for amending the lawsuit, which they can do only once. Therefore, the concept of unquantified receivable claim also benefits the equality of arms principle, as well.

III. The requirements of unquantified receivable claim per TPC

While the benefits of an unquantified receivable claim is undebatable, there are several criteria for enjoying these benefits. As per Article 107 of TPC, which is the only legal ground for an unquantified receivable claim, the following conditions should be met:

i. *It should be impossible for the plaintiff to precisely calculate the amount of the claim, or the circumsances must be such that it cannot be expected from the plaintiff to calculate the exact receivable amount when the lawsuit is being filed.*

ii. *The legal relationship from which the unquantified receivable is stemming should be unequivocally determinable.*

iii. *A claim figure must be specified, even if provisional, at the moment of filing the lawsuit.*

IV. The outcome of filing an unquantified receivable claim although requirements are not met

The legal scholars have diverse views regarding the outcome of filing an unquantified receivable claim without these requirements being met and there are different approaches on that front.

The majority agrees that where the amount of damage can be calculated or determined, the case that is filed as an unspecified compensation action must be dismissed due to lack of sufficient legal interest. This is also confirmed by many precedents, an example to which is the precedent of High Court of Appeals General Assembly of Civil Chambers dated 04.07.2018 and numbered 2016/2633 E., 2018/1300 K. This decision of the General Assembly of Civil Chambers states that the cases that cannot be deemed to be “unquantified” receivable claims but are filed so nonetheless, must be dismissed based on lack of sufficient legal interest before going into the merits of the case, and that this is also not the kind of procedural error that can be cured later on.

V. The additional criterion set by the General Assembly of the High Court of Appeals

Further to the above, the High Court has now brought an additional condition to filing a unquantified receivable lawsuit. The High Court concluded that as the unquantified receivable lawsuit is an

exceptional type of lawsuit, it should be clearly stated in the petition that the lawsuit being filed is an "unquantified receivable lawsuit". Accordingly, the verbal declaration of the plaintiff`s attorney about the case being an unquantified receivable lawsuit was not found sufficient for the lawsuit to be accepted as one. All in all the High Court ruled that since it is not openly stated in the lawsuit petition that the case is an unquantified receivable lawsuit, that case must be categorized and accepted as a partial lawsuit.

VI. Conclusion

The precedent of the General Assembly of the High Court poses great importance, because it shows that failure to clearly indicate in lawsuit petition that the case is being filed as unquantified receivable lawsuit will cause the lawsuit, to be deemed as a partial lawsuit instead. This would bring all the disadvantages of such lawsuit (the statute of limitations running for the part of the receivable/compensation that is not claimed in the case; in certain cases the interest not running for that amount etc.) onto the plaintiff due to lack of one simple statement in the petition.

Data Protection Law

Recent Decisions of the Turkish Data Protection Board

The Turkish Data Protection Board ("Board") has published some of its decisions on December 17, 2021 and December 27, 2021 on its website. Below are brief summaries of these significant decisions in chronological order:

I. Decisions Published on December 17, 2021

The decisions below touch upon various legal topics, but are mainly related to unlawful personal data processing and transfers.

Decision numbered 2021/32 on querying a third party`s personal data from bank records[45]

This decision concerned a case wherein a bank employee queried information about their spouse through the bank using their work authorization and providing the findings as evidence to the case file of a divorce lawsuit. The Board decided that the person working under the data controller bank had accessed, examined and submitted their spouse`s personal data to the court and other parties unlawfully, and therefore, along with other instructions, imposed an administrative fine on the data controller who did not implement the technical and administrative measures as per Article 12 of Turkish Data Protection Law ("DP Law").

[45] https://www.kvkk.gov.tr/Icerik/7107/2021-32 (Last accessed on January 25, 2022).

Decision numbered 2021/78 on taking and storing customers` passport photos during product sales[46]

The Board decided that based on evidence showing that customers` passport information was shared in a WhatsApp group, the data controller had failed to take all necessary technical and administrative measures to provide a sufficient level of security and therefore imposed an administrative fine on the data controller. Moreover, as the data controller did not make any notification to the Board regarding such data breach, the Board also imposed an administrative fine on the data controller on that specific matter, as well.

The Board also decided to notify the public prosecutor's office regarding the breach of the relevant provisions of the Turkish penal code and the suspects of the said unlawful incident.

Decision numbered 2021/79 on sharing the data subject's personal data with his/her relatives[47]

The Board decided that the data controller`s disclosure of the data subject`s relationship with the bank, by calling this data subject`s sister and father via the telephone numbers provided by the Risk Center of the Banks Association of Turkey is unlawful, as this communication was not based on one of the processing conditions stipulated under Article 5 of the DP Law, and thus imposed an administrative fine on the data controller who did not take the necessary technical and administrative measures to prevent unlawful processing of personal data as per Article 12 of DP Law.

Decision numbered 2021/85 on data controller's unsatisfactory response[48]

In this decision, the Board noted that the data subject had applied to the data controller and requested clarification on their data processing activities as the data controller did not provide a privacy notice; and although the data controller sent a response to the data subject, this was not satisfactory and therefore the data subject filed a complaint with the Board.

The Board concluded that while the data controller`s transactions necessitated the processing of personal data, (i) the data controller did not provide any privacy notice (clarification) regarding the data processing activities to be carried out at that time and afterwards, (ii) in order to get information on the use of the personal data, data subject has to search and find the relevant policy, (iii) this policy document covers the entire website, which is not fully compliant with the law and therefore the data controller is instructed to remedy the breach and to inform the Board about the results of such actions.

