ISSN 2147 – 558X

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LEGAL INSIGHTS QUARTERLY

December 2021 – February 2022

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December 2021 – February 2022

December/ Aralık, Istanbul

Yayın Türü / Type of Publication
Yerel Süreli / Local Periodical

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ISSN 2147 – 558X

Preface to the December 2021 Issue

The December 2021 issue of Legal Insights Quarterly was prepared to provide an extensive look into the upcoming legal issues as well as the foremost contemporary legal agenda in Turkey.

The Banking and Finance Law section addresses a significant step towards the digitalization of the industry, within the scope of the recent Draft Regulation on the Operation Principles of Digital Banks and Banking as a Service Model.

The extensive seven-article section on Competition Law for this issue discusses the material developments of this quarter. Initially, the section digs deep into competition law assessment of resale price maintenance practices and discusses the Council of State's Henkel annulment decision as well as the Board's latest SEB decision. We also dissect two newly-announced and noteworthy merger control decisions of the Board. Moreover, we discuss the changes in the market share thresholds under the block exemption mechanism for vertical agreements. Moving on, the section focuses on a recent hub and spoke considerations under Turkish competition law. Furthermore, the section also provides an article including analysis on the interim measures taken based on an allegedly all-new algorithm based competition violation discussed with respect to the recent Board decision.

The Data Protection Law section sheds light on the framework of processing biometric data, with reference to the Turkish Data Protection Board's recent guidance.

Finally, the Internet Law section assesses the draft amendment to the Communique on Dispute Resolution Mechanism concerning Internet Domain Names, while the White Collar Irregularities section focuses on the internal investigations by untangling the document review process alongside guidance for a precise conclusion to an investigation.

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

December 2021

Corporate Law

Formation of Group of Companies: Domination Agreements

I. Introduction

A "Group of Companies" can be defined as affiliated companies which have a relationship of control between them. Pursuant to the Turkish Commercial Code No. 6102 ("***TCC***"), a group of companies shall be formed by minimum three companies with at least one company having control over the other two. Such control relationship can occur pursuant to an actual control, such as holding the controlling shares in the company, or it can occur pursuant to an agreement concluded between companies. While a group of companies does not collectively constitute a separate legal entity, correctly determining their existence is crucial for ascertaining additional liabilities and obligations of the group of companies and the individual companies within the control relationship.

II. Dominant Companies

Under Article 195 of the TCC, dominant companies are those which, either directly or indirectly, (i) hold the majority of voting rights, (ii) have the right to appoint members to the managing body which can make up the quorum of decision, or (iii) make up the majority of the voting rights, solely or together with other shareholders or partners pursuant to an agreement alongside their own voting rights, of another company, or (iv) control another company pursuant to an agreement, or by other means.

Moreover, as per Article 196/2 of the TCC, the presumption of a control relationship shall be established where a company holds the majority of the shares of another company or has sufficient shares to adopt resolutions pertaining to management. In such case, the first company shall be the dominant company (*i.e.* the parent company) and the second company shall be the subsidiary. The TCC's provisions on group of companies shall be applicable if one of the companies' headquarters is located in Turkey in such control relationship, regardless of where the dominant enterprise resides.

III. Domination Agreements

Turkish law recognizes domination agreements and stipulates that they give rise to control relationships. Domination agreements are defined under Article 106/1 of the Trade Registry Regulation No. 2012/4093 ("***Regulation***") as "*agreements concerning the unconditional authority of one of the parties to instruct the managing body of the other corporate entity, where the parties have no direct or indirect subsidiary relationship; or where parties remain independent and isolated despite any subsidiary relationship which may exist*." Pursuant to the foregoing provision, such domination agreements confer management powers. Accordingly, under a domination agreement, the dominant company gives instructions to the affiliated company regarding fundamental matters in respect of its management, including the appointment of executive level managers and setting business goals. Instructions are not required to be made in a certain form. However, only stock corporations, (which are, according to the TCC, the joint stock company, limited company or limited partnerships *(commandit)* with capital divided into shares) are allowed to execute domination agreements.

The Regulation states that those agreements which require the borrower to obtain consent from the lender institution prior to transactions that may jeopardize the re-payment of their loans do not constitute domination agreements, *per se*. That said, provided that the conditions under Article 195 of the TCC are met, the existence of such an agreement does not eliminate the control relationship between the companies. In addition to loan agreements, Article 106/5 of the Regulation stipulates that "*agreements concerning the management of the company by all or part of the shareholders and their relevant rights and obligations on the same, which are signed between the shareholders but where the company itself is not a party,*" shall not constitute a domination agreement. Similarly, the existence of such shareholders` agreements does not remove the control relationship, if the conditions under Article 195 of the TCC are met.

The word "*instruction*" as contained in the relevant legislation is construed widely, to encapsulate all kinds of directives and decisions which are perceived to be binding. On the other hand, mere recommendations and advice will not be construed as "*instructions,*" as long as they are not intended to be binding.

IV. Procedural Formalities of Domination Agreements

As per Article 106/2 of the Regulation, domination agreements must be (i) approved by the general assembly of the subsidiary, (ii) registered with the trade registry office which the subsidiary is registered with, (even in the cases where the residence or headquarters of the party having the authority to give instructions is located abroad, the agreement is executed outside Turkey, or is governed by foreign laws) and (iii) announced in the Turkish Trade Registry Gazette.

Regarding the formalities of the domination agreements, there is no express requirement for the domination agreements to be in writing. However, given that the registration can only be completed if the agreement is in written form (and also translated and notarised if they are drafted in a language other than Turkish), the domination agreements will most certainly need to be in writing.

On the other hand, under Article 198/3 of the TCC the parties to a domination agreement cannot evade their liabilities and obligations arising from the domination agreement by not having the agreement registered with the trade registry. However, failure to register willinvalidate the rights and authorities of the controller of the group of companies arising from the domination agreement. In other words, not registering a domination agreement will deem the domination agreement invalid for the controller of the group of companies, whereas, in order to protect the creditors and shareholders, the dominant companies will remain liable against the said parties.

V. Conclusion

One way of controlling/establishing dominance over a company is executing a domination agreement. Under Turkish law, the domination agreements' validity depends on the satisfaction of procedural formality requirements. On the other hand, in the case of non-registration, liabilities and obligations arising from domination agreements shall be upheld and parties to the agreement shall be barred from arguing

invalidity of the agreement due to non-registration.

