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Preface to the December 2020 Issue

As the final issue of 2020, Legal Insights Quarterly December 2020 was prepared to provide an extensive look into the upcoming legal issues as well as the foremost contemporary legal agenda in Turkey.

Initially, the Corporate Law section provides details for the recent amendments to procedures of general assembly meetings and the changes that it has introduced. The second article elaborates on how non-public joint-stock companies issue premium shares.

The Banking and Finance Law section discusses the digital and innovative amendments in the sector and examines the amendment on Banking Law No. 5411 to enable execution of electronic agreements for banking services.

The Capital Market section provides extensive information on what the draft communiqué regarding issuance of secured capital market instruments introduces and the future impacts of the amendments in the Turkish capital market.

For the Competition Law section, the Turkish Competition Authority's recently published Guidelines on Examination of Digital Data is extensively assessed. Moreover, two most recent and prominent decisions of the Turkish Competition Board are summarized. Finally, the Competition Law section dissects the a decision by the Constitutional Court and which is a milestone decision in terms of competition law as it is the first time that the Constitutional Court has found a violation of constitutional rights arising from a competition law case.

The Employment Law section discusses the protection of personal data under right to privacy and freedom of communication due to inspection of correspondences on corporate e-mail account and termination of employment contract on the grounds of these correspondences.

The Litigation section sheds light on the approach in the Turkish practice regarding distinctive character determination based on language in trademark law.

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

December 2020

Corporate Law

Recent Amendments to Procedures of General Assembly Meetings

The Ministry of Trade ("***Ministry***") has introduced certain amendments to the Regulation on the Procedures and Principles of General Assembly Meetings of Joint Stock Companies and Representatives of the Ministry of Customs and Trade to be Present at These Meetings, which was published in the Official Gazette dated October 27, 2015 and numbered 29515 ("***Regulation***"), with the Amending Regulation on the Procedures and Principles of General Assembly Meetings of Joint Stock Companies and Representatives of the Ministry of Customs and Trade to be Present at These Meetings published in the Official Gazette dated October 9, 2020 and numbered 31269 ("***Amending Regulation***").

The amendments made in the Regulation could be summarized as follows:

(i) Joint stock companies with sole shareholding structure are no longer required to form a presidency or prepare a list of attendants for their general assembly meetings as per Article 14/2 of the Regulation.

(ii) For the non-public joint stock companies, a notarized proxy has to be submitted to represent a shareholder in the general assembly meeting as per Article 18/7 of the Regulation. In other words, it is no longer possible to submit a notarized signature declaration together with a non-notarized proxy to attend the general assembly meeting.

(iii) According to the new Article 28/7 of the Regulation, in case the general assembly meeting is postponed for a reason other than failure to meet the necessary quorum, ordinary meeting and decision quorums which are applicable for the first general assembly meeting shall apply to the meeting which will be held after the postponement.

(iv) In accordance with Article 32/2 of the Regulation, joint stock companies with sole shareholding structure are no longer required to appoint Ministry representatives for their general assembly meetings except for the joint stock companies that are subject to Ministry's approval for their incorporation and amendments to the articles of association.

(v) With the changes made in Article 35/1 of the Regulation, application for the appointment of a Ministry representative can be made physically or through MERSIS (*i.e.* Turkish Central Registration System). In addition, shareholders can request appointment of a Ministry representative with a petition provided that it is signed by all of the shareholders and notarized. The shareholders can submit a petition if (i) the board of directors does not exist, (ii) it is not possible to meet the meeting quorum for the board of directors, and (iii) it is requested to hold a general assembly meeting solely for the election of the board members.

(vi) Prior to the changes made in Article 38 of the Regulation, the Ministry representative fee and taxes accruing in relation to such fee were paid to different governmental authorities

(*i.e.* the Ministry and relevant tax authority). With the Amending Regulation, it is now possible to make both of the payments to the relevant accounting department of the Ministry. Please note that unlike other amendments we have explained above, this provision entered into force as of November 9, 2020.

All in all, the Amending Regulation has introduced several changes that eased the process of holding a general assembly meeting and appointment of a Ministry representative for the joint stock companies especially for the ones with a sole shareholder.

Issuance of Premium Shares by Non-Public Joint-Stock Companies

I. Introduction

Shareholders of non-public joint stock companies are inclined to use certain methods such as bank credits, public offering and share capital increase in order to inject funds into the company to enable the company to continue its activities. Issuance of premium shares together with a share capital increase is one of such options.

Principles and procedures on share capital increases with issuance of premium shares for the non-public joint stock companies (the "***JSC***") are regulated under Turkish Commercial Code No. 6102 ("***TCC***"). With this article, we aim to explain the process of share capital increase with issuance of premium shares in JSCs that are subject to ordinary (basic) share capital system [1] rather than the registered share capital system[2].

[1] *Esas sermaye sistemi* in Turkish.
[2] *Kayıtlı sermaye sistemi* in Turkish.

II. Issuance of Premium Shares

Premium shares can be defined as shares which are issued at a value higher than their nominal value. The JSCs are allowed to issue premium shares during incorporation or following the incorporation through share capital increase process.

In order to increase the share capital and issue premium shares, general assembly of the shareholders must convene with the attendance of the representative to be appointed by the Ministry of Customs and Trade and the representative of the independent auditor, if any.

In the event that the pre-emptive rights will be removed or limited, the board of directors of the JSC will have to prepare a report containing the reasons to issue premium shares and calculation method of the premium. Additionally, in case the JSC has privileged shares and the general assembly resolution hinders the rights of the shareholders with privileged shares, consent of such shareholders will have to be obtained through a special meeting of the privileged shareholders.

Furthermore, persons who are participating in the share capital increase with issuance of premium shares are required to undertake the entire premium amount, together with the increased share capital. It is also important to note that (i) the total premium amount and (ii) at least 25% (twenty five percent) of the share capital increase amount have to be paid before registration of the share capital increase.

The TCC also stipulates that 5% of the net profit has to be set aside as legal reserve until it reaches 20% of paid portion of the share capital. Following the issuance of premium shares, regardless of the

foregoing threshold, the premium amount will have to be added into the legal reserves if it is not used for the expenses of newly issued shares, amortization and charitable contributions. In this respect, the premium amount can be used only to recover losses, to ensure that the JSC continues its operations when it is in financial distress or, to take precautions to prevent unemployment or to ease its consequences. However, in the event the legal reserve exceeds 50% (fifty percent) of the total share capital, the JSC will be able to freely use the premium amount in a way it deems appropriate.

Lastly, the general assembly resolution regarding share capital increase will have to be registered with the relevant trade registry within 3 (three) months following the resolution date and announced in the Trade Registry Gazette as per Article 456 of the TCC.

III. Conclusion

JSCs often have the need to increase their share capital in order to keep operating as going concerns, with issuance of premium shares alongside a share capital increase, an important financial resource is being created for the JSCs; which can be used in cases of emergency in accordance with the provisions of the TCC.

Banking and Finance Law

Digital Revolution: Remote Customer Identification in Banking Sector

I. General Overview

Banking sector is undergoing a transformation thanks to the digitalization and technological innovations. As part of this digital revolution, Article 76 of the Banking Law No. 5411 ("***Banking Law***") was amended to enable execution of electronic agreements for banking services in the previous months.

The Banking Regulatory and Supervisory Authority ("***BRSA***") has very recently taken this digitalization movement one step further and presented the Draft Communiqué on Remote Identification Methods to be used by Banks ("***Draft Communiqué***") to the public opinion on September 21, 2020. In this article, our aim is to reveal major changes introduced with the Draft Communiqué.

II. Remote Identification

The Draft Communiqué introduces remote identification method that banks may use for new customers and verification of customer identity.

Remote identification process will be carried out between the potential customer and customer representative through online video call and without the necessity of the potential customer being physically present at branch of the bank.

According to Article 4/3 of the Draft Communiqué, it will be required to maintain sufficient security level by taking into account possible technological, operational and other similar risks that may arise from the remote identification process. Remote identification process will be reviewed and necessary updates will be made, in case of the following: (i) security incidents and fraud attempts; (ii) amendments in the relevant legislation; (iii) possible fraud and (iv) impotencies in the remote identification method.

Article 6/1 of the Draft Communiqué states that potential customer's application will be received through a form before conducting the remote identification

method and risk assessment will be made through the data acquired via this form. The remote identification will be made in real time and uninterruptedly. Furthermore, potential customer's explicit consent will be recorded at the beginning of the video conference call.

It will be ensured that the integrity and confidentiality of the audio-visual communication between the customer representative and potential customer is at an adequate level. For this purpose, videoconference call will be carried out through end-to-end secure communication

III. Identity Documents to be Used and Authentication of the Persons

Identity documents which (i) may be visually distinguished under white light and (ii) have the following minimum requirements will be used during the remote identification process: rainbow print, optical variable ink, and hidden image, hologram micro lettering security items, photo and wet signature. Verification of the validity and authenticity of the data as well as information included on the identity document will be carried out as part of the remote identification process.

During the video call, an SMS OTP (one-time password delivered through short message service) that is solely for identification process will be sent to the potential customer. The remote identification process will be completed once the SMS OTP is entered to the application interface by this person and is successfully confirmed by the system.

Article 9 of the Draft Communiqué stipulates that the remote identification process will be cancelled, if the process is prevented from running as usual due to the issues such as poor lighting conditions or poor image quality, or if any inconsistency, uncertainty or fraud is discovered in the process or in the documents presented by the potential customer.

As per Article 11 of the Draft Communiqué, the entire remote identification process will be recorded and stored.

IV. Responsibility Arising From Remote Identification

The bank will be responsible to ensure that adequate solutions are used in order to minimize the risk of misidentification of the person. In this regard, the bank should apply additional security and control methods depending on the type and amount of the transactions performed. The burden of proof will be on the bank in case of an objection to the transaction that imposes obligations on the persons or third parties.

As a precautionary measure, the BRSA will be authorized to restrict or halt the remote identification process as a result of the evaluation of the bank's compliance with the relevant legislation, complaints and fraudulent actions and when deemed necessary.

V. Conclusion

The BRSA has recently presented the Draft Communiqué to the public opinion. The Draft Communiqué has been prepared in accordance with the amended Article 76 of the Banking Law which enables entering into electronic agreements in the banking sector. The Draft Communiqué will allow banks to conduct authentication of the identities of the potential customers remotely and electronic banking transactions in Turkey will be carried forward to a next level.

Capital Markets Law

Draft Communiqué Regarding Issuance of Secured Capital Market Instruments

I. Introduction

The Law No. 7222 Amending Banking Law and Certain Other Laws published in the Official Gazette on February 25, 2020 made certain changes in Capital Markets Law No. 6362 ("***Law***") by including a new Article 31/B. This new article introduced the "security agent" concept to Turkish capital markets stage, which has been a well-known concept in foreign capital markets to ensure that issuers fulfil their obligations arising from the capital market instruments.

While Article 31/B contains several provisions regarding security agents and the security management agreement, it has granted the Capital Markets Board of Turkey ("***CMB***") the power to determine the principles including the type of assets that can be utilized as security and the capital market instruments which can be secured.

In this respect, the CMB announced the Draft Communiqué Regarding Issuance of Secured Capital Market Instruments No.II-31/B.1 ("***Draft Communiqué***") on September 10, 2020 on its official website for review of the public. In this article, we will be briefly summarizing the provisions introduced with the Draft Communiqué.