Decision numbered 2021/205 on unlawful processing of personal data[49]

The decision concerned an employer's alleged unlawful processing of data subject's personal data during the dismissal period. The Board decided that following the termination of the employment contract between the data controller and the data subject, the employer`s (i) formatting of the company's computer allocated to the data subject and (ii) blocking the data subject`s access to the company e-mail account by shutting

[46] https://www.kvkk.gov.tr/Icerik/7108/2021-78 (Last accessed on January 25, 2022).
[47] https://www.kvkk.gov.tr/Icerik/7111/2021-79 (Last accessed on January 25, 2022).
[48] https://www.kvkk.gov.tr/Icerik/7112/2021-85 (Last accessed on January 25, 2022).
[49] https://www.kvkk.gov.tr/Icerik/7113/2021-205 (Last accessed on January 25, 2022).

down the relevant e-mail account, are not unlawful.

Decision numbered 2021/227 on processing of the data subject's phone number without relying on any of the processing conditions[50]

The decision is regarding the processing of the data subject's phone number by an educational institution and sending SMS messages for advertisement purposes to the relevant phone number. The Board decided that the said processing was carried out without relying on any of the processing conditions in Article 5 of the DP Law and imposed an administrative fine on the data controller who did not take the requisite technical and administrative measures as per Article 12 of DP Law. With regards to the media company processing the data that was subject to the complaint, the Board assessed that their survey question "Would you like to receive information and promotions on products from companies via SMS?" did not refer to a specific company, but was worded as rather a general question and the affirmative answers are considered as explicit consent and shared with the educational institution. In this regard, the Board also initiated an ex officio investigation with respect to the media survey company.

Decision numbered 2021/228 on unlawful processing of personal data[51]

The decision concerned unlawful processing of data subject's personal data by a law office, which sent text messages to the data subject's phone numbers with regard to an execution proceeding. The data subject was not a party to the said execution proceeding but had previously been a shareholder of the debtor company. The Board decided that the lawyers were the data controllers (not the claimant telecommunication company) and their processing of personal data by sending text messages related to execution proceedings was carried out without relying on any of the processing conditions in Article 5 of the DP Law and failing to consider that the data subject had not been a shareholder of the company since 2015. The Board thus imposed an administrative fine on the data controller who did not take the requisite technical and administrative measures as per Article 12 of DP Law.

Decision numbered 2021/230 on sharing data subject's personal data with judicial authorities[52]

The decision is related to the data subject's former spouse making an inquiry using his system access through his job as a civil servant and sharing the data subject's personal data with judicial authorities.

The Board stated that processing by an employee working within the data controller's operation for a purpose other than the fulfillment of the defined services and legal obligations is unlawful, as it is not based on one of the processing conditions stipulated under Article 5 of the DP Law and it is also contrary to the procedure and principles indicating that personal data must be relevant, limited and not excessive in relation to the purposes for which they are processed. Therefore, the Board decided that the relevant civil servant should be subjected to disciplinary measures; while the data controller was instructed to take the necessary measures and inform the Board of the result.

[50] https://www.kvkk.gov.tr/Icerik/7115/2021-227 (Last accessed on January 25, 2022).
[51] https://www.kvkk.gov.tr/Icerik/7117/2021-228 (Last accessed on January 25, 2022).
[52] https://www.kvkk.gov.tr/Icerik/7119/2021-230 (Last accessed on January 25, 2022).

Decision numbered 2021/333 on transferring personal data to third parties and failure to provide information regarding the data transfer to the data subject[53]

The decision is related to an insurance company transferring personal data to third parties and failure to provide information regarding the data transfer to the data subject. The Board decided that the relevant transactions are lawful as it is based on one of the processing conditions stipulated under Article 5 of the DP Law, by also considering the third party is a data processor. The Board further decided to instruct the data controller to meticulously follow up on the data subjects' applications and to respond to them in accordance with the law and to remedy the deficiencies in its privacy notice.

Decision numbered 2021/361 on sending promotional messages to the data subjects via mobile applications without his/her consent[54]

The Board decided that it is unlawful for the data controller (bank) to process the personal data of the data subject by sending promotional messages via mobile applications without their duly obtained express consent and imposed an administrative fine on the data controller who did not take the necessary technical and administrative measures as per Article 12 of DP Law.

The Board further decided to instruct the data controller to organize its mobile application processes in such a way as to obtain express consent (the Board indicates that automatic enabling of push notifications settings of the Android app is not considered explicit consent and therefore not compliant with the law), and to inform the Board about the results of this process.

Decision numbered 2021/422 on sharing photos of a former employee on the data controller's social media account[55]

The decision relates to a personal data processing activity carried out by sharing the photos of the data subject, who was a former employee of the data controller, on a social media account of the data controller. The Board decided that as the photos of the data subject were not removed from the social media account of the data controller, the data controller unlawfully processes the personal data without relying on any of the processing conditions in Article 5 of the DP Law, thus imposed an administrative fine on the data controller who did not take sufficient technical and administrative measures and instructed the data controller accordingly.