Banking and Finance Law

A Milestone in the Turkish Banking System: Draft Regulation on the Operating Principles of Digital Banks and Banking as a Service Model

I. Introduction

The Banking Regulation and Supervision Agency ("***BRSA***") announced on August 19, 2021 the draft regulation which comprises the operating principles and procedures planned to be introduced for (i) digital banks and (ii) banking as a service model ("***Draft Regulation***"). This draft represents an important step in digitalization of the Turkish banking system.

II. Digital Banking

As per Article 3 of the Draft Regulation, digital banks are defined as "*credit institutions that provide banking services mainly via electronic banking services distribution channels instead of physical branches*." All of the regulatory framework pertaining to credit institutions will also be applicable for digital banks.

As per Article 5 of the Draft Regulation, digital banks are only allowed to provide their services to (i) financial consumers and (ii) small and medium sized enterprises. Digital banks are also allowed to (a) carry out activities in interbank markets and capital markets, (b) accept bank deposits or give loans to other banks, (c) offer safekeeping account services to payment or electronic money institutions and (d) offer banking as a service to interface developers that surpass the threshold for small and medium sized enterprises.

Digital banks are not allowed to open physical branches. On the other hand, as per Article 6 of Draft Regulation, they must establish at least one physical office which will only handle customer complaints. Also, digital banks can provide services to their customers through the existing ATMs (cash machines) of other banks, or those that they will establish themselves. In addition, they can provide services for withdrawing or depositing cash through their contracted merchants.

The maximum amount of unsecured cash loans that digital banks can lend to a financial consumer cannot exceed 4 (four) times the average monthly net income of the relevant individual. In case the customer's average monthly net income is not ascertainable, the total of unsecured cash that can be loaned to the consumer cannot exceed TRY 10,000 (ten thousand Turkish Liras).

If a digital bank increases the total amount of its minimum establishment capital to TRY 2,500,000,000 (two billion five hundred million Turkish Liras), it can apply to the BRSA and request an exemption from the activity limitations listed under Article 5 of the Draft Regulation.

As per the Draft Regulation, the general rules pertaining to the licensing procedures for banks, as set out under the Regulation on Banking Operations Subject to Permission and Indirect Share Ownership ("***Regulation***"), will also be applicable for digital banks. As per Article 11 of the Draft Regulation, the minimum capital requirement for digital banks is TRY 1,000,000,000 (one billion Turkish Liras).

The banks which already have license from the BRSA will not be required to make a separate application to offer digital banking services. Banks that wish to close down their existing physical branches to carry over their services fully or partly to digital will be allowed do so, provided that they act in compliance with a plan to be approved by the BRSA.

Payment service providers, leasing, factoring and financing companies can also apply for a digital banking license on the condition that they (i) provide the application documents indicated under the Regulation on Banking License and the Draft Regulation, (ii) comply with the licensing requirements determined under Banking Law No. 5411 and the Draft Regulation, and (iii) comply with the activity limitations listed under the Draft Regulation.

III. Banking as a Service ("BaaS")

As per Article 3 of Draft Regulation, BaaS is defined as "*a banking service model which enables interface developers to liaise their clients` transactions through service banks, by connecting to the service banks' systems directly via APIs or open banking services in return for fees to be paid to service banks, as a result of which the interface developers are able to provide new products and services by using the benefits of the banking infrastructures that service banks have*." Conventional banks can also carry out BaaS activities.

Interface developers are fin-tech companies or other businesses/enterprises which enable their customers to perform their banking transactions through the mobile app or internet browser-based interface that they develop, by accessing the banking services offered by the service bank on its API or open banking services. Services banks are permitted to offer BaaS only to those interface developers that are established in Turkey.

The Draft Regulation prohibits financial technology companies from using the words "payment service provider, bank, payment institution or electronic money institution" in their commercial titles or from using any expression that may give the impression that they are operating as a bank/payment service provider. In their customer agreements, they must expressly state that (i) they are not a bank or payment service provider and (ii) banking services are provided by the service bank. They must also share on their websites the copies or templates of the standard agreement to be executed between the interface developer and the customer, and the agreement between the service bank and the customer; as well as the name and logo of the service bank on their home page. If the service bank issues a payment card on behalf of the interface developer, the name and the logo of the service bank must be indicated on the cards.

As per the Draft Regulation, certain mandatory provisions must be included in the service agreement between the service bank and the interface developer, such as provisions obliging the interface developer (i) to comply with the transparency requirements and (ii) not to store bank customer information that is not necessary to offer its services or comply with its legal obligations.

IV. Conclusion

The Draft Regulation that is expected to enter into force on January 01, 2022, is a milestone in the digitalization of banking

system, with the purpose to change the banking models in Turkey, in order to keep pace with the digital age.

Capital Markets Law

Exemptions to the Obligation to Make Tender Offers in Public Companies

I. Introduction

Under Article 26 of the Turkish Capital Markets Law ("***CML***"), acquisition of shares entitling its owner with management or voting rights obliges the acquirer to make tender offers to other shareholders to purchase their shares. The CML authorizes the Turkish Capital Markets Board ("***Board***") to regulate the procedures and principles regarding such mandatory tender offers pertaining to publicly traded companies. In this regard, the Board`s Communiqué on Tender Offers No II-26.1 ("***Communiqué***") was published, which regulates the procedures, principles and the exemptions with regard to mandatory tender offers pertaining to publicly traded companies, and recently amended as per below.

II. Obligation to Make a Tender Offer and Exemptions

As per the Article 26 of the CML, in public companies, those shareholders gaining management control or voting rights must make an offer to other shareholders to purchase their shares. Holding directly or indirectly more than fifty percent of the voting rights of the corporation alone or together with persons acting in concert, or holding privileged shares which gives the right to elect the absolute majority of the members of the board of directors or the right to nominate the same number of directors in the general assembly shall be deemed as gaining control of management. However, some exceptions to the tender offer obligation have also been set out in the Communiqué.