II. Provisions of the Draft Communiqué

(i) Secured capital market instruments

According to Article 4/2 of the Draft Communiqué, issuers are allowed to secure capital market instruments they will issue. On the other hand, the CMB can require a capital market instrument to be secured depending on the type of issuer, the amount issued and/or the type of capital market instrument.

The issuers can secure their capital market instruments by (i) transferring the ownership of the assets to be utilized as security to the security agent or (ii) establishing limited rights in rem (*e.g.* pledge or easement) in favor of the security agent as per Article 4/1 of the Draft Communiqué. Please note that this procedure has to be completed at least one day prior to the sale of the capital market instrument and announced in Public Disclosure Platform (*i.e.* KAP) before the sale as per Article 4/3 of the Draft Communiqué.

Moreover, trade name of the security agent, information about the capital market instrument and security agent's powers have to be registered by the issuer at the relevant registry where the issuer's headquarters is located. The registered information also has to be announced in the Turkish Trade Registry Gazette prior to the first sale to be made within the scope of the prospectus or issuance document as per Article 10/3 of the Draft Communiqué.

(ii) Security assets

According to Article 5/1 of the Draft Communiqué, some of the assets that can be used as security to the capital market instruments are as follows:

a. cash (Turkish lira/convertible currencies)
b. certain assets,
c. foreign currency bonds and government domestic debt securities, lease certificates,
d. shares traded on Borsa Istanbul Star Market,

e. debt instruments issued by banks,
f. letter of guarantee payable upon first request, without any restrictions,
g. standard precious metals traded on Borsa Istanbul,
h. mortgage-based securities and asset-based securities,
i. Real property, and
j. Limited rights in rem established on the assets listed above.

Article 5/4 of the Draft Communiqué states that as of the day the security asset has been transferred to the security agent: (i) all of the security assets should be located in the Republic of Turkey except assets stated under item (c) above, (ii) the creditor should be residing in Turkey if the security asset is a receivable and (iii) there has to be no transfer restrictions for the assets which will become the security.

After determining the assets and satisfying the conditions above, the ownership will be transferred to the security agent or a limited right in rem will be established as per Article 6/1 of the Draft Communiqué. In this respect, security assets will be kept separate from the assets and bank accounts of the security agent and security assets will not be subject to pledge, seizure or other encumbrances for the debts of the security agent.

(iii) Security agent

The security agent will be independent and will have to check whether the assets to be secured satisfy the requirements stated under the Draft Communiqué before obtaining the ownership or establishment of the rights in rem.

The security agent is authorized to and in charge of managing and protecting the security assets, taking legal remedies, converting such assets into cash in order to meet the receivables from the security, distribution of the proceeds to investors, returning the assets to the issuer if there are any remaining amounts following distribution, protecting rights and interests of the investors.

(iv) Security management agreement

Pursuant to Article 7 of the Draft Communiqué, a written agreement has to be signed by the issuer and the security agent containing (i) the undertaking to transfer the ownership of the security to the security agent or to establish a limited right in rem, (ii) the rights and obligations of the security agent to protect, manage and liquidate the assets utilized as security.

Article 7 also provides the minimum information that has to be included in the security management agreement. For example, information about the capital markets instrument which is secured, the type of issuer's payment obligation arising from the issuance of capital market instrument, when and how such obligation will be fulfilled, under which circumstances it will be possible to meet the receivables from the security, the salary to be paid to the security agent, whether the security agent can assign its duties to third parties has to be included in the security management agreement.

Security management agreement has to be submitted to the CMB together with the documents prepared for maximum issue limit application as per Article 8/1 of the Draft Communiqué. In this respect, a single security management agreement can be made for the entire maximum issue amount or separate agreements can be made for the issuances to be made within the maximum issue. In case the parties enter into a single security management agreement for the entire maximum issue

amount, the security assets have to be separately stated in the agreement in terms of each issuance as per Article 8/2 of the Draft Communiqué.

(v) Event of default

Pursuant to Article 9/1 of the Draft Communiqué, failure to make the capital, interest and similar other payments of the relevant capital market instrument within the period stated under the prospectus or issuance document will be considered as a default of the issuer under the security management agreement. Please note that other events of default can be also determined by the parties.

In the event of default by the issuer, the security agent will have the right to liquidate the security assets and distribute the proceeds between the investors without giving any notice or additional time to the issuer, obtaining permission or approval from a judicial or administrative authority as per Article 9/2 of the Draft Communiqué.

III. Conclusion

With the provisions introduced in the Draft Communiqué, investors will be able to collect their receivables more quickly, which will also help the issuer in terms of lower interest rates. In addition, having an independent security agent and granting security agent the right to manage and sell the secured asset, registering and announcing the secured assets in the relevant trade registry will provide transparency and protect the investors' rights more effectively. As a result of such changes, it is expected by the legislators to attract more investors to Turkish capital markets in the near future.

Competition Law / Antitrust Law

Clarification on the Examination of Digital Data: Recently Published Guidelines of the Turkish Competition Authority on Examination of Digital Data during On-site Inspections

I. Introduction

The Turkish Competition Authority ("***Authority***") recently published its Guidelines on Examination of Digital Data during On-site Inspections ("***Guidelines***")[3] which set forth the general principles with respect to the examination, processing and storage of data and documents held in the electronic media and information systems, during the on-site inspections to be conducted by the Authority. According to the recitals of the Guidelines, the Authority deemed it necessary to determine and set out the relevant principles, in light of the recent amendment to Article 15 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***") concerning on-site inspections.[4]

The Guidelines essentially (i) clarify the procedures to be abided by when the data on the electronic media or information systems are required to be examined by the case handlers during on-site inspections, in a way that relatively echoes the recent enforcement practices of the Authority, and (ii) introduce a new method for the

[3] The Guidelines were approved by the Turkish Competition Board ("***Board***") with its decision dated 08.10.2020 and numbered 20-45/617.

[4] Law No. 7246 on the Amendment of Law No. 4054 was promulgated on 24.06.2020 via the Official Gazette numbered 31165. In this respect, the wording of Article 15(a) of Law No. 4054 is amended as follows: "*[To] examine the books, all types of data and documents of undertakings and associations of undertakings, kept on physical or electronic media and in information systems, and take copies and physical samples thereof."*

examination of digital data, which is akin to the methodology and principles set forth within the European Commission's ("***Commission***") Explanatory note on Commission inspections pursuant to Article 20(4) of Council Regulation No 1/2003 ("***Commission's Explanatory Note***").

II. What do the Guidelines bring: An unchartered territory or statutory safeguard with new formalistic principles?

In terms of legislative justification of the Guidelines, it should be noted that the Board's decisional practice[5] had, in effect, already been emphasizing that the previous wording[6] of Article 15(a) of the Law No. 4054 did not preclude the Authority from exercising its investigative powers on the data and documents held in electronic media and information systems, during its on-site inspections. That being said, the Authority's approach was merely shaped with the case law of the Board and thus, a guidance based on secondary legislation was most welcomed on this front. In this respect, the Guidelines essentially concretise the Board's decisional approach and explicitly set forth the scope of investigative powers of the Authority during the on-site inspections, while also pinpointing which acts of undertakings might be deemed as non-compliant with the relevant principles.

Furthermore, the Guidelines underline that, during an on-site inspection, the case handlers of the Authority are entitled to conduct their examination on the relevant undertaking`s IT systems such as servers, desktop or laptop computers and portable devices, as well as all data storage apparatus and mechanisms, such as CDs, DVDs, USB sticks, external hard disks, backup records and cloud services. In a similar vein, the Guidelines note that the case handlers may utilize digital forensics software or hardware during their on-site inspection, to search, retrieve and duplicate the digital documents or data, as well as recover any deletions.

The Guidelines also emphasize the principles governing the examination of portable devices (*e.g.*, mobile phones, tablets etc.), where the case handlers shall decide whether the relevant device should be subject to the review within the scope of the on-site inspection, after a quick browse to determine whether the subject portable device contains any digital data pertaining to the relevant undertaking. The Guidelines specify that those portable devices which are allocated entirely for personal use cannot be brought under the scope of an on-site inspection. That being said, personal portable devices which also include digital data pertaining to the relevant undertaking would still be subject to the review of the case handlers through the use of digital forensic tools. It should be noted that the Guidelines do not introduce a completely brand new

[5] *Gediz/Aydem Decision* of the Board dated 01.10.2018 and numbered 18-36/583-284, para. 1034 and *Chemotherapy Drugs Decision* of the Board dated 02.01.2020 and numbered 20-01/14-06, para. 204. Additionally, in the Chemotherapy Drugs Decision, the Board indicated that certain decisions of administrative courts rendered with regard to applications for judicial review of the Board's decisions had upheld the Authority's powers to inspect digital data and electronic documents: *see* Turkcell Decision of the 10th Chamber of Council of State dated 25.11.2002 and numbered E: 2000/5592, K: 2002/4506; Turkcell Decision of the Plenary Session of Administrative Law Chambers, Council of State dated 16.06.2005 and numbered E: 2003/315, K: 2005/21 77; Koçak Petrol Decision of the 13th Chamber of Council of State dated 26.03.2013 and numbered E:2009/5890, K: 2013/847 and *Reysaş* Decision of the 13th Chamber of Council of State dated 26.03.2013 and numbered E: 2010/543 K:2013/844.

[6] The wording of Article 15(a) of the Law No. 4054 prior to the amendment was as follows: "*To this end, it is entitled to: (a) Examine books, any paperwork and documents and take their copies if needed.*"

approach to the examination of personal devices or accounts, as there are recent decisions wherein the Board decided that personal devices[7] or e-mail accounts[8] can also be examined within the scope of on-site inspections, if they contain information pertaining to the relevant undertaking.

The Guidelines also draw a framework for the undertakings' obligation to cooperate with the case handlers of the Authority during the on-site inspections. Accordingly, the undertaking under scrutiny is obliged to prevent any interferences to the data itself or the medium wherein it is stored, as well as to fully and actively assist the case handlers where needed with regard to the IT systems, such as by (i) providing the case handlers with information regarding the IT software and hardware, (ii) authorizing the case handlers as system admins, (iii) providing remote access, (iv) isolating the computers and servers from the network, (v) limiting user access to corporate accounts and (vi) restoring backed-up/stored business data. In this respect, the undertakings' obligation to cooperate, as stipulated within the Guidelines, also closely reflects the Board's current decisional practice, wherein the relevant undertaking's failure to provide the case handlers access to its IT infrastructure (*e.g.* Office365 and eDiscovery) due to reasons of technical impossibility or concerns about potential breach of the relevant undertakings' data protection policy, was deemed to be non-compliant with the cooperation obligation.[9]

As another significant point, the Guidelines emphasize that the attorney-client privilege shall be respected when an on-site inspection is conducted. To that end, the Guidelines indicate that, in order to benefit from the attorney-client privilege, two cumulative conditions shall need to be met, which is again, in line with the recent decisional practice of the Board.[10] Accordingly, for digital data or documents to fall under the protective cloak of the attorney-client privilege, the Guideline criteria are: (i) the correspondence shall be between the undertaking and an independent/outside legal counsel, who has no employment relationship with the relevant undertaking and (ii) the correspondence shall be made with the purpose of exercising the undertaking's right to defence. The Guidelines explicitly set forth that communications that are not directly related to the use of undertaking's right to defence and particularly communications that are made with the purpose of facilitating any conduct that violates competition rules or for concealing an on-going or future violation of the competition rules are out of the scope of attorney-client privilege.