Decision numbered 2021/548 on calling the data subject without his/her consent[56]

The decision is regarding a digital platform dealer obtaining and processing a data subject's cell phone number for a campaign and calling the data subject without his/her consent. The Board decided that even if the digital platform is referred to as the data controller and the dealer as the data processor under the contract they had executed, in this case the dealer should be considered as the data controller since it called the data subject,

[53] https://www.kvkk.gov.tr/Icerik/7105/2021-333 (Last accessed on January 25, 2022).
[54] https://www.kvkk.gov.tr/Icerik/7109/2021-361 (Last accessed on January 25, 2022).
[55] https://www.kvkk.gov.tr/Icerik/7110/2021-422 (Last accessed on January 25, 2022).
[56] https://www.kvkk.gov.tr/Icerik/7123/2021-548 (Last accessed on January 25, 2022).

(who was not registered in the digital platform's own CRM system) without the digital platform`s instruction and knowledge, and the digital platform did not even convey the relevant phone number to the dealer. The Board thus imposed an administrative fine on the dealer who did not implement the technical and administrative measures cited under Article 12 of the DP Law.

Decision numbered 2021/572 regarding the use of the data subject's photo by his/her school[57]

The Board decided that the sharing of the photos that were the subject of the complaint was carried out on the basis of express consent of the data subject/guardian as per Article 5 of the DP Law, thus there is no action to be taken regarding the complaint. Nevertheless, the Board also instructed the data controller to determine whether the photo of the data subject is separable from the main photo *e.g.*, through masking, if not, to erase the photo as the data subject is no longer a student and express consent, by nature, is revocable.

Decision numbered 2021/584 on processing personal data on the grounds that it was publicly available in bar association records[58]

The decision is related to a company operating in the insurance and private pension business. According to the decision, this company unlawfully processes data subject's personal data on the grounds that it was publicly available in bar association records.

The Board concluded that data subject's mobile phone number is not publicly available, and even if it was, as claimed, in this case the data subject is not being contacted to benefit from their professional expertise, but to request an appointment regarding the insurance company activities and the processing by sending a SMS is carried out without relying on any of the processing conditions in Article 5 of the DP Law, thus imposed an administrative fine on the data controller who did not take the relevant technical and administrative measures as per Article 12 of DP Law.

II. Decisions Published on December 27, 2021

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

Decision numbered 2021/603 on delivery of a package to an address which is not provided by the data subject[59]

The decision is about a courier company delivering a package to the data subject's work address even though the data subject indicated their home address as the delivery location. The Board decided that (i) the delivery to the address which is not indicated by the data subject constitutes an act of unlawful processing of personal data, therefore issued an administrative fine against the cargo company with respect to this action; (ii) as for the retention of the home address of the data subject from a previous order, the Board decided that there is no additional action to be taken, since the cargo company has kept such information no more than the time range allowed in the relevant law, (iii) that the data controller should take the necessary actions to warn

[57] https://www.kvkk.gov.tr/Icerik/7118/2021-572 (Last accessed on January 25, 2022).
[58] https://www.kvkk.gov.tr/Icerik/7122/2021-584 (Last accessed on January 25, 2022).
[59] https://www.kvkk.gov.tr/Icerik/7131/2021-603 (Last accessed on January 25, 2022).

the data subject to submit a complete application with all the required elements in it in the event that the data subject's application lacks any of the requirements set forth under the DP Law.

Decision numbered 2021/670 on retention of personal data[60]

The decision is about the retention of a job-applicant's personal data which was provided while applying online for an open position at a bank, after their job application was rejected. The Board decided that the purpose of processing data has ceased, as the job applicant did not get the job; moreover, since the data subject has requested deletion of the personal data, the relevant data should have been destroyed within thirty (30) days of the data subject's request, and not be held till the next destruction cycle. The Board, along with related instructions, imposed an administrative fine on the bank due to not deleting the data within thirty (30) days.

Decision numbered 2021/761 on disclosure of medical records[61]

The decision concerns the disclosure of the medical records of a minor patient by a hospital operated by the Ministry of Health upon request by the attorney of the non-custodial parent. In the decision, the Board emphasized the Ministry of Health acts as the data controller in the given situation. The Board instructed the data controller to implement a set of security measures for compliance and institute disciplinary measures set forth in Article 18 (3) of DP Law against the persons, who were responsible for the incident.

Decision numbered 2021/799 on unlawful processing of the data subject's personal data[62]

The decision is regarding the unlawful processing of the data subject's personal data with regards to a language test that has an international validity by an accredited institution in Turkey. The Board stated that the data controller gave an instruction to test centers to take finger scanning records for the entrance to the exam, however an alternative process should have been created. Although express consent was obtained for the processing and cross-border transfer, they were not compliant with the elements stipulated under DP Law. Accordingly, the Board (i) imposed an administrative fine on the data controller whose headquarter is abroad determining the test center in Turkey as a data processor, (ii) instructed the test center in Turkey to respond to data subject requests in detail as data processor may respond to the relevant requests on behalf of the data controller, (iii) instructed the data controller to switch to an alternative identity authentication method and ensure that the test centers in Turkey to comply with that system and inform the Board of the result.