According to Article 18 of the Communiqué, upon application, the Board may grant an exemption from the obligation to make a tender offer, in the event of one of the following:

- Acquisition of publicly traded company shares or voting rights in accordance with a capital structure change, which is necessary to strengthen the financial structure of the partnership in financial difficulties;
- Provided that the shares of a publicly traded company are not used in any general assembly meeting or a change is not made in the company's board of directors, if the portion leading to an obligation to make a tender offer out of the shares held in capital of the publicly held company is disposed of or is committed in writing to be disposed of within a period of time to be deemed fit by the Board;
- The change in the management control of the parent company of the publicly traded company did not have the purpose of acquiring the management control of the publicly traded company;
- Sales of shares owned by the state in public companies that are undergoing privatization;
- Change of management control arising from the merger in which the company subject to merger is a party to the merger as the transferee, provided that the shares of the shareholders who cast negative votes at the general assembly meeting where this transaction was approved before the merger took place are bought back, as per the principles and procedures specified in the

offering circular issued during the initial public offering;

- In case of defaulting on the bank loans, the shares given to the bank as a guarantee of the loan which become the property of the bank in accordance with the Article 47/4 of the CML, the transfer of such shares to the special purpose entity in which the bank is also the founder, and acquisition of these shares from the bank or special purpose entity by third parties, after the ownership of these shares is transferred to the bank or the special purpose entity;
- Transfer of shares to comply with a legislative provision that determines the nature of shareholding; or
- Control is transferred as a result of the inheritance of an estate or the legal matrimonial property regime between the spouses.

The draft Communiqué No. II-26.1.ç amending the Communiqué on Tender Offers No. II-26.1 on the above matters, among others, was first issued by the Board in February 2021 for public consultation and came into force upon its publication in the Official Gazette on October 16, 2021.

Under Article 18 of the Communiqué, applications for exemption requests must be made to the Board by relevant parties within 6 (six) business days following the obligation for tender offer to arise. If, as a result of the examinations of the evaluation of the information and documents requested by the Board, it is concluded that the exemption conditions have been met, the relevant parties may be exempt from the obligation to make a tender offer. According to the Article 19 of the Communiqué, in case the application to be exempted from the obligation to make a tender offer is not approved by the Board, a tender offer will have to be made within 1 (one) month following the Board's decision not to grant the exemption.

III. Conclusion

According to the Turkish Capital Market Law, in the public companies, shareholders gaining management control or voting rights must make an offer to other shareholders to purchase their shares. The important point here is that the particular shareholder must have control of management. In case the shareholders have such a control, they have the obligation to make a tender offer. However, the Board`s Communiqué on Tender Offers No II-26.1 does provide some exceptions to the tender offer obligation. If the shareholders meet one of the exemption conditions listed in the Communiqué, then an application must be made to the Turkish Capital Markets Board within 6 (six) business days following the obligation for tender offer to arise. After the examinations of the Board regarding the exemption, if the Board gives an unfavorable decision, a tender offer will made by the shareholders.

Competition / Antitrust Law

An Overview of the Turkish Competition Board's Approach to Resale Price Maintenance Practices in Light of the Groupe SEB Decision [1]

I. Introduction

The Turkish Competition Authority has recently published its Groupe SEB decision [2] in which it evaluated the allegation that Groupe SEB İstanbul Ev Aletleri Ticaret A.Ş. ("***Groupe SEB***") and İlk Adım Dayanıklı Tüketim Malları Elektronik Tekstil İnşaat ve İletişim Hiz. San. Tic. Ltd. Şti. ("***İlk Adım***") violated Article 4 of the Law No. 4054 ("***Law No. 4054***") by way of determining the resale prices and restricting the online sales of their distributors and other resellers. The Turkish Competition Board (the "***Board***") assessed the activities of Groupe SEB and İlk Adım which included interfering with distributors' pricing strategies, imposing sanctions on distributors that disrupt the pricing strategy such as prohibiting the online sales and also notifying distributors to increase their prices. Based on the evidence collected during the on-site inspections and upon consideration, the Board decided to impose administrative monetary fines on Groupe SEB and İlk Adım.

II. The Board's Evaluation in Groupe SEB Decision

In setting out the background to the case, the Board described Groupe SEB as an undertaking active in the small home appliances market. Its products include steam irons, vacuum cleaners, personal and laundry care products, food and drink preparation accessories and electronic cooking appliances. Groupe SEB is active in the distribution of these product segments under various brands, namely Tefal, Rowenta, Moulinex and Krups, and through various sales channels such as exclusive shops, own shops, business to business, business to consumer, internet shops, corner dealers, premium dealers, chain stores, technology superstores, shop in shop and its distributor, İlk Adım. More specifically, İlk Adım is Groupe SEB's distributor for traditional stores and local dealers.

As for the relevant product market, the Board determined this to be the small house appliances market, for the case at hand. The Board also pointed out that the market consisted of many different undertakings which operated through six main sales channels: (i) distributors and exclusive shops, (ii) traditional shops and local dealers, (iii) local chain stores, (iv) e-commerce platforms, (v) technology superstores and (vi) hypermarkets. In light of this, the Board defined the geographic market as Turkey.

In its substantive assessment, the Board mainly focused on the allegations concerning the practices of Groupe SEB and İlk Adım, with regard to (i) resale price maintenance ("***RPM***") and (ii) online sales restrictions.

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[1] This article first appeared in Mondaq. (https://www.mondaq.com/turkey/antitrust-eu-competition-/1117584/an-overview-of-the-turkish-competition-board39s-approach-to-resale-price-maintenance-practices-in-light-of-the-groupe-seb-decision)

[2] Turkish Competition Board's decision dated March 4, 2021, 21-11/154-63.

i. Assessment on the Resale Price Maintenance Allegations

Firstly, the Board evaluated the practices conducted by Groupe SEB. The Board stated that the main sales channels for products distributed by Groupe SEB are the "Tefal shops" (exclusive shops) and corner stores. On the other hand, the Board also stated that internet sales constitute another important sales channel, as online sales have increased over the past years and that e-commerce has become more popular.

After examining the documents collected during the on-site inspection, the Board stated that Groupe SEB mainly aims to keep the final sales prices of the products at the recommended level. It is also seen from the documents that in case Groupe SEB determines that a price is below the recommended level, it requests the dealers to increase their prices to the recommended sales prices. Moreover, it is also understood that Groupe SEB has been monitoring the prices constantly, especially for sales made through online channels, that employees from different sales channels have been constantly reporting the prices to each other, and based on this data Groupe SEB issues warnings to its distributors who apply lower sales prices. All in all, the Board revealed that Groupe SEB`s objective and sales strategy was ensuring resale price maintenance.