In addition to bringing the recent enforcement trends of the Authority under a statutory safeguard, the Guidelines also introduce a brand-new procedure, which

[7] *Koçak Petrol Decision* dated 05.08.2009 and numbered 09-34/837-M and *Nuhoğlu İnşaat Decision* dated 21.12.2017 and numbered 17-42/669-297 of the Board.

[8] *Askaynak Decision* dated 26.12.2019 and numbered 19-46/793-346 and *Ege Gübre Decision* dated 07.02.2019 and numbered 19-06/51-18 of the Board.

[9] *GROUPE SEB Decision* dated 09.01.2020 and numbered 20-03/31-14 and *Siemens Decision* dated 07.11.2019 and numbered 19-38/581-247 and *Unilever Decision* dated 07.11.2019 and numbered 19-38/584-250 of the Board.

[10] *Enerjisa Decision* of Ankara Regional Administrative Court, 8th Administrative Law Chamber dated 10.10.2018 and numbered E.2018/658 K.2018/1236; *Çiçeksepeti Decision* dated 02.07.2020 and numbered 20-32/405-186, *Huawei Decision* dated 14.11.2019 and numbered 19-40/670-288, *Warner Bros Decision* dated 17.01.2019 and numbered 19-04/36-14 of the Board.

grants the Authority the discretion to continue its inspection of the digital documents or data, in the computer forensics laboratory of the Authority, if deemed necessary. [11] The relevant paragraph of the Guidelines echoes paragraph 14 of the Commission's Explanatory Note, which sets forth that if the selection of documents relevant for the inspection is not yet finished at the end of the envisaged on-site inspection at the undertaking's premises, the copy of the data can be collected to continue the inspection process at the Commission's premises. [12] Similar to the principles set forth within the Commission's Explanatory Note, the Guideline also states that the Authority will invite the investigated undertaking, in writing, to have a representative present during the opening of the sealed envelope and the examination to be carried out at the Authority. To that end, the Guidelines also suggest that if the Board deems it necessary, it may decide to return the sealed envelope containing the digital data to the relevant undertaking, without being opened. This new procedure might be the harbinger of continued inspections by the Authority in the future and it also bolsters the necessity of robust on-site inspection compliance procedures by the undertakings in light of the increasing complexity of the processes within the scope of on-site inspections.

[11] Having said this, the Guidelines provide that the inspection of the digital data contained in mobile phones shall be completed at undertaking's premises, in any event.

[12] In such instances, the Commission may create an authentic copy and secure it in a sealed envelope for further examination - either at the Commission's premises, or if there is a new announced visit at the premises of the undertaking. The Commission's Explanatory Note is also aligned with the Commission's practice of requesting from the undertaking to keep the sealed envelope, where relevant. In that case, the undertaking keeps its data under control but also bears a responsibility for keeping it safe.

III. Conclusion

In conclusion, taking into account the recent decisions of the Board concerning on-site inspections, it can be stated that the Guidelines actually reflect the previously established practices and current approaches of the Authority, along with further clarifications and a newly introduced formalistic methodology similar to the Commission's Explanatory Note. That being said, since the Guidelines also take a snapshot of the Board's recent approach, this could result in a formalization that allows relatively less room to manoeuvre going forward, from a case-law stand point. All things considered, the Board`s case-by-case assessments will still shed further light on the actual implementation of the Guidelines and be most welcomed.

Once in a Blue Moon: The Turkish Competition Board accepted the failing firm defence while reinforcing its case law on what constitutes unity of interest

The Turkish Competition Board ("***Board***") recently published its reasoned decision[13] concerning the acquisition of certain assets of Yıldız Sunta MDF Orman Ürünleri Sanayi Tesisleri İthalat İhracat ve Ticaret A.Ş. ("***Yıldız MDF***"), which was going through a composition with creditors and whose production activities had been ceased, by Yıldızlar Yatırım Holding A.Ş. ("***Yıldızlar***") or its current subsidiaries and/or subsidiaries to be established.

I. Why is the decision important?

The Board's decision stands out as there are only a few other cases where the failing firm defence was accepted and it

[13] The Board's decision dated August 13, 2020 and numbered 20-37/525-233.

demonstrates how the Board would assess whether a transaction satisfies the relevant conditions in a concrete manner. The decision gains further significance as it further delves into the concept of "*unity of interest*" and puts forth that the existence of family ties cannot be construed in a stand-alone basis to infer that there is unity of interest.

II. Board's Assessment on whether Yıldızlar and Yıldız MDF constituted a single undertaking

Before delving into its substantive assessment concerning the transaction, the Board scrutinized whether Yıldızlar and Yıldız MDF constituted a single economic unit (*i.e.* a single undertaking), due to kinship between certain persons that are involved in the management structure of the parties to the transaction. The Board found that the chairmen of the board of directors ("***BoD***") of Yıldızlar and Yıldız MDF are brothers and also the chairman of Starwood Orman Ürünleri A.Ş.'s ("***Starwood***") BoD is their uncle. In this regard, the Board emphasized that, in terms of the undertakings that are controlled by natural persons, the fundamental matter is to clarify whether the relevant natural persons were in the same economic unit. The Board further elaborated that, persons with kinship who take active role in management structure of different firms, could be deemed to be in a single economic decision making mechanism depending on the character and level of the relations between such people[14], and examined whether Yıldızlar, Yıldız MDF and Starwood are in a single economic unit.

After evaluating the shareholding and management structures of Yıldızlar, Yıldız MDF, Starwood and Yıldız Entegre Ağaç San. ve Tic. A.Ş. ("***Yıldız Entegre***")[15], the Board found that the respective shareholders and managers of Yıldız Entegre, Yıldız MDF and Starwood largely consisted of people who were relatives of each other, although none of them were simultaneously managers or shareholders of more than one of the respective undertakings. Furthermore, the Board indicated that although Yıldız Entegre was a minority shareholder of Yıldız MDF between 2012 and 2014, this was a symbolic shareholding and Yıldız Entegre never exercised control over Yıldız MDF. As a result, the Board resolved that these three undertakings were controlled by separate natural persons who were merely relatives of each other.

In accordance with the foregoing information, the customers of these undertakings indicated that (i) although they were active in the same industry, they had separate management, accounting and marketing departments; (ii) they have been perceiving each other as competitors, (iii) they had their own separate price lists for their products, (iv) it was possible to supply from these three undertakings separately, and (v) they assumed that it was possible to sustain the commercial relations with other two if a sales agreement with one is terminated. In addition to their customers' statements, the Board found that these undertakings were monitoring each other's prices through their respective dealers. Furthermore the

[14] The Board's indication on this front is in line with its approach in its previous decisions; e.g. Traffic Signalization Decision dated 12.03.2020 and numbered 20-14/191-97; Mavi Giyim Decision dated 08.03.2018 and numbered 18-07/121-65; Altıparmak Gıda Decision dated 31.03.2010 and numbered 10-27/393-146; Ajans Press/PR Net decision dated 21.10.2010 and numbered 10-66/1402-523; Gıdasa decision dated 7.2.2008 and numbered 08-12/130-46.

[15] Yıldız Entegre is a company controlled by Yıldızlar.

Board underlined a correspondence between Yıldız MDF and Starwood, wherein it was expressed that they would not grant any privileges to each other.

In light of the foregoing, the Board concluded that Yıldız MDF, Yıldız Entegre and Starwood were controlled by different natural persons, their competitors and buyers considered these three undertakings as each other's competitors, therefore there was no unity of interest between the three undertakings and they should be considered as separate undertakings. The Board's assessment was similar to its assessment in its *Paraffin* decision[16] where it resolved that although the two paraffin manufacturers in question were separately controlled by two brothers, there were no unity of interest between them, as they were competing with each other in the market and there were not any common members of their board of directors for the last five years

III. The merits of the case and the "*failing firm*" defence

In its assessment as to the merits, the Board first dealt with failing firm defence asserted by Yıldızlar. In this respect, the Board acknowledged that there were three conditions for the failing firm defence to be accepted: (i) the allegedly failing firm would in the near future be forced out of the market due to financial difficulties if not acquired by another undertaking, (ii) there were not any less anti-competitive alternatives than the transaction under review, and (iii) if the transaction was not cleared, the assets of the allegedly failing firm would inevitably exit the market.

The Board indicated that the first condition was satisfied as Yıldız MDF ceased its production activities as of February 2019 and it was going through a composition with creditors. In terms of the second condition, the Board evaluated whether there were any undertakings other than Yıldızlar that considered acquiring or investing in Yıldız MDF during the process of composition with creditors. In this respect, the Board found that although there were several foreign groups that had been negotiating with Yıldız MDF with the intent of acquiring it, these negotiations did not succeed. The Board further determined that there were no local or foreign investors, which were interested in acquiring Yıldız MDF, throughout the merger review process. As for the third condition, the Board indicated *inter alia* that Yıldız MDF's production has not been active during merger review and as a result of the transaction; the machinery/ equipment and facilities that were idle prior to the transaction could become active once again.

Moreover, consistent with its approach in its Doğan/Bağımsız/Kemer decision[17], the Board further scrutinized Yıldız MDF's debt structure and claimants to determine whether there had been collusion between the transaction parties that aims to benefit from the failing firm defence and bypass the relevant legislation. As a result of its scrutiny, the Board could not find any evidence indicating that Yıldız MDF became indebted to Yıldızlar on purpose, to facilitate the acquisition by using the failing firm defence.

Lastly, the Board assessed whether the transaction would result in restriction of competition in the horizontally overlapping markets, namely, the markets for medium density fibreboards (MDF) and parquets.

[16] The Board's Paraffin decision dated 28.10.2009 and numbered 09-49/1220-308.

[17] The Board's *Doğan/Bağımsız/Kemer* decision dated 10.3.2008 and numbered 08-23/237-75.

The Board analysed the upswing of concentration that would happen as a result of the transaction, through an analysis pertaining to sales and capacity based market share of the combined entity. As a result of its analysis, the Board resolved that the transaction would not result in significant impediment of effective competition and unconditionally approved the transaction.

IV. Conclusion

To that end, the Board has rendered a significant decision which (i) could be defined as "once in a blue moon" since it has accepted the failing firm defence, (ii) elaborates "unity of interest" and sets forth that family ties are not sufficient to consider two undertakings as a single economic unit and (iii) concretises the conditions to accept the failing firm defence.

Clash of Opinions in the Sheet Glass Market: The Board did not Grant Individual Exemption to the Dealership Agreement between Trakya Cam and its Dealers; Despite a Detailed Dissenting Vote

The Turkish Competition Board (the "***Board***") published its reasoned decision[18] on the exemption request for the Authorized Dealership Agreement (the "***Agreement***") which is stipulated to be executed between Trakya Cam Sanayii A.Ş. ("***Trakya Cam***") and its nineteen authorized sellers/dealers.

The decision is noteworthy as it includes detailed information as well as a significant dissenting vote elaborating the individual exemption conditions concerning (i) new developments or improvements or economic or technical improvement in the production or distribution of goods, and in the provision of services and (ii) consumer benefit in detail.