Decision numbered 2021/847 on erasure of personal data[63]

The decision is regarding a data controller failing to comply with a data subject's request of erasure of personal data (former address information) from a website. The Board considered the retention of former address information for invoice documents lawful as the legal retention periods are

[60] https://www.kvkk.gov.tr/Icerik/7136/2021-670 (Last accessed on January 25, 2022).
[61] https://www.kvkk.gov.tr/Icerik/7137/2021-761 (Last accessed on January 25, 2022).
[62] https://www.kvkk.gov.tr/Icerik/7138/2021-799 (Last accessed on January 25, 2022).
[63] https://www.kvkk.gov.tr/Icerik/7140/2021-847 (Last accessed on January 25, 2022).

applied. However, the Board indicated that retention of invoice documents is different than retention of user address information in user's personal account and therefore, decided to instruct the data controller to establish channels that will enable personal data to be updated/destroyed and outdated personal data not to be displayed to data subjects and to take the necessary measures preventing the use of the personal data destroyed/requested to be destroyed for purposes other than retention purposes, to satisfy the principle of maintaining data records which are "accurate and where necessary kept up to date".

Decision numbered 2021/889 on broadcasting footages of data subject by a sports complex[64]

The decision is related to the recording and broadcasting of the sports games the data subject played in without his express consent by a sports complex. The Board evaluated that the data subject's image is processed by the data controller without relying on any personal data processing conditions, thus imposed an administrative fine on the data controller who did not take technical and administrative measures as per Article 12 of DP Law and considering that the relevant processing activity can only be carried out within the scope of express consent, the Board instructed the data controller to implement the necessary procedures in this regard and inform the Board of the outcome.

Decision numbered 2021/909 on sharing of personal data with the execution office[65]

The decision is regarding a data controller (attorney) who conveys the data subject's personal data to the execution office within the scope of an execution proceeding pertaining to the debt of the data subject's sibling. In terms of sharing of personal data with the execution office by the data controller attorney without consent, the Board decided that the processing of personal data relies on the conditions under Article 5/2 (a) and (e) of DP Law, thus there is no action to be taken within the scope of DP Law; reminded the data subject that if they think their personal data has been unlawfully obtained by the creditor, they can seek legal action within the scope of Turkish Penal Code provisions and reminded the data controller that data subject requests should be responded within due time.

Decision numbered 2021/989 on sharing a data subject's image on a news content without their express consent[66]

The Board made an assessment to evaluate whether the subject of the application falls outside the scope of the DP Law as per Article 28 thereof, and to determine which right (personal rights or freedom of press) should supersede. In this regard, the Board decided that the content of the news does not present public interest and benefit and is not accurate, and thus had violated the data subject's personal rights and imposed an administrative fine on the data controller for (i) not obtaining express consent, (ii) failing to take technical and administrative measures as per Article 12

[64] https://www.kvkk.gov.tr/Icerik/7139/2021-889 (Last accessed on January 25, 2022).

[65] https://www.kvkk.gov.tr/Icerik/7141/2021-909 (Last accessed on January 25, 2022).

[66] https://www.kvkk.gov.tr/Icerik/7143/2021-989 (Last accessed on January 25, 2022).

of DP Law and (iii) the activity lacking any legal basis.

Decision numbered 2021/993 on issuing an invoice to the data subject by mistake[67]

The Board evaluated that even if obtaining data subject's personal data was lawful in this case, processing this personal data by issuing an invoice to the data subject without any processing conditions is unlawful, thus imposed an administrative fine on the data controller who did not take the requisite technical and administrative measures as per Article 12 of DP Law.

Internet Law

The Constitutional Court Has Published a Significant Pilot-Judgment on Access Ban of Internet Contents

The Turkish Constitutional Court handed down a significant decision ("Decision") on October 27, 2021. This unanimous decision may lead to essential changes in the legislation, which could have a fundamental and positive impact in the freedom of expression and press in Turkey.

In the Decision, the Constitutional Court consolidated a series of different individual applications that generally relate to the access ban imposed on several news contents broadcasted on the Internet, based on Article 9 of Law No. 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through such Broadcasts ("Law No. 5651") on the basis of the individual application file with number 2018/14884.

In the Decision published on the Official Gazette on January 7, 2022, the Constitutional Court unanimously decided that the applicants` rights of freedom of expression and press guaranteed under Articles 26 and 28 of the Constitution and the right of effective application guaranteed under Article 40 of the Constitution were violated due to imposition of access bans based on Article 9 of Law No. 5651 and accordingly, the Court`s pilot-judgment procedure should be implemented to remedy these violations which originated from structural problems.

In the Decision, the Constitutional Court concludes that by considering that the first instance courts' decisions within the scope of Article 9 of Law No. 5651 being handed down in the same direction, was pointing to the existence of a systematic problem directly originating from the law, and therefore there is a clear need to reevaluate the present system in order to prevent similar new violations. In this regard, the Constitutional Court evaluated that it would be beneficial to consider the below recommendations regarding the minimum standards in order that the interferences with the online media comply with the requirements of the democratic society pursuant to Article 13 *(Restriction of fundamental rights and freedoms)* and do not result in the violation of Article 26 *(Freedom of expression and dissemination of thought)* of the Constitution. Before proposing the minimum standards, the Constitutional Court emphasized the following facts:

(i) Article 9 of Law No. 5651 was designed as a separate method of process from the current judgment procedures. Although the preamble of the law defines the access ban method as a "(precautionary) measure", access to the websites are banned indefinitely. It is clear that such indefinite restrictions constitute great danger in terms of freedom of expression and press.

[67] https://www.kvkk.gov.tr/Icerik/7144/2021-993 (Last accessed on January 25, 2022).

(ii) The complainant media entity and the relevant persons faced hard-to-overcome difficulties for responding to the case that is filed against them, denying them the opportunity to provide a defense to ground their claims. This eventually led to a violation of freedom of expression and press.