The Board stated that Groupe SEB`s interference in the sales prices was observed in various ways. Indeed, Groupe SEB is shown to have interfered directly with the prices applied by its dealers under its own sales channels. Moreover, Groupe SEB interfered with the prices applied by its distributor İlk Adım's dealers through issuing warnings to İlk Adım. The Board determined that the documents related to Groupe SEB's activities on resale price maintenance concerned mainly online sales, as it was easier to determine any inconsistency between the recommended sales price and the prices applied by the dealers within the scope of online sales. However, it was noted that Groupe SEB's resale price maintenance practices also included other sales channels, based on its policy to ensure price consistency throughout all of its sales channels. In addition, the Board also found that Groupe SEB implemented certain measures against those undertakings which did not comply with its recommended sales prices.

In this respect, the Board stated that Groupe SEB and İlk Adım had interfered with the sales prices and applied sanctions, including the restriction and prohibition of online sales, to those who do not comply with the price maintenance. Consequently, it has been observed that some sellers increased their prices after facing these sanctions. The Board evaluated these practices to be resale price maintenance, a vertical restraint as per Article 4 of the Law No. 4054 which lists the competitive restrictions prohibited under Turkish competition law. In this case, fixing the purchase or sale price of products or services, or those elements such as cost and profit which form the price, and any terms of purchase or sale, fall within the prohibition set out in Article 4/1(a) of the Law No. 4054.

As for the evaluation of İlk Adım`s practices, the Board found that when Groupe SEB determines that the prices applied by a dealer belonging to İlk Adım`s sales channel are lower than it should be, Groupe SEB first informs İlk Adım of the matter and asks them to warn

the dealer to increase the prices or terminate the sales of the products. In this respect, the Board concluded that Groupe SEB's resale price maintenance practices concerning İlk Adım's dealers are executed through İlk Adım, rather than directly by Groupe SEB. This highlights Groupe SEB's interference with İlk Adım's commercial practices. The Board evaluated the relationship between these two undertakings and stated that İlk Adım is an undertaking which is capable of taking decisions independently within the meaning of the general preamble of the Law No. 4054. Referring to the preamble, the Board emphasized that competition law applies to all undertakings which conduct economic activities. As for the resale price maintenance practices in question, the Board found that İlk Adım was responsible for these practices, as it was an economically independent undertaking and a separate legal entity that resold the products supplied from Groupe SEB. Although the lists including the resale prices of the products were determined by Groupe SEB, İlk Adım was deemed liable for forcing its dealers to comply with those price lists and for interfering with their resale prices. Consequently, the Board concluded that these practices constituted resale price maintenance within the scope of Article 4 of the Law No. 4054.

Moreover, the Board stated that these resale price maintenance practices could not benefit from the block exemption set forth under the Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("***Communiqué No. 2002/2***") since they constituted a restriction within the meaning of Article 4(a) of the Communiqué No. 2002/2. Subsequently, the Board evaluated whether the cumulative conditions for individual exemption within the scope of Article 5 of Law No. 4054 were fulfilled, *i.e.*, if the practices (i) ensured new developments or improvements or economic or technical improvement in the production or distribution of goods and the provision of services; (ii) help customers benefit from the foregoing condition; (iii) did not eliminate competition in a significant part of the relevant market; and (iv) did not restrict competition more than necessary to achieve the goals set out in the first two conditions.

The Board decided that none of these conditions were fulfilled. Firstly, the resale price maintenance practices did not ensure any new developments or improvements; on the contrary, the Board emphasized that the high dealer prices would limit the intra-brand competition among the dealers and reduce their incentives to invest and minimize costs. The Board rejected Groupe SEB's brand image defenses on this point, as increasing the products' prices artificially would not preserve the brand image before the consumers as they claimed, nor would this lead to any efficiency gains. As for the second condition, the Board decided that it was not fulfilled either, since resale price maintenance was a form of restriction intended to reduce intra-brand competition which led to the increase of the prices for consumers. The Board also concluded that the third and fourth conditions were not fulfilled, due to the fact that despite the many undertakings active in the small home appliances market, Groupe SEB had significant market power in many of the product segments and resale price maintenance led to the reduction of intra-brand competition.

The decision also included the Board's by object and effects based analysis. The Board stated that resale price maintenance

was a by object infringement, and in light of the evidence collected during the on-site inspection, it was sufficient to determine the existence of the object to interfere with the resale prices of the dealers, to conclude there was a violation. Because of this, evaluation of the effects of the practices in the market was not an essential factor in order to decide whether a violation took place.

ii. Assessment on the Online Sales Restrictions Allegations

The Board stated that Groupe SEB was also involved in practices leading to the restriction of online sales, alongside its resale price maintenance practices. In some cases, Groupe SEB interfered directly with the internet sales of the dealers, and in others it conducted these practices indirectly, through İlk Adım. After evaluating the evidence collected during the on-site inspection, the Board stated that Groupe SEB constantly monitors the market and shapes its strategies concerning resale price maintenance based on the developments in the market.

The Board determined that Groupe SEB's practices related to the restriction or prohibition of internet sales were price-based. Whenever Groupe SEB had determined that the prices on the internet had not been in line with the price lists or the recommended prices issued, Groupe SEB interfered with the prices and requested a revision, and in case of non-compliance, Groupe SEB restricted the internet sales, sometimes even directly preventing the online activities of the infringers, to ensure they revised their prices. The Board concluded that this demonstrated that the restriction and prevention of internet sales appeared both as a sanction to ensure resale price maintenance and as a practice to directly restrict competition.

The evidence showed that while the request mostly originated from Groupe SEB, there were also cases that demonstrated İlk Adım`s interference with its dealers' internet sales. In this respect, İlk Adım's practices could be considered as the restriction of passive sales within the scope of Article 4 of the Law No. 4054. The Board did not consider İlk Adım's distribution network as a selective distribution network and therefore, decided that the restrictions imposed on the internet sales of the dealers could be evaluated within the scope of Article 4(b) of the Communiqué No. 2002/2. Therefore, the Board stated that the vertical relationship between Groupe SEB and İlk Adım's dealers could not benefit from the group exemption within the scope of the Communiqué No. 2002/2. The Board also analyzed the conditions set forth under Article 5 of the Law No. 4054 for individual exemption for this practice, but concluded that none of the conditions were fulfilled.

In light of the above, the Board decided that Groupe SEB and İlk Adım violated Article 4 of the Law No. 4054 through resale price maintenance and restriction of internet sales. In this respect, the Board imposed administrative fines on both undertakings.

III. An overview of the Turkish Competition Board's Approach to RPM Practices

Over the past few years, the Board has focused its attention towards vertical agreements, especially on resale price maintenance and restrictions of online sales practices. The Board's recent

decisional practice highlights its approach towards these practices. In this respect, the Board's most notable decisions are briefly scrutinized under this section.