I. General information on Trakya Cam and the relevant product market definition

Trakya Cam, which is a subsidiary of Türkiye Şişe ve Cam Fabrikaları A.Ş. ("***Şişecam***"), is active in almost all types of glass such as base glass (sheet glass, frosted glass, mirror, laminated glass, coated glass, glass for architectural projects), automotive glass and other transportation vehicle glass, energy glass and domestic appliances glass. Most significant purchasers of these products operate in the construction, automotive, energy, domestic appliances, furniture and agriculture sectors.

In terms of the relevant product market analysis, the Board did not define the sub segments of the sheet glass product separately; based on its assessment that sheet glass does not lose its sheet glass nature despite of different processes and can be used as substitutes for each other according to different needs and preferences. There are numerous precedents in which the Board defined the relevant market as *"sheet glass market"*.[19] In light of the Board's consistent approach, the relevant product market has been defined as *"sheet glass market"* within the case at hand as well.

[18] The Board's decision dated June 25, 2020 and numbered 20-31/382-171.

[19] The Board's *Trakya Cam-I* decision dated November 17, 2011 and numbered 11-57/1477-533; *Trakya Cam/Isıcam Exemption* decision dated January 24, 2013 and numbered 13-07/73-42; *Trakya Cam/Düzcam Exemption-I* decision dated December 2, 2015 and numbered 15-42/704-258; *Trakya Cam/Düzcam Exemption-II* decision dated December 21, 2017 and numbered 17-42/670-298.

II. General information on the Agreement

Pursuant to the Agreement, the dealers of Trakya Cam would be authorized to sell the sheet glass produced by Trakya Cam to the market and within this scope, organize the delivery of Trakya Cam's products to customers without reprocessing, as they are purchased, or by cutting the products if necessary.

With the Agreement, Trakya Cam imposed non-compete obligations on its authorized dealers. More specifically, the Agreement set forth that the dealers could not manufacture, import, sell, distribute, keep in stocks and promote the similar or competing products produced, sold, marketed by Şişecam Düzcam and the dealers would not take franchise, representation or agency from companies that are competitors of Şişecam Düzcam and/or would not establish similar commercial relations with such companies.

The Agreement was assessed as a distribution agreement that includes non-compete obligation; however, does not include exclusive territory allocation to authorized dealers or active and passive sales restrictions. It also does not include vertical restrictions such as determining resale price, imposing a minimum resale price, or restriction on passive sales. That being said, the non-compete clause imposes restrictions on the dealers (i) to obtain sheet glass products only from Trakya Cam or from another supplier that Trakya Cam will determine, and (ii) not to produce, sell or market competing products directly or indirectly. Therefore, the Agreement has been evaluated within the scope of Article 4 of Law No. 4054 on the Protection of Competition Law ("***Law No. 4054***").

III. Board's assessment on whether the Agreement would benefit from block or individual exemption

In order to determine whether the Agreement benefits from block exemption under Block Exemption Communiqué No. 2002/2 on Vertical Agreements, the Board first examined the market share of Trakya Cam. In its previous decisions, the Board indicated that Trakya Cam is in dominant position in sheet glass market due to factors such as the high market share, entry barriers, high financing capacity, the strong image of the Isıcam brand, the reliability of the group being the only producer in the market for years, and the foreign trade restrictions. In conclusion, the Board held that the Agreement cannot benefit from block exemption since Trakya Cam's market share exceeds 40%.

Accordingly, the Board proceeded with making an individual exemption analysis under Article 5 of Law No. 4054. In terms of the first condition of individual exemption (*i.e.* new developments or improvements or economic or technical improvement in the production or distribution of goods, and in the provision of services), it is stated that the efficiency gains should be objective and not be assessed from subjective point of view of the parties. The benefits created by the agreement and what the economic importance of such efficiencies must be clearly defined and verified. The Guidelines on the General Principles of Exemption sets forth that, in case of measurable efficiencies, undertakings making an assessment or application within the scope of the first condition must, as accurately as possible, estimate the value of the efficiencies and describe in detail how the amount has been computed if necessary.

In light of the foregoing, the Board concluded that, although the evaluations to be made in order to ensure sufficient certainty that the efficiency gain has been or will be achieved with the distribution system should be supported more concrete data, sufficient explanations and concrete data have not been provided in order to demonstrate efficiency gains contributed to economy and consumers objectively. Therefore, the Board concluded that the Agreement could not benefit from individual exemption.

IV. The assessments made under the dissenting vote

Although the Board concluded that the Agreement cannot benefit from individual exemption since it does not meet the conditions, the dissenting vote is noteworthy, since it examines the individual exemption conditions concerning (i) new developments or improvements or economic or technical improvement in the production or distribution of goods, and in the provision of services and (ii) consumer benefit in detail.

In terms of the first condition, the dissenting opinion argues that, with the Agreement, the authorized dealers would focus on Trakya Cam products and therefore be able to evaluate the demand more accurately. Accordingly, Trakya Cam would be able (i) to receive more accurate feedback about the market, (ii) to plan its production more effectively and therefore (iii) ensure product range and continuation of supply. Moreover, the dissenting opinion also suggests that the distribution system would reduce the cost of logistic and stocking.

As for the second condition, the dissenting opinion argues that the distribution system would increase the choices of the customers in terms of retail sales points and different branded products. It has been also stated that since the consumer demand would be better understood, product supply would respond to the trends among consumers in terms of both existing and newly designed products. Furthermore, it has emphasized that the sheet glass products could not be distinguished by the consumers visually in terms of quality and brand due to its physical characteristics; however it could only be distinguished as a result of analyses in laboratories, and therefore, a customer who wants to buy sheet glass of good quality could be deceived easily with a different type of sheet glass. Therefore, the dissenting vote observed that the consumers would not be deceived anymore due to the non-compete obligation, and as evident, the complaints on that front have been reduced. To that end, the first two conditions of individual exemption would be met.

In this regard, the dissenting opinion concludes that, despite the high entry barriers, imposing non-compete obligation at the reseller/wholesale level would not eliminate competition in a significant part of the relevant market and restrict competition more than necessary to achieve the goals set out in the first two conditions of the individual exemption, based on the grounds that (i) the retail sales would not be restricted, (ii) there were many players active in the same segment with the authorized dealers, (iii) the term of the Agreement was limited to two years and (iv) the sheet glass market was dynamic in terms of products and distribution channels. To that end, according to the dissenting opinion, the Agreement should have been granted with individual exemption.

As a result, the decision gains significance

as the dissenting opinion evaluates the effects of the non-compete clause specifically for the sheet glass market.

The Constitutional Court Decided That Failure to Impose the More Favorable Administrative Monetary Fine on Onmed Has Violated the Principle of Legality of Crime and Punishment

Turkish Constitutional Court (***"Court"***) examined the individual application made by *Onmed Tıbbi Ürünler Pazarlama ve Dış Ticaret A.Ş.* (***"Individual Application"*** or ***"Application"***) on April 27, 2016 and rendered a decision on June 17, 2020 where it ruled that the judgment of the High State Court violated the "principle of legality in crime and punishment", which is enshrined under Article 38 of the Turkish Constitution[21], as it failed to take into account the turnover which would have led to a more favorable result for Onmed in terms of the amount of the administrative monetary fine. This is a milestone decision in terms of competition law as it is the first time that the Constitutional Court has found a violation of constitutional rights arising from a competition law case. The decision of the Constitutional Court is also important as it clearly acknowledges the existence and clarifies the scope of application of the principle of legality of crime and punishment in administrative monetary fines imposed as per Law No. 4054 on the Protection of Competition ("***Law No. 4054***").

As a background information on the process concerning the Individual Application and the Court's Decision, the Board launched a full-fledged investigation against Onmed Tıbbi Ürünler Pazarlama ve Dış Ticaret A.Ş (***"Onmed*** or "***Applicant***") and decided that Onmed violated Article 4 of Law No. 4054 by way of determining the conditions of supply outside the market, fixing the purchase or sale conditions of goods, market partitioning and hindering competitors' activities in the medical consumables market.[22] The Board accordingly imposed an administrative monetary fine on the Applicant amounting to 5% of the Applicant's turnover based on the year preceding the date of the last instance of violation as per Article 16 of the Law No. 4054.

Onmed initiated an annulment lawsuit against the Board's fining decision. While the proceedings were still ongoing, per the amendment in the second paragraph of Article 16 of Law No. 4054, the criteria to be applied in determination of the amount of the administrative monetary fines have changed.[23] The amendment required the Board to impose administrative monetary fine based on the undertaking's turnover generated by the end of the financial year preceding the date of the decision, or if this is not calculable, its revenue generated by the end of the financial year closest to the date of the fining decision.

The annulment request of Onmed was then rejected. Onmed appealed the decision; however its appeal request was not accepted either. During the appeal process, one of the arguments Onmed brought forward was that the amendment in Law No. 4054 required the administrative

[21] Article 38 of the Turkish Constitution reads as follows: "*No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed*".

[22] The Board's *Onmed* decision (16.03.2007; 07-24/236-76)

[23] The amendment was published in the Turkish Official Gazette on February 8, 2008.

monetary fine to be re-calculated based on Onmed's turnover for the year preceding the date of the Board's decision as it would have led to a more favorable result (i.e., smaller amount of administrative monetary fine) for Onmed. However, The Plenary Session of Administrative Law Chambers of the High State Court did not even consider this argument of Onmed and upheld the High State Court's decision. After Onmed exhausted all of the remedies available, it made an individual application before the Constitutional Court, claiming that (i) the decision of High State Court violated the principle of legality in crime and punishment, (ii) the annulment decisions rendered in the lawsuits initiated by other undertakings that were found to be in violation in the same investigation breached the principle of equality[24], and (iii) the right to attain the reasoned decision was violated as the reasoning for rendering a divergent decision was not explained.

The Constitutional Court decided that the Application is admissible since the allegation is related to the violation of a fundamental right guaranteed in the Constitution and in the European Convention of Human Rights (***"Convention"***) and it went on to the substantial examination. As for the examination regarding admissibility, the Court emphasized that the principle of legality in crime and punishment is limited to sanctions that can be considered as criminal charges in scope of the Constitution and the Convention, but that the Court interprets the "charge of crime" in terms of the right to a fair trial and that administrative fines, which have a punitive characteristic, are also protected under this principle.

The Court also emphasized the relevant precedents of the High State Court[25] where the Board's decisions, which did not take into account the favorable regulation in the calculation of fines, were found to be unlawful and annulled accordingly.

The Applicant claimed that its revenue generated by the end of the financial year preceding the date of the fining decision was lower than its revenue for the year preceding the date of the last instance of violation and the amended law should have been considered when calculating the administrative monetary fine.

The Constitutional Court underlined that the principle of legality in crime and punishment is one of the founding elements of the rule of law. The Court also mentioned some of its relevant precedents [26] where it ruled that the principles of the Penal Code may be applicable to misdemeanors as well.

For all these reasons, the Court decided that the imposition of an administrative monetary fine without any assessment regarding the favorable amendment's implementation, and without any explanation as to why the amended provision was not applied, violated the principle of legality in crime and punishment guaranteed under Article 38 of the Constitution and sent the case file for re-examination by the 13th Chamber of the Council of State.

[24] The Board's fining decision was indeed annulled as a result of the annulment lawsuits initiated by some other undertakings that were subject to a fine in the same investigation, according to the principle of legality of punishment and crime.