(iii) Access ban method under Article 9 of Law No. 5651 does not provide the procedural assurances of judicial law since the decisions were granted within 24 hours without a trial, the applicants were not notified, nor included in the access ban procedure. Therefore, the applicants were not informed of the evidences and claims submitted by the complainants and had no opportunity to provide their own arguments against them.

(iv) Although in certain circumstances, the method to ensure swift and effective protection of personal rights can fail to also provide certain procedural protections at the immediate outset, these procedural rights and assurances must absolutely be remedied in the following stages of the proceedings to prevent damage to the rights of the counterparty. Therefore, an effective and firm supervision mechanism is vital.

(v) Procedurally, the objection authority (which, in this case, would be another criminal judgeship of peace, different from the one that granted the original access ban) can examine the evidences and claims of both parties, conduct an *ex officio* investigation to determine the facts, thereby providing those fundamental assurances that were unable to be provided to the counterparty afterwards and balancing the conflicting rights of the parties. However, this authority granted under Article 270 of the Criminal Procedure Law is not set out as an obligation for that objection authority and Law No. 5651 does not impose such an obligation either. In fact, none of the applications examined by the Constitutional Court included any findings that such procedure was conducted by the judgeship who handed down the access ban order.

(vi) The scope of Article 9 of the Law No. 5651 and ambiguity regarding its limits allow a broad discretion to the judicial authorities, which demonstrate that achieving a successful result from an objection against an access ban decision is, while not impossible, difficult at best.

(vii) Article 9 of the Law No. 5651 does not explain how the criminal judgeships of peace shall use their authority and does not provide the tools to assist them in granting proportionate decisions in accordance with the necessities of a democratic society.

(viii) Today, modern states do not prefer a direct intervention to online media, instead they conduct such procedures in cooperation with all the actors that are active in the Internet and assume methods where the state intervenes less.

In accordance with the foregoing, the Constitutional Court proposes the following:

i. The nature of Article 9 of Law No. 5651 should be made foreseeable. To that end, the scope and legal characteristics of the procedure for access ban in Article 9 of Law No. 5651 should be rearranged in such a way that it is sufficiently clear and understandable.

ii. While determining the scope of the access ban procedure in Article 9 of Law No. 5651, it should be considered that the laws regulating the restriction of Internet should be drafted in a way that would

narrow down this practice as much as possible and its use should be specific to the cases which necessitate a pressing social need. In that sense,

- Article 9 should be harmonized with Article 1 which determines the purpose and scope of Law No. 5651,

- The limits of the protection for the personal rights provided by Article 9 of Law No. 5651 should be clarified, and prerequisites should be established for implementing access bans, such as certain critera or thresholds regarding the extent of the tortious act should have reached before access ban can be implemented.

iii. While regulating the legal nature of access ban procedure under Article 9 of Law No. 5651, (i) if it is decided that the decision rendered within the scope of this article is a protection measure, the judgment should be made pursuant to the relevant provisions regarding the protection measures under the Criminal Procedure Law No. 5271, the outcome of the access ban decision must be determined in the contentious proceeding that follows *i.e.*, under a criminal case which was brought against the alleged crime that is subject to the access ban, (ii) however, it should also be emphasized that usually those who are responsible, namely the content and hosting providers, cannot be reached, therefore, judicial authorities must not be obligated to file an investigation or conduct a contentious proceeding in every single situation, (iii) it is essential for this method restricting freedom of expression to contain necessary procedural guarantees so that it does not lead to arbitrary practices and does not disproportionately eliminate the use of freedom.

iv. With a provision to be added to Article 9 of the Law No. 5651, the appeal authority might be tasked with overseeing an adversarial trial process that entails the active participation of the parties affected by the decision to deny access and to remedy the shortcomings in the first phase of the proceedings. In this case, since a decision will be reached for the first time on the merits of the dispute, it would be necessary to establish an effective judicial review mechanism such as appeal and/or further appeal against those decisions.

v. It should be taken into account that access ban to a content on the Internet is a heavy-handed intervention tool when the access of that content within the borders of a certain country is prevented indefinitely from the date of decision, and it should not be resorted to as long as it is possible to fight the harmful content on the Internet with other methods. In this context, in cases where Internet content needs to be restricted, provisions should be introduced to guide the criminal judgeships of peace. In order to prevent disproportionate and arbitrary practices, it should be stated in the provisions to be introduced that the access ban decision is a mandatory or exceptional measure, and this is the last resort or the last measure that could be taken. Furthermore, an obligation to ensure a reasonable balance between the tools to be used and the legitimate aim to be achieved should be brought, and alternative tools other than the access ban method should be introduced.

In conclusion, the Constitutional Court decided that the interference by banning access to 129 news contents in news websites based on Article 9 of Law No. 5651 violates the freedom of expression and press guaranteed under Articles 26 and 28 of the Constitution and this violation directly results from the law as it does not have the fundamental guarantees for the

protection of freedom of expression. The Constitutional Court also highlighted that it receives numerous individual applications every day, which include claims of violation of freedom of expression and press due to access ban decisions based on Article 9 of Law No. 5651. The Constitutional Court indicated that even if it renders new decisions attesting the violation and revoking access ban decisions in terms of present applications and other pending applications, this will not prevent similar applications from being made and similar access ban decisions from being rendered by first instance courts, therefore, the provision of law that led to the violation should be reviewed in order to eliminate the violation and its consequences and to prevent similar new violations and a copy of the decision should be reported to the Grand National Assembly of Turkey.