In its Maysan Mando decision,[3] the Board decided that Maysan Mando Otomotiv Parçaları San. ve Tic. A.Ş. ("***Maysan Mando***") violated Article 4 of the Law No. 4054 by determining the resale prices of shock absorbers through the supply agreements with its dealers. The Board evaluated such conduct under the Block Exemption Communiqué No. 2017/3 on Vertical Agreements in the Motor Vehicles Sector ("***Communiqué No. 2017/3***") and held that further to Article 6 of the Communiqué No. 2017/3, directly or indirectly prohibiting the distributors from freely determining their selling prices is considered as a restraint which aims to restrict competition, and any agreement that contains such restrictions cannot benefit from the block exemption provided within the scope of the Communiqué No. 2017/3.

To highlight another example of resale price maintenance, the Board's BP/Opet/PO/Shell decision[4] concerned the fuel and LPG sector. The Board investigated the practices of five undertakings and decided that four out of the five *(BP Petrolleri A.Ş., Petrol Ofisi A.Ş., Shell & Turcas Petrol A.Ş. and OPET Petrolcülük A.Ş. – excluding Total Oil Türkiye A.Ş.)* interfered with their dealers' pump prices. The Board analyzed the investigated undertakings' recommended prices and their dealers' prices and ultimately decided that dealers predominantly complied with the prices set by the investigated undertakings. Therefore, the Board imposed an administrative monetary fine on the relevant undertakings for determining the resale prices of their dealers.

In *Yataş,* [5] the Board evaluated the allegation that Yataş Yatak ve Yorgan Sanayi Ticaret A.Ş. ("***Yataş***") and Doğtaş Kelebek Mobilya Sanayi ve Ticaret A.Ş. ("***Doğtaş***") violated Law No. 4054 by determining the resale prices, fixing discount rates and limiting the payment methods of their distributors. The Board examined the various contracts that Yataş and Doğtaş executed with their distributors and based on the relevant provisions of the said contracts, concluded that the price lists provided by Yataş and Doğtaş were of an advisory nature and apart from that, there was no indication that Yataş and Doğtaş had determined the resale prices, fixed discount rates or limited payment methods under the contracts executed with their distributors. In its assessment, the Board compared the recommended sales prices and the actual sales prices of the dealers, and concluded that the dealers could deviate from the recommended sales prices and determine their own. In addition, after examining the invoices, the Board determined that the dealers were able to apply different percentages of discounts and offer various payment methods to the consumers. The Board, after assessing the provisions of Yataş's and Doğtaş's agreements, stated that neither Yataş's nor Doğtaş's contract provisions restricting online sales satisfied

[3] Turkish Competition Board's *Maysan Mando* decision dated June 20, 2019, 19-22/353-159.

[4] Turkish Competition Board's *BP/Opet/PO/Shell* decision dated March 12, 2020, 20-14/192-98. Ankara 7th Administrative Court issued a stay of execution for the monetary fine imposed against Opet Petrolcülük A.Ş. (January 14, 2021; E. 2021/60) and the administrative judicial process concerning this decision is still ongoing.

[5] Turkish Competition Board's *Yataş* decision dated February 6, 2020, 20-08/83-50.

Article 5(a) of the Law No. 4054, thus such agreements did not benefit from the protective cloak of individual exemption. All in all, the Board decided that there was no need to initiate a full-fledged investigation against these undertakings and issued a written opinion recommending that both Yataş and Doğtaş to alter and renew their dealer agreements to exclude the prohibition of passive sales via internet otherwise it would initiate further action in accordance with Law No. 4054 as indicated in the written opinion issued based on Article 9(3) of the Law No. 4054. For completeness, according to the dissenting opinion of one of the Board members, there was evidence indicating that Yataş interfered in its dealers' resale prices and thus the Board should have decided to initiate a full-fledged investigation against Yataş.

In *Sony Eurasia,*[6] the Board evaluated the allegations against Sony Eurasia Pazarlama A.Ş. ("***Sony***") concerning the determination of online resale prices of its distributors. According to the reasoned decision, many of the e-mail messages collected as evidence by the case handlers indicated that online price levels were monitored by sales teams and managers. In addition, some of the internal e-mail correspondences suggested Sony was issuing warnings to its distributors about low price levels, especially on online sales platforms. Last but not least, the decision indicated that some of the external e-mail messages between the Sony sales team and distributors contained warnings made to distributors to correct their prices. As a result of its assessment, the Board decided that Sony (i) monitored the price levels in online platforms, (ii) expected compliance with its recommended resale prices, and (iii) had the ability to threaten the distributors with withholding incentive payments in case of non-compliance. Against this background, the Board concluded that Sony`s conduct restricted its distributors' ability to autonomously determine their online prices. In light of the above, the Board, with majority vote, decided that Sony violated Article 4 of the Law No. 4054 by determining the online resale prices of its distributors, and imposed an administrative fine. On the other hand, the dissenting opinion by Prof. Dr. Ömer Torlak stated that (i) distributors autonomously determined their prices, (ii) there was no conclusive evidence that Sony implemented a resale price maintenance scheme including any sanctions imposed on any of its distributors, (iii) Sony had various distribution channels, (iv) the prices of distributors were in fact different than the recommended prices, and (v) intra-brand competition was strong in the market.

Henkel[7] is another important decision that highlights the Board's approach concerning the evaluation of monitoring practices. In this decision, the Board conducted a full-fledged investigation against Türk Henkel Kimya Sanayi ve Ticaret A.Ş. ("***Henkel***") in order to determine whether the relevant undertaking violated Article 4 of the Law No. 4054 by way of resale price maintenance. In *Henkel*, the Board noted that the sole fact that Henkel collected data on its products' resale prices and used this information in its planning of commercial and promotional activities could not be considered as a violation in and of itself.

[6] Turkish Competition Board's *Sony Eurasia* decision dated November 22, 2018, 18-44/703-345.

[7] Turkish Competition Board's *Henkel* decision dated September 19, 2018, 18-33/556-274.