[25] The decision of 23th Chamber of Council of State dated 15/1/2007 and numbered E. 2006/1286, K. 2007/140; the decision of 24th Chamber of Council of State dated 7/5/2010 and numbered E. 2007/14508 K. 2010/3849

[26] *Mahmut Manbaki*, B. No: 2012/731, 15/10/2014, § 47, *Samet Öztürk,* B. No: 2014/20188, 6/12/2017, § 30).

The Court's decision is a significant one for being a first to find a violation of a fundamental constitutional right due to imposition of an administrative monetary fine as per Law No. 4054. It is also an important reminder of the scope of application of the principle of legality in crime and punishment in the field of competition law

Employment Law

Evaluation on the Matter of Examining Employee Correspondences in Corporate E-Mail Accounts in light of the Constitutional Court's Decision[27]

I. Introduction

Turkish Constitutional Court granted a decision ("***Decision***") on September 17, 2020 regarding an applicant's claims on violation of right to request protection of personal data under right to privacy and freedom of communication due to inspection of correspondences on corporate e-mail account and termination of employment contract on the grounds of these correspondences.

II. Examination of Work Computers and Corporate E-mail Addresses

1. Labour Law Perspective

In terms of Turkish labour law, pursuant to their right to govern and right to supervise, employers may supervise their employees to determine whether or not they are compliant with their orders and instructions. It is accepted that this right to supervise includes examination of the computers provided by the employers for work purposes.

In this regard, the High Court of Appeals acknowledges that the supervision of the e-mail address that is given by the employer to the employee for the purposes of being used in the workplace and for conducting the work assigned by the employer cannot be considered as violating the employment agreement, also, it cannot be argued that such supervision violates the employee's right to protection of personal data. In other words, according to the established case-law of the High Court of Appeals, the employer has the authority to examine company computers and corporate e-mail accounts[28]. In a decision, the High Court of Appeals explicitly stated that *"[I]t is understood that the defendant company had made an investigation on the computer given to the plaintiff for the purposes of carrying out the works of the defendant company. The employer has the authority to examine computers and e-mail accounts which belongs to it, as well as incoming e-mails to these accounts, at all times."*[29] Thus, employers may examine the data stored in work computers without the employees' consent, provided that such examination is limited to scope of work and germane to the purposes of the investigation.

However, such examination might raise some concerns in terms of data privacy. Accordingly the next section of this work focuses on explanations from a Turkish data protection law perspective.

[27] This article was previously published on Mondaq. (https://www.mondaq.com/turkey/constitutional-administrative-law/995702/constitutional-court39s-decision-on-inspection-of-employees39-correspondences-on-the-corporate-e-mail-account published on October 19, 2020) (Last accessed on November 16, 2020).

[28] 9th Civil Chamber of the High Court of Appeals' decision numbered 2009/447 E. 2010/37516 K. and dated December 13, 2010.

[29] 22nd Civil Chamber of the High Court of Appeals' decision numbered 2016/6321 E. 2016/13143 K. and dated May 3, 2016.

2. Data Privacy Perspective

Internal investigation, particularly electronic review, will require review, collection, categorization, analysis and otherwise processing of the employees' data, which may include certain personal information as well. Under Turkish privacy laws, processing personal data requires explicit consent of the data subject (*i.e.* employee), in principle.

On the other hand, there are a variety of exceptions to explicit consent requirement, one of which is processing personal data for the legitimate interests of the data controller (*i.e.* employer), where necessary, provided that the processing does not harm the data subject's fundamental rights and freedoms.

The balance between the employees' right to privacy and the employers' right to monitor their employees' conversations and correspondences has been subject to Turkish Constitutional Court's assessment.

Turkish Constitutional Court acknowledged that an employer may restrict certain rights of its employees (*e.g.* right to privacy) within working hours and ask them to comply with certain rules for the purposes of the maintaining order, peace and confidence in the workplace, but stated that these restrictive measures to enforce employees to comply with the rules (a) should not harm the essence of the employees' fundamental rights, (b) should be expressly included in the employment agreements or other corporate rules and (c) the employees should be informed about them. Unless they are duly informed and notified of such interference, employers would have the reasonable expectation that the employer would not arbitrarily interfere with their fundamental rights and freedoms, including their right to privacy, and should be protected accordingly.

Besides, the court also required these measures to be implemented proportionately, even if the employee is duly and adequately informed. For instance certain reasonable measures should be taken to avoid excessive review and processing of the employees' personal data (*e.g.* filtering correspondences subject to review through conducting business related keyword search, in an attempt to exclude all personal correspondences from the review, narrowing down the scope of investigation to a limited number of employers and to a certain time period).

Accordingly, if an employer wishes to proceed with an internal review without obtaining the explicit consent of its employees, it should be able to establish that (i) it had legitimate interest in conducting this internal review, (ii) its employees should have reasonably expected review of their communications and devices for the purposes of the internal review, as they have been clearly and sufficiently informed of such possibility, (iii) the investigation did not harm the essence of the employees' fundamental rights, as the review was conducted in a proportionate matter by taking reasonable measures to avoid an excessive invasion of privacy.

On a side note, as a separate obligation, the employees should also be clearly informed of the fact that and should be aware that their messages and communications could be accessed, monitored and reviewed by the employer within the scope of the compliance review and their rights under the data protection legislation.

3. Criterion Established through the Decision for Inspecting Employees' Correspondences on the Corporate E-mail Account

The subject matter of the decision was an inspection conducted by the management of a law firm on the applicant's ("***Applicant***") correspondences in the corporate e-mail account, subsequent to an interview with the Applicant, which was conducted after a complaint received by three out of five members of the Applicant's team. As a result of this inspection, the firm terminated the Applicant's employment contract. In the termination notification, it was stated that the correspondences on the corporate e-mail account, which is used to ensure the continuity of the business and also known to be controlled at any time by the employer and kept confidential for security reasons at the enterprise network, had been inspected to investigate the claims against the Applicant. The Applicant stated that the personal correspondences made over his corporate e-mail account were inspected by the employer without his consent, that there was no written or verbal rule at the workplace that employees' corporate e-mail accounts could be inspected. This statement actually constitutes the basis of the Decision.

The Constitutional Court noted that in principle, the employer can control the communication instruments made available to the employees within the scope of its management authority in order to ensure the efficient conduct of the business and the control of the information flow, and to establish certain rules regarding the use of communication instruments. As explained in the previous sections of this article, this was the High Court of Appeals' and the Constitutional Court's already established practice. In the Decision, the Constitutional Court also add that unless employees were informed beforehand that the employer can monitor and inspect the communication in workplace devices when deemed necessary, the employees can reasonably expect that there will be no such oversight. The Constitutional Court also emphasized that the management authority of the employer is limited to the conduct of the business in the workplace and ensuring the order and safety of the workplace.

The Constitutional Court consequently stated that within the scope of the positive obligations of the State, the courts should examine to the extent possible whether certain safeguards are provided by the third party who intervenes with the certain right. To that end the courts should observe (i) whether there are legitimate reasons for the inspection of communication instruments made available to the employees and the content of the communication made through these instruments, (ii) whether the processing is transparent and the employer informs the employees in advance of the processing activities, (iii) whether the intervention on the employee's right to request protection of personal data and freedom of communication is related to and efficient for the purpose of investigation, (iv) whether there is another method less intrusive to achieve such purpose, (v) whether the intervention is proportionate and related and limited to the purpose and (vi) whether the balance between the consequences and impact of the inspection of the employee's communication and conflicting interests and rights of the employer is considered.

III. Conclusion

It is acknowledged by the legal doctrine, the High Court of Appeals and the Constitutional Court that employers' right

to supervise includes examination (*without obtaining employees' consent*) of employees' correspondences in the corporate e-mail account which is provided by the employers for work purposes. Nevertheless, this right cannot be used arbitrarily and there are certain criteria that must be followed by the employers in conducting such examination. In this regard, the Decision established the criteria required to be met by the employers when inspecting employee correspondences that exist in the corporate e-mail accounts of the employees. The Constitutional Court innovatively set forth that (*on top of already established requirements*), (i) the employees must be clearly informed in advance on the fact that corporate e-mail accounts may be monitored and audited, as well as on the purposes of processing such personal data, (ii) the respective situation must require access to corporate e-mails and it must be evaluated whether or not there are other means to achieve the same purpose and (iii) the examination should be limited to the claims directed towards the relevant employee.

In that sense, the Decision constitutes a crucial judgment for painting a clear and comprehensible picture for the examination of employees' corporate e-mail accounts and it certainly observes the utmost protection of the employees' fundamental rights and freedoms.

Litigation

Distinctive Character Determination based on Language is now a Confirmed Approach in Trademark Law

I. Introduction

Trademark law regulates that the phrase to be registered as a trademark for certain goods and services should not describe the goods and services for which the phrase will be registered. The reason behind this fundamental understanding is that any trademark registration provides an untouchable territory for its proprietor, meaning that the registered phrase would be allocated to its owner for trademark-related uses on the goods and services that are in the scope of the trademark until the trademark protection is over. Accordingly, the descriptive words for certain goods and services are not allowed to be registered for related goods and services to have them not allocated for a singular proprietor. The distinctive character, or descriptiveness from a different point of view, of the phrase "süzme" (*cottage cheese, in English*) for milk and dairy products has been a long-standing issue before courts and the Turkish Patent and Trademark Institute (TURKISHPATENT) and the dispute on this is finally over now.

II. The history of the issue

The descriptiveness of the phrase "süzme" for milk and dairy products is an on-going issue before Turkish IP Courts. Indeed the Turkish High Court of Appeals rendered many precedents[30] ruling that the phrase "süzme" is descriptive for milk and dairy products. Since the phrase is commonly used for a certain way of cheese manufacture in Turkey, many companies engaged in the milk and dairy products sector, such as SÜTAŞ, Pınar, İçim or Bahçıvan, pursued litigations or prosecutions before courts and TURKISHPATENT over the years.

While the mere use of "süzme" for milk and dairy products is found to be descriptive, umbrella branding is accepted

[30] For example: the precedent of High Court of Appeals 11th Civil Chamber dated 25.09.2019 and numbered 2018/3941 E., 2019/5827 K.;

as a way of discriminating the found-to-be descriptive phrase of "süzme". [31] A trademark opposition against the trademark application of "İÇİM Süzme" based on several "süzme" trademarks had been filed and was rejected by TURKISHPATENT. Following, the opponent filed an action against the rejection decision, yet the High Court of Appeals confirmed that the umbrella branding, i.e. the "İÇİM" phrase at the beginning, discriminated the phrase sufficiently to eliminate the descriptiveness. A very similar case[32] also goes for the trademark application "*Bahçıvan Bembeyaz Süzme Peynir*".

III. The case before EUIPO

It has been set forth that the understanding and the settled practice regarding the phrase "süzme" before Turkish IP Courts and TURKISHPATENT showed the tendency for evaluation of the phrase as a descriptive one for milk and dairy products. The key point of this practice was that the evaluations are always made by considering the targeted consumers as Turkish consumer, by nature. Nevertheless, a very recent EUIPO decision evaluated the descriptiveness of the phrase "süzme" for milk and dairy products once again and reached a different conclusion.