Lastly, the Constitutional Court stated that the evaluations of individual applications of the same nature lodged until the date of this decision and the new ones that will be made after this date are postponed for one (1) year as of the publication of the decision on the Official Gazette pursuant to Article 75/5 of Court's Bylaws and the relevant persons should be informed through the website by announcing their application numbers.

The steps to be taken by the Grand National Assembly of Turkey in light of this pilot-judgment are yet to be seen.

Telecommunications Law

Newly Introduced Consumer Rights in the Electronic Communication Sector

I. Introduction

The Regulation Amending the Regulation on Consumer Rights in the Electronic Communication Sector ("**Amending Regulation**") has been published in the Official Gazette on January 18, 2022.[68]

The draft version of the Amending Regulation was previously opened to public consultation[69] by the Information and Communications Authority ("**ICTA**") on July 8, 2021[70] and various stakeholders of the electronic communication sector (such as the Turkish Competitive Telco Operators' Association "**TELKODER**") submitted their opinion and evaluations to ICTA.[71]

As the draft was opened to public consultation, ICTA stated that the this

[68] *See*: https://www.resmigazete.gov.tr/eskiler/2022/01/20220118-3.htm (Last accessed on January 19, 2022).
[69] *See:* Decision no. 2021/İK-THD/188 and dated 6 July 2021, https://www.btk.gov.tr/kamuoyu-gorusleri/elektronik-haberlesme-sektorune-iliskin-tuketici-haklari-yonetmeliginde-degisiklik-yapilmasina-dair-yonetmelik-taslagina-iliskin-kamuoyu-goruslerinin-alinmasi, (Last accessed on January 19, 2022).
[70] *See:* https://www.btk.gov.tr/duyurular/elektronik-haberlesme-sektorune-iliskin-tuketici-haklari-yonetmeliginde-degisiklik-yapilmasina-dair-yonetmelik-taslagi-kamuoyu-gorusune-acilmistir (Last accessed on January 19, 2022).
[71] *See:* https://telkoder.org.tr/wp-content/uploads/2021/08/TuketiciHaklariYonet.Deg_.Tas_.pdf (Last accessed on January 19, 2022).

Amending Regulation had been prepared in order to re-regulate the consumer rights and operator's obligations considering the current needs resulting from amendments on consumer rights legislation and the developments on electronic communication sector.

The Amending Regulation sets forth (i) new obligations to be imposed on the operators, (ii) further rights for the consumers using electronic communication services, (iii) new terms to be applicable for subscription agreements and (iv) new rules concerning the restriction or suspension of services and therefore, introduces essential changes in the electronic communication sector. The President of ICTA, Ömer Fatih Sayan, posted his remarks about the Amending Regulation on Twitter, along with an explanatory video.[72]

The Amending Regulation also has the purpose to harmonize legislative instrument with the recently introduced Regulation on Verification Process of the Applicant's Identity in the Electronic Communications Sector ("**Identity Verification Regulation**") published on the Official Gazette dated June 26, 2021[73] and entered into force on December 31, 2021 which sets out new methods and standards for identity verification in the electronic communications sector.[74]

II. The New Obligations of the Operators

(i) Transparency and Obligation to Inform

As per Article 3 of the Amending Regulation, operators are obliged to inform subscribers regarding the additional charges to be reflected upon their subscribed tariff. Accordingly, if a paid call is made by the subscriber outside the scope of the registered tariff, then the operators are obliged to inform the subscriber that an additional fee will be charged for this call. This obligation includes the calls to be made to the directions determined by ICTA, but excludes the customer`s over-usages under the registered tariff itself.

The Amending Regulation also sets forth a provision enabling users to compare the offers of the different operators regarding tariffs and packages during choosing electronic communication services through the e-Government gateway.

Pursuant to Article 8 of the Amending Regulation, operators are obliged to provide clear and transparent information regarding the tariffs and campaigns they offer. Accordingly, product packages, campaigns and tariffs cannot be introduced with the same name. Each package will be promoted with a single and separate name. Furthermore, operators are required to provide detailed information regarding the tariffs that are (i) now in effect, (ii) no longer on offer but still has active subscribers and (iii) expired within the last 2 (two) years. The Amending Regulation also sets forth that transactions requiring subscriber approval as per relevant

[72] *See*: https://twitter.com/ofatihsayan/status/1483184703708536837, (Last accessed on January 19, 2022).

[73] *See*: https://www.resmigazete.gov.tr/eskiler/2021/06/20210626-21.htm (Last accessed on January 19, 2022).

[74] *See:* Detailed information regarding the Identity Verification Regulation can be found at here: https://www.mondaq.com/turkey/new-technology/1095836/turkey-introduces-new-methods-for-identity-verification-in-the-electronic-communications-sector

legislation cannot be merged into a same/single approval, they need to be approved separately.

Sayan indicated in his tweet that the Amending Regulation is aimed to prevent possible confusion and misunderstanding by the subscribers: as well as highlighting that the subscriptions approved indirectly without the specific request of the subscriber will thus be avoided. Therefore, promotions which are based on statements such as "*If you subscribe to this campaign, you will also be deemed to have approved the other campaign of the relevant operator*" will be prohibited.

(ii) Subscription Agreements

The Amending Regulation has brought the following essential amendments on the establishment and execution of the subscription agreements as well as the consumers' rights within its scope.