However, the Board further stated that intervening directly to the resale prices which should have been freely determined within the scope of the independent commercial decisions of the buyers and preventing the buyers from setting the resale prices, constitute violation. The Board concluded that Henkel's conduct went beyond talking to the customer and monitoring the sales prices of the reseller and instead Henkel intervened in its customers' independent decision-making capacity by applying measures in order to determine the resale prices of its products within a certain program, and thus prevented its customers from freely determining their prices. All in all, the Board unanimously decided that Henkel violated Article 4 of the Law No. 4054 via maintaining the resale prices of its products and decided to impose administrative monetary fines on the relevant undertaking. Upon Henkel's appeal, the 13th Chamber of the Council of State recently decided to reverse the Court of Appeal's judgment [8] that rejected the request to quash the Board's Henkel decision[9]. In this regard, the 13th Chamber of Council of State found the Board's decision unjustified and decided that Henkel had not violated Article 4 of the Law No. 4054 by way of resale price maintenance. The 13th Chamber of the Council of State discussed the Board's relatively strict approach on the standard of proof for RPM cases and stated that Henkel's practices were not considered as an anti-competitive act of pressure or encouragement as the element of "pressure or encouragement" in question must be of a value to affect buyers' freedom to determine resale prices as an independent economic behaviour and there was no clear and concrete data to prove the existence of "pressure or encouragement" element in the case at hand.

As for the Board's approach concerning by object restrictions and effects based analysis, in each of the *BP/Opet/PO/Shell, Maysan Mando, Sony Eurasia, Henkel* and *Yataş* decisions, the Board stated that resale price maintenance constituted a by object restriction. [10] The Board confirmed this approach once again in its *Groupe SEB* decision.

IV. Conclusion

It is clear that resale price maintenance has become one of the hottest topics in the Turkish competition law regime considering the Board's significant decisions in the past few years, as well as its most recent *Groupe SEB* decision in which the Board evaluated all aspects of the resale price maintenance in detail, along with the restrictions on online sales and price strategies.

[8] Ankara Regional Administrative Court 8th Chamber of Administrative Law's judgment dated December 23, 2020 and numbered 2020/394 E., K.2020/2451. Following the judgement of Council of State, Ankara Regional Administrative Court 8th Chamber of Administrative Law's judgment dated September 9, 2021 and numbered 2021/1300 E., 2021/1241 K., rescinded Ankara 4th Administrative Court's decision dated 08.01.2020 and numbered 2019 E., 2020/50 K..

[9] The 13th Chamber of Council of State's judgment dated July 6, 2021 and numbered 2021/969 E., 2021/2654 K.

[10] The administrative judicial processes concerning some or all of these decisions may be still ongoing.

New era for RPM cases? Council of State held that elements of coercion or incentive should be proven in the Competition Board's Henkel Decision [11]

This case summary includes an analysis of the 13th Chamber of the Council of State's reversal [12] of Ankara Regional Administrative Court's judgment,[13] which had dismissed the request to quash the Turkish Competition Board's decision [14] regarding the allegations concerning RPM against Türk Henkel Kimya San. ve Tic. A.Ş. (***"Henkel"***).

In its decision, the Board had concluded that Henkel had infringed Article 4 of Law No. 4054 by determining the resale prices of its products and imposed an administrative fine of TRY 6,944,931.02. Under the judicial review that followed, the first instance administrative court and the appellant regional administrative court had both found the Board decision to be lawful. Nevertheless, the 13th Chamber of the Council of State decided that the Board has to prove with clear and tangible evidence, that the element of "coercion or incentive" by the supplier had reached a level that restricted the buyers` independent economic behaviour in terms of their freedom to set their own resale prices, and hence considerably raised the standard of proof for RPM cases. The ruling of the 13th Chamber of the Council of State is a signal to the Board to change its approach which has been getting stricter over the years in RPM cases.

I. Background

In the application filed with the Turkish Competition Authority (***"TCA"***) on January 20, 2017, it was claimed that Henkel violated Law No. 4054 by determining the resale prices of its "beauty and personal care products" and "laundry and home care products." As a result of the preliminary investigation, it was decided to open a full-fledged investigation against Henkel with regard to the alleged RPM practices.

The Board noted that Henkel, with a computer program called "Field Control Services" (***"FCS"***) could monitor the end-point sale prices for both its own and other firms` products. Additionally, Henkel`s field staff examine the product details such as promotional insert prices, the display conditions of Henkel products, etc. and upload the relevant photos to the FCS. Henkel also has another system called "Star Store" (***"SS"***) for internal reporting its own products in the beauty and personal care categories, where it can monitor the product prices and check whether they were under or over the price recommended by Henkel. In this context, when a buyer's resale price was found to be lower than the recommended price, Henkel made various

[11] This article first appeared in Mondaq. (https://www.mondaq.com/turkey/antitrust-eu-competition-/995208/recently-published-guidelines-of-the-turkish-competition-authority-on-examination-of-digital-data-during-on-site-inspections-)

[12] The 13th Chamber of Council of State's judgment dated July 6, 2021, and numbered 2021/969 E., 2021/2654 K.

[13] Ankara Regional Administrative Court 8th Administrative Chamber's judgment dated December 23, 2020, and numbered 2020/394 E., 2020/2451 K. Following the above judgment of the Council of State, the case was returned to the Ankara Regional Administrative Court. The 8th Chamber of Ankara Regional Administrative Court with its judgment dated 09.09.2021 and numbered 2021/1300 E., 2021/1241 K., rescinded the first instance Ankara 4th Administrative Court's decision dated 08.01.2020 and numbered 2019 E., 2020/50 K. and thereby quashed the Board's Henkel decision.

[14] Turkish Competitition Board's *Henkel* decision August 19, 2018, 18-33/556-274.

attempts to increase the price. Based on the case at hand, even though the rapporteurs were of the opinion that Henkel did not violate the law, the Board unanimously decided to impose an administrative fine of TRY 6,944,931.02 to the undertaking, on the ground that it had violated Article 4 of Law No. 4054 by way of indirectly determining the resale prices.

On September 9, 2018, Henkel applied for a judicial review and annulment of the Board's decision. In the first instance, Ankara 4th Administrative Court decided to dismiss the case as the subject matter of the case was found to be in accordance with the law. Henkel appealed the case to the Ankara Regional Administrative Court 8th Administrative Chamber where the court again rejected the application since the subject of the appeal was found to be in accordance with the legal procedure and substantive law, and Henkel`s allegations were not considered adequate for the judgment to be annulled. As a result, Henkel decided to take the matter to the Council of State, the highest court in the judicial review process.