1. The case before EUIPO Opposition Division

Sütaş Süt Ürünleri A.Ş. ("***Sütaş***") brought a case before EUIPO Opposition Division as a trademark opposition case against a trademark application of Yadex International GmbH ("***Yadex***"), based on its trademark "süzme peynir". The subject matter trademark application is a trademark, designating the European Union in its international registration for a figurative trademark that contains the phrase "PINAR Tam Kivaminda Süzme Peynir Yumusacik Ve Leziz" for the goods of "*Butter; buttercream; curdled milk; milk-based desserts; dips [dairy products]; low fat spreads from dairy products; cream cheese; yogurt; yogurt drinks; cheese; cheese dips; white cheese; hard cheese; cheese mixtures; kephir [milk beverage]; margarine; milk; milk creams [yogurt]; drinking milk or milk-containing beverages; milk products; powdered milk for food purposes; milkshakes; whey; dairy products; quark; cream [dairy products]; edible oils; edible fats; soymilk [milk substitute]; rice milk [milk substitutes]*" of Class 29. The applicant has applied for a phrase indicating the word "süzme" for milk and dairy products.

The EUIPO Opposition Division examined the opposition and decided to accept the opposition of Sütaş due to the presence likelihood of confusion. The EUIPO Opposition Division stated in its acceptance decision that (i) the dominant parts of trademarks, *i.e.* süzme peynir, are mutually present in both the trademark and the additional elements of the opposed trademark, to wit "pınar", "tam kivaminda" and yumusacik ve leziz" are secondary elements of the trademark and thus cannot be subjected to a similarity examination; (ii) there is a low visual similarity between the trademarks while there is an average aural similarity; and (iii) conceptually the phrases of both trademarks do not have any meaning for English-speaking consumers, so the conceptual similarity does not have any effect on the likelihood of confusion.

[31] The precedent of High Court of Appeals 11th Civil Chamber dated 07.01.2020 and numbered 2018/3381 E., 2020/86 K.
[32] The precedent of High Court of Appeals 11th Civil Chamber dated 14.01.2020 and numbered 2019/2241 E., 2020/368 K.

Finally, The EUIPO Opposition Divisions found the similarities sufficient to create a likelihood of confusion without considering the earlier trademark descriptive for milk and dairy products and accepted the opposition. The acceptance decision has been appealed before the EUIPO Board of Appeals.

2. The case before EUIPO Board of Appeals

The Board of Appeals firstly evaluated the targeted consumers and stated that the goods and services in the scope of both trademarks are every day, low-priced product for the general public and that the average consumer of these products is not very well aware or highly conscious about the minor differences between two trademarks. [33] Additionally, as the trademarks are European Union trademarks and the settled practice addresses that finding a risk of confusion for only a part of the relevant public targeted in the European Union is sufficient to reject the registration of the contested trademark application regardless of whether or not this part of the public is primarily targeted by the business activities of the parties concerned. Therefore, it complies with the procedural economy to consider the average consumer as an English-speaker, although there are considerable numbers of Turkish-speakers in English-speaking areas.

As to the similarity comparison of the trademark, the Board of Appeals states that even though the allegation that Turkish-speaking consumers will understand the meaning, it is the English-speaking consumer who should be taken into consideration, with reference to the above explanations. Therefore, the dominant element of the earlier trademark is the verbal element "süzme peynir", which means that the "süzme peynir" phrase is the dominant element and "PINAR" is the co-dominant element of the later trademark application. In that sense, the trademark is found to be similar in an average degree both visually and aurally, but they are not to be found conceptually similar as they both have no meaning as explained above. Overall, the Board of Appeals found the trademarks similar.

As another step of the similarity examination, the similarity of the goods or services is examined and found to be identical, highly similar, or similar. Accordingly, the outcome of the similarity examination now depends on the global assessment of other relevant factors.

The said global assessment of the Board of Appeals contains the distinctive character and global likelihood of confusion. The Board of Appeals stated that, since the English-speaking community will not understand the Turkish words, it has been concluded that the distinctiveness of the trademarks is normal. On the other hand, the differences between the trademarks are found to be insufficient to conclusively exclude a likelihood of confusion.

Based on the examination summarized above, the Board of Appeals confirmed the appealed decision of the Opposition Division and decided that there is a likelihood of confusion between the trademarks. The confirmation about the effect of language on descriptiveness falls under this confirmation as well.

IV. Evaluations

The decisions of EUIPO have an advisory role for Turkish IP Law practice, as the

[33] *See*: https://euipo.europa.eu/eSearchCLW/#basic/*///number/2126%2F2019-1 (Last accessed on October 24, 2020)

European IP Law regulations are the regulative source of Turkish IP Law regulations. Therefore the subjected decision of EUIPO has an important effect on Turkish IP Law practice. The heart of this decision is "*the distinctiveness examination of a phrase based on language."*

The Turkish practice regarding the phrases of this case is completely different than the practice of EUIPO. The fundamental difference as to the distinctiveness is surely due to the language of the average consumer. Indeed, the Turkish Courts decided for annulment of the trademark "süzme peynir" based on descriptiveness, but EUIPO decided to accept the opposition that is filed based on the trademark "süzme peynir" without considering any descriptiveness. The main difference between these practices is the language spoken by the related consumer.

This decision might pave the way for descriptive words in foreign languages to be registered as trademarks in Turkey. Any word having a descriptive meaning in any language for certain goods or services can, with such interpretation, be registered in Turkey as a trademark, since the word would possibly not mean anything for Turkish-speaking consumers and not being used by them to define the relevant goods or services. However, it should also be kept in mind that the judicial and administrative bodies in Turkey acknowledge English as a commonly spoken language by Turkish people too.

V. Conclusion

The Turkish practice regarding the trademark "süzme peynir" is settled with the acknowledgement that it is descriptive for milk and dairy products. On the other hand, EUIPO explained in both examination stages that this word should be evaluated according to the English-speaking community and it should be acknowledged that the contested phrase has no meaning for these consumers. Accordingly, EUIPO decided to accept the opposition relying on the trademark "süzme peynir". Consequently, the Turkish word "süzme peynir" could be protected as a trademark in EU jurisdiction, while it was denied registration as a trademark due to being descriptive for milk and dairy products in Turkey.

The opposite outcome of these two practices is surely due to the language spoken by the consumers in those jurisdictions, which shows the role of average consumer profile in such evaluations related to trademarks. Having said that, it can also be concluded that any descriptive word in any language can be registered as a trademark in Turkey for the described goods and services.

High Court of Appeals brings a New Approach to Evidentiary Law and Enhances the Significance of E-Mail Messages as Evidence

The most essential regimes of the civil procedure law are those on burden of proof and principles on the method of proving an event or transaction. Article 200 Code of Civil Procedure No. 6100 ("***CCP***") sets forth the obligation to prove by deed. According to this article, the party who bears the burden of proof is obligated to prove existence of the transactions that exceeds the sum of four thousand eight hundred Turkish Liras with deeds, and in such a case opposing party cannot produce a witness without prior consent of the party who presented a deed regarding the disputed issue.

Apart from mentioned article, which is also named as prohibition of proof by witness, Article 199 of CCP brings another instrument of proof called "document", without actually mentioning its conclusive force in the civil procedure law. In another words, Article 199 of CCP, without recognizing its probative force and indicating if it is an exception to the obligation to prove by deed, defines a civil procedure law instrument named "document". Article 199 of CCP defines "document" as follows: "written or printed texts or documents, certificates, drawings, plans, sketches, photographs, films, visual or audio data and electronic data and other means of collection of information that are convenient for proving the facts related to the dispute"

In Turkish legal doctrine,[34] it is indicated that Article 199 of CCP shall not be regarded and interpreted as an exception to the obligation to prove by deed. That said, such an approach brings the question of why CCP contains Article 199. The recent decision of High Court of Appeals dated 10.6.2020, and numbered 2017/1014 E., 2020/4488 K. ("***Decision***") sheds a light to this question.

In the Decision, it is discussed whether e-mail messages, which falls under the definition of "***document***" as per Article 199 of CCP, between an attorney and a client should be taken into consideration in the assessment that is made for determination of whether the defendant is indebted, even in a case where the debt in question exceeds four the limit of "thousand eight hundred Turkish Liras". In the Decision, the court concludes that e-mail messages sent by the parties shall be regarded as document in accordance with Article 199 of CCP and valued as instrument of proof even in the scenario where the value of the disputed transaction is greater than the limit that is set out for proof by deed.

In that sense the Decision keeps the CCP in tune with rapidly growing digital era and develops the formulaic concepts of civil procedure law to match with the realities of the current circumstances. So this decision enhances and confirms the significance of e-mail correspondences in evidentiary law and also shows that the everyday e-mail correspondences can be used as evidence even in cases where the dispute is subject to the obligation to prove by deed. This ultimately requires the sender and recipient of such messages to more diligent with an eye towards possible use of these messages as evidence.

Data Protection Law

Turkish DPA's Announcement on Cross-Border Data Transfers

Turkish Data Protection Authority ("***DPA***") published an announcement in October 26, 2020 regarding cross-border data transfers. The purpose of the announcement seems to be providing a general response and the Turkish DPA's views to the criticism and feedback received from private sector and academic institutions regarding the difficulties in cross-border data transfers.

DPA begins by stating it has made the effort to provide conveniences to actors involved in processing activities in order to ensure effective compliance with Law No. 6698 on Protection of Personal Data ("***Law***"). DPA also states that it is also trying to assist relevant actors such as taking recommendations and views of the

[34] Ali Cem Budak, Varol Karaaslan, Medeni Usul Hukuku, Adalet Yayınevi, İstanbul 2017, s.233.

stakeholders, giving extension of the VERBIS deadline thrice, as an example.

DPA addresses these criticisms by dividing its response to several categories:

Regulation Stipulated in the Law on the Cross-Border Data Transfers

The announcement mentions procedural requirements on cross-border data transfers by specifying the regulations stipulated in the Law and states that the relevant provisions do not aim to prevent the cross-border transfers that occur at an ever-increasing amount as a result of globalization and technological developments; but it aims to establish a predictable and transparent transfer regime based on the protection of fundamental rights and freedoms.

Determining the Countries with Adequate Protection

According to the announcement, evaluation on determining the countries with adequate protection, shortly, the adequacy assessment, can be divided into four sections: (i) assessment on whether adequate protection is available in the relevant country, (ii) the importance of reciprocal adequacy, (iii) adequacy determination operations conducted by DPA and (iv) Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data ("***Treaty No. 108***").

(i) Assessment on Whether Adequate Protection is Available in The Relevant Country

DPA refers to Turkish Data Protection Board ("***Board***") decision dated 05.02.2019 and numbered 2019/125, which includes a form created to be used in the determination of countries with adequate protection. According to the relevant form, in determining the countries with adequate protection; it is stated that criteria such as follows, will be taken into account: reciprocity condition, legislation of the relevant country regarding the processing of personal data and its implementation, existence of an independent data protection authority, party status to international agreements on the protection of personal data, membership status to international organizations, and membership status to global and regional organizations that Turkey is a party to, and the volume of trade with the relevant country. The announcement, by making reference to several EU documents, further states that determination of the countries with adequate protection is a dynamic process that necessitates comprehensive and multi-dimensional evaluations including establishment of dialogue mechanisms and close cooperation with the relevant country, and the continuity of the protection level provided.

(ii) The Importance of Reciprocal Adequacy

DPA refers to the sub-paragraph (b) of Article 9/4 of the Law, which stipulates that when DPA makes an adequacy evaluation on the foreign country, it will consider its reciprocity status with Turkey regarding data transfers. According to DPA, the Ministry of Foreign Affairs is an important factor on the adequacy and the Ministry regards the reciprocity condition greatly. The announcement defends the focus on reciprocity by stating that a reciprocal adequacy with the country subject to evaluation will be essential for the data controllers and data processors operating in our country to benefit from a safe, cost-free and accelerated transfer of personal data equally, to have economic

benefits and in this sense and not to be at disadvantage due to the asymmetry that a single-party adequacy would create.