(a) Identity Verifications

As per Article 4 of the Amending Regulation, subscription agreements might be concluded either in writing or electronically which is also in line with the Identity Verification Regulation. During the establishment of the subscription agreements, the client is required to present the originals of the necessary identity documents or other equivalent documents, rather than to submit their copies. Sayan pointed out in his Tweet that with this provision, irregularities committed by using third party ID cards will be avoided. On the other hand, the Amending Regulation still requires that the copies of other necessary documents should be submitted for foreigners, or corporate subscriptions. In cases where the subscription agreement is concluded electronically under Identity Verification Regulation, the copies of the identity documents or other equivalent documents are deemed to be submitted and therefore, it might be concluded that the ID verification through Identity Verification Regulation qualifies as physical submission of relevant identity documents. Operators are obliged to store such information and documentation obtained from subscribers for a period of 30 (thirty) years after the termination of the subscription agreements.

Pursuant to Article 4 of the Amending Regulation, without prejudice to the provisions of Law No. 6698 on the Protection of Personal Data, for the transactions requiring subscription approval and conducted outside the scope of the Identity Verification Regulation, the transactions will not be processed without first making an identity verification and confirming that the consumer is a direct subscriber. Moreover, those who have more than one number might restrict the transaction authority of their other numbers.

(b) Summary of the Subscription Agreements

Pursuant to Article 5 of the Amending Regulation, before the execution of the subscription agreement, operators are required to provide consumers with an easy and understandable summary in a separate page. The summary page must include information listed in the Amending Regulation.

(c) Contract Subscriptions

According to Article 9 of the Amending Regulation, before subscribers make any contractual commitments, operators are required to provide with an easy and understandable summary of the terms in a separate page, which must include certain information as listed in the Amending

Regulation. Moreover, it is regulated under the Amending Regulation that the commitment period under contract cannot exceed 24 (twenty-four) months and subscribers will be informed on the matters constituting the violation of commitment with a clear, plain and understandable text in the commitment document. Lastly, the subscribers will be informed about the end of the commitment period and at which prices they will continue to receive services.

(d) Access Rights of the Consumers

Pursuant to Article 6 of the Amending Regulation, operators are required to provide access to the consumers through online transaction center enabling them to check their approval status regarding their subscriptions. Moreover, as per Article 11 of the Amending Regulation the consumers' right to access information with respect to their invoices and billing details is extended to 1 (one) year from 6 (six) months.

(e) Termination Rights of the Consumers

As per Article 9 of the Amending Regulation, in case the operator fails to fulfil the criteria determined by the ICTA under the Address Based Internet Speed Measurement, the subscriber will have the right to terminate the contracted subscription commitment without paying a cancellation fee; except for any remaining payment for the mobile device subject to the commitment.

Moreover, Article 12 of the Amending Regulation sets forth further means to consumers to terminate their subscription agreements which are; through the e-Government gateway, the operators' online transaction centers, and application through e-mail message and customer services of the operators. The Amending Regulation also set out the rules regarding the consumer's non-payment of the last invoice after the termination of the subscription agreement.

(f) Invoice Delivery

Article 11 of the Amending Regulation sets forth the rules regarding operators' obligation to send the invoice through e-mail message and SMS. If the subscribers do not indicate any preference regarding the invoice to be sent, operators will send them their invoice details and link to the relevant invoice via SMS.

(iii) Service Restriction or Suspension

As per Article 10 of the Amending Regulation, operators may suspend their services in cases where it is determined that the service is above the customary usage level or the invoice is not paid on the due date, by informing the subscriber. In cases where it is determined that the service is above the customary usage level, if it is not possible to inform the subscriber and intervention is required in a short time, the obligation to inform subscriber may not be required to protect the consumer`s interest. The Amending Regulation further sets forth details regarding how the electronic communication service is restricted or suspended and how the subscriber will be informed about them. Accordingly, the operators will not charge new fees to the subscribers whose services are restricted or suspended, except for the device and license fee.

(iv) Transition Period and Enforcement

Articles 1, 2 4, 7, 12, 13, 15 and 16 of the Amending Regulation will enter into force on March 1, 2022 and remaining provisions will enter into force on

December 31, 2022. The President of ICTA is authorized to execute the Amending Regulation.

Within three months as of the entry into force of the Article 8 of the Amending Regulation, the operators are required to inform subscribers regarding the authorization restriction option for those who have more than one number, via SMS.

III. Conclusion

The Amending Regulation introduces comprehensive amendments regarding obligations of the operators, consumer rights, subscription agreements terms, and rules concerning the restriction or suspension of services. Operators and service providers might find it necessary to prepare an action plan and take the required measures and steps stipulated under the Amending Regulation in order to ensure compliance within the transition period.

White Collar Irregularities

2021 FCPA Enforcement Actions and Highlights[75]

So far, 2021 has seen less activity in terms of enforcement actions under the Foreign Corrupt Practices Act ("**FCPA**"), compared to 2020. In 2021, the United States Department of Justice ("**DOJ**") took a total of 19 enforcement actions,[76] and the Securities and Exchange Commission [77] ("**SEC**") took a total of 4 enforcement actions. Therefore we observe that the DOJ has been a lot more active than the SEC in terms of the number of enforcement actions this year.