II. The Board's RPM Precedents Prior to the Ruling of the Council of State

When the TCA`s decisional practice since 1998 is examined, two things stand out. First, the Board's approaches on preliminary investigations and full-fledged investigations tend to differ, with regard to the distinction between restriction by object or effect. In its preliminary investigations the Board applies Article 9(3) of Law No. 4054, which is a tool used by the Board to terminate the preliminary investigation and refrain from initiating a full-fledged investigation on procedural efficiency grounds, among others, when the infringement affects only a small market, and in a way, conducts an effect analysis. [15] However, in its full-fledged investigations, the Board predominantly considers RPM practices as restriction by object. [16] In this approach, some actions have been deemed illegal on their own, regardless of the effects of such action. On the other hand, there have also been full-fledged investigations in which the Board conducted an economic analysis of the effects, such as the *Tefal* decision.[17]

Secondly, when the Board's decisional practice is viewed chronologically, between years of 1998 and 2008, the TCA seems to have been relatively active regarding RPM allegations, by conducting 20 full-fledged investigations and imposing administrative fines in 14 of these cases. On the other hand, when we look at the 2008-2017 period, the TCA conducted only four full-fledged investigations and imposed administrative fines in only two of them, the *Anadolu Elektronik* and *Aral Oyun* cases. [18] The

[15] Turkish Competitition Board's *Dagi* decision dated July 15, 2009, 09-33/725-165, *KWS* decision dated November 25, 2009,09-57/1365-357 and *Yatsan* decision dated September 23, 2011, 10-60/1251-469, *Aygaz* decision dated March 3, 2013, 13-14/204-105; *Çağdaş/Zuhal Müzik* decision dated October 24, 2013, 13-59/825-350; *Duru Bulgur* decision dated March 8, 2018, 18-07/112-59 ; *Yataş* decision dated February 6, 2020, 20-08/83-50 .

[16] Such as, Turkish Competitition Board's *Anadolu Elektronik* decision dated June 23, 2011, 11-39/838-262 ; *Henkel* decision dated August 19, 2018, 18-33/556-274 ; *Sony Eurasia* decision dated November 28, 2018, 18-44/703-345 ; *Maysan Mando* decision dated June 20, 2019, 19-22/353-159 .

[17] Turkish Competitition Board's *Tefal* decision dated March 4, 2021, 21-11/154-63 .

[18] Turkish Competitition Board's *Anadolu Elektronik* decision dated June 23, 2011, 11-39/838-262, *Aral Oyun* decision dated October 7, 2016, 16-37/628-279.

reason for such noticeable decrease in the number of TCA's full-fledged investigations may be the *Leegin Judgment*[19] of the U.S. Supreme Court in 2007, in which the century-old "per se" approach was abandoned and rule of reason analysis was adopted.

However, starting with the *Henkel* decision in 2018, the Board has imposed administrative fines in 12 full-fledged investigations out of 14 in total so far.[20] Thus one can say that RPM activities have once again come under the TCA`s radar and close scrutiny. However, also in the period starting with 2018, in some of its preliminary investigations, the Board decided not to launch full-fledged investigations by applying Article 9(3) of the Law No. 4054.[21]

After examining recent decisions of the Board and the administrative fines it imposed, it is safe to say that TCA's enforcement activity on RPM practices has increased significantly and the Board have shifted into a stricter approach against RPM practices. Moreover, it seems like the increase in RPM cases will continue, as more full-fledged investigations are in the pipeline. Different periods in the Board's decisional practice and the gap between years of 2008-2017 can easily be noted by the below graph.

III. The Council of State's Approach in the Henkel Case

Although the Council of State accepted that as a general rule, in a vertical relationship, Law No. 4054 prohibits suppliers from determining a minimum or fixed resale price for buyers, it held that Communique No. 2002/2 grants block exemptions to certain types of activities, albeit with certain types of limitations. Examples of these limitations are "impeding the buyer's freedom to set its own resale price" and "determining a minimum or fixed price as a result of coercion or incentive."

The Council of State held that Henkel sells and distributes its products through large-scale retailers and distributors, and there are no explicit provisions regarding RPM under the agreements concluded with them. Therefore, the allegation concerns whether Henkel determined the resale prices indirectly, although in terms of determining if it is anticompetitive behaviour causing an infringement, there is no difference between direct or indirect implementation of RPM practices. Accordingly, it is important to establish in this case whether Henkel, by using the monitoring systems (FCS and SS), had tried to determine fixed resale prices through its price recommendations by using coercion or incentives.

Examining the evidence presented during the full-fledged investigation, it is noted that the phrase "taking action" is used multiple times in the intercompany

[19] Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007)

[20] Turkish Competition Board's *Henkel* decision dated August 19, 2018, 18-33/556-274 ; *Sony Eurasia* decision dated November 28, 2018 , 18-44/703-345 ; *Turkcell* decision dated January 10, 2019, 19-03/23-10 ; *3M* decision dated April 18, 2019, 19-22/232-13 ; *Maysan Mando* decision dated June 20, 2019, 19-22/353-159 ; *Tefal* decision dated March 4, 2021, 21-11/154-63 ; *Akaryakıt* decision dated March 3, 2020, 20-14/192-98 ; *Bellona* decision dated March 26, 2020, 20-16/231-112 ; *Baymak dated* March 26, 2020, 20-16/232-113 ; *DYO* decision dated April 15, 2021, 21-22/267-117 ; *Anka Mobil* decision dated April 15, 2021, 21-22/266-116 ; *Philips* decision dated August 05, 2021, 21-37/524-258 .

[21] Turkish Competition Board's *Yataş* decision dated February 6, 2020, 20-08/83-50.

correspondences. However, when statements from Henkel's buyers are reviewed, buyers insist that recommendations of Henkel and/or phrases like "taking action" are merely recommendations and do not obstruct the buyer's freedom to determine the resale price in practice. As previously stated, even if a supplier`s conduct can seem coercive or based on incentives, in order to fulfil the element of "coercion or incentive" stated in the Communique No. 2002/2 and Guidelines, the "coercion or incentive" in question must be at such a level that would affect the buyers' independent economic behaviour in terms of their freedom to determine resale prices. Otherwise, in a situation where the buyer can make independent decisions, it is not possible to state the supplier is determining the resale price or even engaging in anti-competitive behaviour. In line with the above-mentioned elements and criteria, the Council of State found that Henkel`s conduct did not constitute an anti-competitive act of coercion or incentive, but was merely a reproach towards the resellers who did not comply with recommended prices.