(iii) Adequacy Determination Operations Conducted by Turkish DPA

DPA states that their operations regarding the determination of countries with adequate protection are carried out in close cooperation with the Ministry of Justice, the Ministry of Foreign Affairs and the Ministry of Trade and negotiations. Within this scope, meetings are held with various countries regarding adequacy and updating of Turkey's personal data legislation in accordance with EU legislation. The announcement further states that DPA, in coordination with other relevant public institutions and organizations, has taken all necessary measures in order to conduct reciprocal adequacy negotiations with the European Commission.

(iv) Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Treaty No. 108)

DPA addresses that the current legislative framework of international transfers is in line with the Treaty No. 108. DPA claims that the Treaty No. 108 does not eliminate the possibility of making the data flow between the Contracting States subject to notification or does not prohibit making regulations in their domestic law regarding domestic or cross-border transfers in certain cases, by making references to the Treaty and its Explanatory Note.

Furthermore, DPA, by making reference to EU legislation, emphasizes that being a party to the Treaty No. 108 is not the only condition to determine the adequacy. DPA indicates that it follows a similar approach to EU, which makes further assessments to determine adequacy. DPA states that it is a misconception that they are making international transfer impossible since they allow international transfers in case of a written undertaking in line with Article 9 of the Law, by referring to Board decision of July 22, 2020 with number 2020/559 regarding "cross-border transfer of personal data based on Treaty with number 108".

Personal Data Transfer to the Countries without Adequate Protection

In terms of personal data transfer to the countries without adequate protection, the announcement indicates the requirement for parties to undertake adequate protection in written form and obtain Board's approval, as per (b) subparagraph of second paragraph of Article 9 of the Law, by also taking into account the Board's instructions. Following that, the announcement also refers DPA's announcement on Binding Corporate Rules as an adequate protection mechanism for intra-group transfers to be made between multinational group companies.

Provisions Included in Other Laws

DPA, by referring to first paragraph of Article 4 of the Law, states that legal provisions that personal data processing operations are subject to in different areas are applied with the Law and therefore, the requirements arising out of the distinctive nature of these operations should also be fulfilled. The announcement then refers to paragraph 6 of Article 9 of the Law, which stipulates that international transfer provisions in other laws are reserved and mentions paragraph 5 of Article 90 of the Constitution, which stipulates that "International agreements duly put into effect have the force of law" to emphasize that if there is a provision regarding cross-border transfer of personal data in the laws

and international treaties which are duly put into effect, that provision will be followed.

DPA's Conclusion

As a conclusion, DPA refers to the provision regulated under third paragraph of Article 20 of the Constitution regarding the right to request protection of personal data to suggest that DPA serves for the protection of a fundamental right and freedom. DPA further states it aims to benefit Turkey from the results of the opportunities arising out of technological developments, by following the relevant developments and to establish practices compliant with personal data protections laws.

DPA finalizes the announcement by stating that the process requiring the Board's approval for cross-border data transfer which is seen as a problem by the public is a consequence of the provision being regulated in a mandatory manner under Article 9 of the Law.

Internet Law

ICTA Published Procedures and Principles on Social Network Provider

Information Communications and Technologies Authority's ("***ICTA***") decision on Procedures and Principles on Social Network Provider ("***Procedures and Principles***")[35] was published on the Official Gazette on October 2, 2020 and came into force on the same date. The Procedures provides obligations for social network providers regulated within the amendment to the Law No. 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts ("***Law No. 5651***").

I. Scope of the Procedures and Principles

The Procedures and Principles exclude (i) real and legal persons that display content that is suitable for social interaction on only a certain part of the broadcast and (ii) platforms where the function for content for social interaction is provided as a secondary and ancillary service.

The Procedures and Principles provide that in cases where the social network provider's number of daily access is "continuously" less than 1 million, the social network provider may file a request to the ICTA asking to be considered out of the scope. If such request is deemed appropriate as a result of the technical evaluation, ICTA will notify the social network provider that it is outside the scope. However, if ICTA determines that the daily access from Turkey is more than 1 million, ICTA will notify the social network provider that it is within the scope.

II. Social Network Provider Representative

Per the Procedures and Principles, the representative may be a real person or a legal entity. Legal entity representative(s) must be established in Turkey and gain corporate identity in Turkey while the real person representative(s) must be a Turkish citizen.

Duties of the representative under the Procedures and Principles are to ensure the following:

[35] Bilgi Teknolojileri ve İletişim Kurumu [Information Communications and Technologies Authority], 2020. *Sosyal Ağ Sağlayıcı Hakkında Usul Ve Esaslar [Procedures And Principles On Social Network Provider]*. Official Gazette of October 2, 2020.

i. Compliance with formally served documents, notifications, or requests sent by ICTA, Access Providers Union as well as judicial and administrative authorities.
ii. Responding to submissions made by individuals within the scope of Law No. 5651.
iii. Compliance with the reporting obligation.
iv. Compliance with social network provider's obligations as the content or hosting provider.
v. Compliance with other obligations within the scope of the Law No. 5651.

Social network provider is obliged to provide the ICTA with the representative's identity, title and contact information and report any changes to the ICTA immediately and within twenty four (24) hours at the latest.

As governed under the amendments to the Law No. 5651, there is a 5-tiered sanction mechanism that would apply respectively in case the social network provider continues to violate this obligation within the periods: (i) administrative monetary fine of 10 million Turkish Liras (in case the obligation is not fulfilled within 30 days as of notification of the ICTA), (ii) additional administrative monetary fine of 30 million Turkish Liras (in case the obligation is not fulfilled within 30 days as of first administrative fine), (iii) prohibition for the resident tax payers to place advertisements on the social network provider (in case the obligation is not fulfilled within 30 days as of the second monetary fine), (iv) bandwidth throttling of 50% (in case the obligation is not fulfilled within 3 months as of the advertisement ban decision), (v) bandwidth throttling up to 90% (in case the obligation is not fulfilled within 30 days as of the first bandwidth throttling). In the latter throttling decision, the judge may determine a throttling ratio (not less than 50% by also considering the nature of the services.

The advertisement ban will be published in the Official Gazette and relevant public entities and authorities will monitor the implementation of advertisement prohibition.

III. Individual Requests

According to the Procedures and Principles, social network provider must respond to individual requests regarding contents within the scope of Article 9 and 9/A of the Law No. 5651, within 48 hours, at the latest. If the response is negative, social network provider must provide the grounds for the negative response. Social network provider must ensure that the individual requests can be made easily along with an option to make an individual request in Turkish language. Responses for requests made in Turkish must be in Turkish.

Non-compliance may trigger an administrative monetary fine of 5 million Turkish Liras. The Procedures and Principles govern that after receiving the complaint, ICTA will evaluate whether the social network provider has fulfilled its obligations and will assess the complaints filed due to non-compliance with this obligation on a collective basis during the reporting periods (semi-annually). ICTA will take the following into consideration during its assessment:

i. Whether the social network has necessary systems to effectively comply with this obligation,
ii. Whether the social network is consistently negatively responding to certain persons or entities,

iii. Whether the social network is systemically violating the required turnaround times, and
iv. Whether the negative responses are given with the reasoning.

IV. Semi-Annual Reports

Procedures and Principles regulate that social network provider must provide ICTA with semi-annual reports containing statistical and categorical information about individual requests and application of notified removal and/or access ban decisions.

This report must also be published in the social network provider's website without including any personal data.

Matters pertaining to the preparation and publishing of these reports and its notification to the ICTA may be determined by and communicated to the social network provider by ICTA.

V. Data Localization

Per the Procedures and Principles, social network provider shall take necessary measures to store the data of users in Turkey, in Turkey. Measures on keeping fundamental user information along with data relating to matters that might be notified by the ICTA in Turkey should be prioritized. Also, the measures taken by the social network must be notified to ICTA during each reporting periods.

Telecommunications Law

Mobile Call Termination Market Analysis

The Information and Communication Technologies Authority ("***ICTA***") published Mobile Call Termination Market Analysis[36] ("***Analysis***") within the scope of Electronic Communications Law No. 5809 and Market Analysis Regulation, on September 8, 2020 for public opinion. Previous market analysis on mobile call termination services has been made in 2017.

The Analysis provides evaluations on significant market power and market actors, and mainly provides evaluations on (i) mobile call termination service definition, (ii) market definitions, (iii) regulation requirements in the market, (iv) competition level in the market, (iv) operators having significant market power in the market, and (v) obligations imposed to the operators having significant market.

Accordingly,

i. Analysis states that mobile call termination services cover the services initiated and terminated on mobile networks, and services initiated on fixed networks and terminated on mobile networks.
ii. Analysis defines the market mobile call termination services in a manner covering mobile call termination, voice/visual call termination and SMS/MMS termination, including 2G, 3G and 4.5G technologies and geographical region as Turkey.
iii. Analysis refers to European Commission decisions with numbers 2007/879/EC and 2014/710/EU, and states that the markets must be regulated in the light of these decisions.
iv. Analysis evaluates the competition level, and determines the competition level as low.

[36] *See* https://www.btk.gov.tr/uploads/boarddecisions/kamuoyu-gorus-alinmasi-mobil-cagri-sonlandirma-pazari/258-2020-web.pdf (Last accessed on November 17, 2020)

Consequently, ICTA determined that:

i. TT Mobil İletişim Hizmetleri A.Ş. ("***TT***"), Turkcell İletişim Hizmetleri A.Ş. ("***Turkcell***"), Vodafone Telekomünikasyon A.Ş. ("***Vodafone***"), Küresel Mobil Uydu Haberleşme Sistemi (Global Mobile Personal Communications by Satellite, GMPCS) ("***GMPCS***") and Sanal Mobil Şebeke Hizmeti (Virtual Mobile Network) ("***VMN***") operators are the operators who have significant market power in the mobile call termination market.
ii. TT, Turkcell and Vodafone must be subject to the following obligations: interconnection obligation, non-discrimination obligation, transparency obligation, obligation to draft and publish reference interconnection proposals, tariff control obligation, account separation and cost accounting obligation and co-location obligation.
iii. GMPCS and VMN must be subject to the following obligations: interconnection obligation, non-discrimination obligation and transparency obligation.
iv. SMS and MMS termination services must continue to be regulated by ICTA.

Anti-Dumping Law

Turkey Concludes Investigation on Plastic Infant Care Products Imported from China and Taiwan

On August 4, 2019, through the Communiqué No. 2019/22[37], the Ministry of Trade ("***Ministry***") had initiated an anti-dumping investigation against imports of products classified as "only plastic made pacifiers, feeding bottles and other feeding, nursing and infant care products (formula plate, artillery, formula spoon, fruit strainer, milk storage bag, sippy cup (including with straws), milk container, teether/teether ring, soother holder, manual nose aspirator/nose cleaner, chest guard, manual breast pump, breast pump, soother container, artillery container, teat/feeding bottle teat, feeding bottle, sippy cup end piece, nose aspirator end piece, manual breast pump milking bottle)" under the CN Codes 3923.21.00.00.11, 3923.29.10.00.11, 3923.29.90.00.11, 3923.30.10.00.19, 3924.10.00.00.21, 3924.10.00.00.22, 3924.10.00.00.29, 3924.10.00.00.31, 3924.10.00.00.32, 3924.10.00.00.39, 3924.90.00.00.11, 3924.90.00.00.19, 3926.90.97.90.16, 3926.90.97.90.17, 3926.90.97.90.18, 8414.10.81.90.00, and 8414.10.89.90.00 originating from People's Republic of China and Thailand (together, the "***Products***").