Of the 19 enforcement actions taken by the DOJ, 16 of them were related to real persons, which appear to be related to bribery schemes involving state owned energy or petro-chemical companies in Brazil and Venezuela. In terms of sectoral concentration of FCPA enforcement actions of 2021 concerning corporations, we observe a wide array of sectors including energy, advertising, consultancy and engineering services, with a condensation in banking and financial services sector.

DOJ and SEC Enforcement Actions - Highlights

In January 2021, Frankfurt-based multi-national financial services company Deutsche Bank Aktiengesellschaft ("**Deutsche Bank**"), has agreed to a cease-and-desist order and agreed to pay more than $120 million, which includes around $43 million to settle the SEC's charges for violating the books and records and internal accounting controls provisions of the Securities Exchange Act of 1934, as part of coordinated resolutions with the SEC and the DOJ. The charges arise out of a scheme to conceal corrupt payments and bribes made to third-party intermediaries by falsely recording them on the company's books and records, as well as related internal accounting control violations, and a separate scheme to engage in fraudulent and manipulative commodities trading practices. According to the SEC's order, Deutsche Bank

[75] This article first appeared in Mondaq (https://www.mondaq.com/turkey/securities/1142670/2021-fcpa-enforcement-actions-and-highlights)

[76] *See:* https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2021 (last accessed on January 23, 2022).

[77] *See* https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml#targetText=SEC%20Enforcement%20Actions%3A%20FCPA%20Cases&targetText=In%202010%2C%20the%20SEC's%20Enforcement,government%20contracts%20and%20other%20business (last accessed on January 23, 2022).

engaged foreign officials, their relatives, and their associates as third-party intermediaries, business development consultants, and finders to obtain and retain global business. The order finds that Deutsche Bank lacked sufficient internal accounting controls related to the use and payment of such intermediaries, resulting in approximately $7 million in bribe payments or payments for unknown, undocumented, or unauthorized services. Accordingly, these payments were inaccurately recorded as legitimate business expenses and involved invoices and documentation falsified by Deutsche Bank employees.

In April 2021, the SEC charged Asante Berko, a former executive of a foreign-based subsidiary of a bank holding company with orchestrating a bribery scheme to help a client to win a government contract to build and operate an electrical power plant in the Republic of Ghana in violation of the FCPA. Accordingly, Asante Berko arranged for his firm's client, a Turkish energy company, to funnel at least $2.5 million to a Ghana-based intermediary to pay illicit bribes to Ghanaian government officials in order to gain their approval of an electrical power plant project. The SEC is seeking monetary penalties against Asante Berko among other remedies.

In June 2021, Amec Foster Wheeler Limited ("**Foster Wheeler**") has agreed to pay more than $43 million, including more than $10.1 million to settle the SEC's charges, as part of coordinated resolutions with the SEC, the DOJ, the Brazil Controladoria-General da União/Advocacia-Geral da União, the Ministério Publico Federal and the United Kingdom Serious Fraud Office. According to the SEC and the DOJ, Foster Wheeler, a company that provided project, engineering, and technical services to energy and industrial markets, engaged in a scheme to obtain an approximately $190 million oil and gas engineering and design contract to design a gas-to-chemicals complex in Brazil (UFN-IV project) from the Brazilian state-owned oil company, Petroleo Brasileiro S.A. (Petrobras). Accordingly, from 2012 through 2014, Foster Wheeler's UK subsidiary made improper payments to Brazilian officials to win the contract. The bribes were paid through its employees and third party agents. According to the order, Foster Wheeler paid approximately $1.1 million in bribes in connection with obtaining the contract and earned at least $12.9 million in profits from the corruptly obtained business.

In September 2021, London-based WPP plc ("**WPP**"), the world's largest advertising group has agreed to pay more than $19 million to resolve charges that it violated the anti-bribery, books and records, and internal accounting controls provisions of the FCPA. According to the SEC, WPP implemented an aggressive business growth strategy that included acquiring majority interests in many localized advertising agencies in high-risk markets, and it failed to ensure that these subsidiaries implemented internal accounting controls and compliance policies. The SEC's order also finds that WPP failed to promptly or adequately respond to repeated warning signs of corruption or control failures at certain subsidiaries, along with other schemes and internal accounting control deficiencies related to its subsidiaries in China, Brazil, and Peru.

In October 2021, Switzerland-based global financial institution Credit Suisse Group AG and its U.K. subsidiary Credit Suisse Securities (Europe) Limited ("**Credit**

Suisse") will pay more than $547 million in penalties, fines and disgorgement, as well as restitution to victims in an amount to be determined, as part of coordinated resolutions. Credit Suisse will also be subject to enhanced compliance and self-reporting measures, which will include appointment of an independent third party to monitor its transactions, risk management and internal control systems, as well as its existing credit transactions with financially weak and corruption-prone states and companies. According to the DOJ's press release, Credit Suisse admitted to conspiring to commit wire fraud by defrauding U.S. and international investors in an $850 million loan to finance a tuna fishing project in Mozambique.

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

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

Our legal team consists of 90 lawyers. We take pride in being able to assist our clients in all fields of law. Our areas of expertise particularly include competition law, corporate law, M&A, contracts law, white collar irregularities and compliance, data protection and cybersecurity law, litigation and dispute resolution, Internet law, technology, media and telecommunications law, intellectual property law, administrative law, real estate law, anti-dumping law, pharma and healthcare regulatory, employment law, and banking and finance law.

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

For further information, please visit www.elig.com

ELİG
GÜRKAYNAK
Attorneys at Law

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