The investigation was launched upon the application of the Turkish company Burda Bebek Ürünleri San. ve Tic., a domestic manufacturer. Within the scope of the investigation, the Ministry requested additional data from other domestic manufacturer companies regarding the applicant's claims within their application, and opined upon gathering the relevant information that the data received from other companies do not change or interfere with the facts of the investigation.

The Ministry conducted its investigation and evaluation based on the data it gathered on a three year period (through 2016 to 2018). Per the Information Report of the Ministry[38], it was able to conduct

[37] *See* https://www.resmigazete.gov.tr/eskiler/2019/08/20190804-7.htm (Last accessed on October 23, 2020)

[38] *See* https://www.resmigazete.gov.tr/eskiler/2020/08/20200818-2-1.pdf (Last accessed on October 23, 2020)

the investigation through the information and data available to it at the time, as importers from People's Republic of China and Thailand did not cooperate or provide sufficient information for the calculation of their dumping margins. Thus, the Ministry determined the dumping margins by comparing the determined weighted average of normal value of the Products, to the weighted average of their FOB export price.

In determining whether there is injury or threat of injury to the relevant domestic market, the Ministry reviewed and evaluated a wide array of data such as the general import quantity, general import value and unit import price, also taking into account the improvements in imports originating from countries other than those subject to the investigation, wherein it observed an increase in values and numbers in 2017 and a small decrease in 2018. Another significant result procured by the Ministry appears to be the repression percentage of the sale prices of the domestic market, by the entry prices of imports originating from People's Republic of China and Thailand. However this result was not mentioned in the Information Report in detail, as the basis information gathered from domestic manufacturers was considered classified.

The main parameters taken into account by the Ministry appear to be the economic indicators of the domestic market, a few of which were values relating to manufacturing, capacity and rate of capacity utilization, domestic sales, export, market share, cost, profitability, stocks. In this regard, a considerable decline was observed in terms of domestic sales, market share, profitability, rate of return and cash flow. Consequently, in determining whether there is injury or threat of injury to the domestic market, the Ministry predicated that, although there appears to be some level of progression in certain economic indicators, it mainly observed severe deterioration in key economic indicators such as manufacturing, domestic sales, profitability, rate of return and cash flow. Further, the Ministry stated in its report that the level of dumping margins of imports from the relevant countries were significantly above the negligible rate. Based on the foregoing outcome, the Ministry concluded that imports from the relevant countries do, in fact, cause injury to the domestic market.

In light of the above, on August 18, 2020, the Ministry announced its decision upon the completion of the investigation on the Products per the Communiqué No. 2020/20[39], wherein the Ministry decided to apply anti-dumping measures (i) at a rate of 12% of the CIF cost for imports originating from People's Republic of China, and (ii) at a rate 26% of the CIF cost for imports originating from Thailand. The Ministry decided to impose the relevant rates without granting any exception to any particular company, since none of the importers from the relevant countries provided sufficient information to or cooperated with the Ministry during the course of the investigation.

White Collar Irregularities

2020 FCPA Enforcement Actions and Highlights

So far, 2020 has seen around the same amount of activity in terms of enforcement actions under the Foreign Corrupt Practices Act ("***FCPA***"), compared to 2019. In 2020, the United States

[39] *See* https://www.resmigazete.gov.tr/eskiler/2020/08/20200818-2.htm (Last accessed on October 23, 2020)

Department of Justice ("***DOJ***") took a total of 22 enforcement actions, [40] and the Securities and Exchange Commission [41] ("***SEC***") took a total of 5 enforcement actions.[42]

According to the FCPA Blog's "2020 FCPA Enforcement Index," 7 companies paid a total of $2.6 billion to resolve FCPA cases in 2020, including resolutions with the DOJ and the SEC, which includes the largest FCPA penalty paid to date.[43] In terms of the sectoral concentration of FCPA enforcement actions in 2020, we observe that the sector mainly affected by the actions appears to be the healthcare sector.

I. DOJ Declinations

The DOJ had been investigating violations of the FCPA by World Acceptance Corporation ("***World***"), due to the fact that it had uncovered evidence that, between 2010 and 2017, World's Mexican subsidiary has paid over $4,000,000 to third party intermediaries partly in bribes to Mexican government officials to obtain contracts with Mexican unions and state government officials involving making loans to union members and receiving payments on these loans withholding the amount of repaid loan amount from the paychecks. In August 2020, the DOJ announced that it declined to proceed with the prosecution taking into account (i) World's prompt and voluntary self-disclosure and full cooperation, (ii) the nature and seriousness of the offense, (iii) World's full remediation which included additional FCPA training and discontinuation of relations with the relevant third parties in Mexico, and (iv) World's agreement to disgorge to the SEC for the full amount of its ill-gotten gains.

II. DOJ Enforcement Actions - Highlights

In January 2020, Airbus SE ("***Airbus***"), a global provider of civilian and military aircrafts based in France, agreed to pay a combined penalty of approximately $3.9 billion to resolve foreign bribery charges with authorities in the United States, France and the United Kingdom, becoming the largest global foreign bribery resolution to date. According to the DOJ's report, Airbus was involved in a bribery scheme where it used third-party business partners to bribe government officials and non-governmental airline executives around the world in order to enhance its business interests and obtain business advantages, also violating the Arms Export Control Act and its implementing regulations, the International Traffic in Arms Regulations, in the United States. The DOJ's investigation proceeded in parallel with the joint investigations conducted by the U.K. Serious Fraud Office and the French Parquet National Financier.

In August 2020, the DOJ closed its investigation with regard to Herbalife Nutrition Ltd. ("***Herbalife***"), a U.S. based publicly traded global nutrition company. According to the DOJ's report, between 2007 and 2016, Herbalife has engaged in a scheme to falsify its books and records to conceal its corrupt and other improper payments and benefits provided to Chinese

[40] *See* https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2020 (Last accessed on October 18, 2020).
[41] *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 October 18, 2020).
[42] These figures reflect the statistics as of the date on which Legal Insights Quarterly (December 2020) went to press.
[43] See https://fcpablog.com/2020/09/01/heres-the-ytd-2020-enforcement-index-another-record-year-for-the-fcpa/ (Last accessed on November 17, 2020)

officials and state-owned entities. Herbalife carried out the scheme for the purpose of obtaining, retaining, and expanding Herbalife's business in China, which included obtaining and retaining direct selling licenses for its subsidiaries in China and influencing certain Chinese governmental investigations into Herbalife China's compliance with Chinese laws. Herbalife agreed to pay a criminal penalty of over $55.7 million to the DOJ and approximately $67 million to the SEC to resolve its violations of the FCPA. Herbalife also agreed to cooperate in any ongoing or future criminal investigations concerning Herbalife, and to enhance its compliance program and to report to the government on the implementation of its enhanced compliance program.

In June 2020, Novartis AG ("***Novartis***"), a global pharmaceutical and healthcare company based in Switzerland, and its former subsidiary Alcon Pte Ltd ("***Alcon***") (current subsidiary of Alcon Inc.), have agreed to pay a combined penalty of $112.8 million to the SEC, as well as to pay more than $233 million in criminal fines, to settle charges arising out of violations of the FCPA. Novartis also agreed to an undertaking to the SEC of self-reporting on the status of its remediation and implementation of compliance measures. According to the reports, local subsidiaries of Novartis, which included Alcon at the time, engaged in schemes to make improper payments or to provide benefits to public and private healthcare providers in South Korea, Vietnam, and Greece in exchange for prescribing or using Novartis-branded pharmaceuticals and Alcon surgical products between 2012 and 2016.

In September 2020, the DOJ closed its investigation with regard to Sargeant Marine Inc. ("***Sargeant***"), an asphalt company formerly based in Florida. Sargeant agreed to pay a criminal fine of $16.6 million to resolve charges for violating the anti-bribery provisions of the FCPA. According to the DOJ, between 2010 and 2018, Sargeant paid millions of dollars in bribes to foreign officials in Brazil, Venezuela, and Ecuador to obtain contracts to purchase or sell asphalt to the countries' state-owned and state-controlled oil companies. Sargeant Marine admitted to bribing a Minister in the Brazilian government, a high-ranking member of the Brazilian Congress, and senior executives at Petróleo Brasileiro S.A.-Petrobras to obtain valuable contracts to sell asphalt. Between 2012 and 2018, it bribed four Petróleos de Venezuela, S.A. officials in Venezuela in exchange for inside information, and for their assistance in steering contracts to purchase asphalt. Sargeant also bribed an official at Ecuador's state-owned oil company EP Petroecuador to secure a 2014 contract to supply asphalt.

III. SEC Enforcement Actions

In February 2020, Cardinal Health, Inc. ("***Cardinal***"), an Ohio-based pharmaceutical company has consented to pay $5.4 million in disgorgement, $916,887 in prejudgment interest, and a civil penalty of $2.5 million to resolve charges for violating the books and records and internal accounting controls provisions of the FCPA. According to the SEC's order, between 2010 and 2016, Cardinal's former Chinese subsidiary managed two large marketing accounts for the benefit of a European dermocosmetic company whose products Cardinal China distributed. The dermocosmetic company directed the day-to-day activities of the Cardinal China employees, who used the marketing account funds to promote the dermocosmetic company's products. The

employees directed payments to government-employed healthcare professionals and to employees of state-owned retail companies who had influence over purchasing decisions.

In April 2020, the SEC charged Asante K. Berko, a former executive of a foreign-based subsidiary of a U.S. bank holding company, for arranging for a Turkish client, an energy company, to funnel at least $2.5 million to a Ghana-based intermediary to pay illicit bribes to various Ghanaian government officials in order to gain their approval of an electrical power plant project.

In April 2020, Eni S.p.A. ("***Eni***"), an Italian oil and gas company whose American depositary receipts are listed on the New York Stock Exchange, agreed to pay $24.5 million in disgorgement and prejudgment interest on the grounds that it violated the books and records and internal accounting controls provisions of the FCPA. According to the SEC, Saipem S.p.A., Eni's minority-owned subsidiary in Algeria entered into four sham contracts with an intermediary between 2007 and 2010 to assist in obtaining contracts awarded by Algeria's state-owned oil company, paying approximately €198 million to the intermediary. Sapiem S.p.A. was awarded at least seven contracts from the Algerian state-owned oil company.

In July 2020, Boston-based pharmaceutical company Alexion Pharmaceuticals Inc. ("***Alexion***") has agreed to cease and desist and to pay $14,210,194 in disgorgement, $3,766,337 in prejudgment interest, and a $3.5 million penalty to resolve charges that it violated the books and records and internal accounting controls provisions of the FCPA. Among other findings, the SEC order finds that Alexion subsidiaries in Turkey and Russia made payments to foreign government officials to secure favorable treatment for Alexion's primary drug, "Soliris". Between 2010 and 2015, Alexion Turkey paid Turkish government officials to improperly influence them to approve patient prescriptions and provide other favorable regulatory treatment for "Soliris".

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