Even though the Board stated in its decision that the resale prices showed increase following Henkel's objections to the resellers, Council of State found that it is not clear whether the price adjustments in question were made as a result of coercions or incentives by Henkel's employees. The Court also noted that since Henkel has strong competitors in the market and does not have more than 20-25% market share, there is a strong substitution effect between the competitors in relevant market, and consumers' preferences are likely to be quickly affected by any price adjustments. Furthermore, since the large-scale retailers are powerful and there are no exclusivity conditions for distributors, it is highly unlikely that Henkel will be able to determine the resale prices. In other words, even if the prices have increased, the Court required that a strong link between Henkel's actions and the price adjustment must be established based on clear and tangible evidence, hence the bar for the standard of proof has been raised.

IV. Conclusion

As a result, the 13th Chamber of Council of State decided Henkel did not violate Article 4 of the Law No. 4054 by determining resale prices and found the Board's decision unlawful. The decision can be interpreted as the Council of State stepping away from restriction by object for two reasons:

> The "coercion or incentive" in question must be at such a level that it would affect the buyers' independent economic behaviour in terms of their freedom to determine resale prices, and
>
> The price adjustments in question must be shown to be made clearly as a result of the supplier`s (Henkel's) conduct.

For now, it seems that the Council of State is trying to steer the TCA's considerably more stringent approach towards a more effects-based approach and restrain the TCA from penalizing those RPM practices with no negative effect on the market. The ruling of the 13th Chamber of the Council of State considerably raised the standard of proof for RPM cases and this may cause the Board to change its strict approach in the forthcoming days.

The Turkish Competition Board Approved Ereğli Demir ve Çelik Fabrikaları T.A.Ş.`s Acquisition of Sole Control over Kümaş Manyezit Sanayi A.Ş. Following its Vertical Concentration Assessment

In a recently published decision, the Turkish Competition Board ("***Board***") assessed the application for Ereğli Demir ve Çelik Fabrikaları T.A.Ş.'s ("***Erdemir***") acquisition of sole control over Kümaş Manyezit Sanayi A.Ş. ("***Kümaş***") which is ultimately controlled by Yıldız Holding A.Ş. and Gözde Girişim Sermayesi Yatırım Ortaklığı A.Ş.[22]

In its review of the notified transaction, the Board deemed the transaction to be an acquisition that falls under Article 5/3 of the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***") given that proposed transaction concerns Erdemir acquiring sole control over and thereby changing the control structure of Kümaş.

The Board first evaluated the parties' activities in Turkey to determine the relevant product markets for the transaction. Kümaş is active in areas of refractory products and refractory raw materials. The acquirer Erdemir, on the other hand, is controlled by OYAK Group ("***OYAK***") which operates in various sectors through its subsidiaries, such as mining-metallurgy, cement, concrete, paper, energy, chemistry, finance, automotive and logistics.

For the purposes of its relevant product market assessment, the Board visited previous European Commission ("***Commission***") decisions and adopted the same categorizations for refractory products. Accordingly, the Board divided refractories into certain sub-segments with respect to supply and demand of products: (i) shaped and unshaped refractories, (ii) basic and non-basic refractories, (iii) refractories from dolomite and refractories from magnesite, and further divided refractory products both from dolomite and magnesite into fired and unfired refractory products since fired and unfired refractory products cannot be substituted with each other.[23] Consequently, the Board adopted narrow product market definitions for refractory products as, (i) basic unshaped refractory products from dolomite, (ii) basic unshaped refractory products from magnesite ("***BURM***"), (iii) basic shaped unfired refractory products from dolomite, (iv) basic shaped fired refractory products from magnesite ("***BSRM fired***"), (v) basic shaped unfired refractory products from magnesite ("***BSRM unfired***"), (vi) non-basic unshaped refractory products.

Considering only calcined magnesite ("***CCM***") that is also produced by Kümaş is used in the iron and steel sector, the Board also narrowly segmented raw materials of the refractory products. Consequently, the Board sub-segmented magnesite and dolomite raw materials that are used in Kümaş's production portfolio into, (i) sintered magnesite ("***DBM***"), (ii) fused magnesite ("***FM***"), (iii) CCM, (iv) sintered dolomite ("***DBD***"), (v) magnesite ore. While considering Kümaş's and OYAK's activities, the Board determined the relevant product market for the iron and steel sector to be the iron and steel

[22] Turkish Competition Board's decision dated January 14, 2021, 21-03/32-16.

[23] *RHI/Magnesita Refratarios* (M.8286); *Imerys/Alteo Certain Assets* (M.8130); *Cookson/Foseco* (M.496)

market.[24] The Board also decided that the relevant product market for the cement sector is the cement market. Furthermore, for refractory products, cement, iron and steel sectors the geographical market is determined as Turkey by the Board.

In the light of the relevant product market definitions for each sector, the Board identified relevant product markets for the purposes of the notified transaction as, (i) BURM, (ii) BSRM fired, (iii) BSRM unfired, (iv) CCM, (v) iron and steel, (vi) cement markets.

In terms of concentration assessment regarding this transaction, the Board first indicated that the notified transaction does not give rise to horizontally affected markets as the parties operate in separate product markets, and the transaction would not lead to the creation of or strengthening a dominant position. However, the Board remarked that there are vertical relationships between (i) BURM and BSRM fired markets where Kümaş is active and OYAK's iron and steel, and cement production, (ii) BSRM unfired market where Kümaş is active and OYAK's iron and steel production, (iii) CCM which is manufactured by Kümaş and is being used as a raw material input in Kümaş's production of refractory products and OYAK's iron and steel production.

The Board assessed each vertical relationship between the parties of the transaction in detail. The Board stated that given that BURM is used in the manufacture of iron, steel and cement there is a vertical relationship between BURM and iron and steel, and cement. To that end, the Board noted that, according to paragraph 25 of the Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions ("***Guidelines***"), unless the merged entity that arises from the non-horizontal merger transaction, holds a dominant position in at least one of the relevant markets in question after a merger, a non-horizontal (*i.e.,* vertical) merger would not have any negative effect on competition. Accordingly, the Board decided that the acquisition would not raise competition concerns as OYAK's shares in iron and steel and cement markets and Kümaş's shares in BURM market do not exceed the thresholds provided in the Guidelines.

With regard to the vertical relationship between BSRM fired, iron and steel, and cement, the Board reminded that as per paragraph 27 of the Guidelines, a concentration would not raise competition concerns for so long that Herfindahl-Hirschman Index ("***HHI***") level in the relevant market is below 2500 and the merged entity holds less than 25% of the market shares. Consequently, the Board decided that although Kümaş's shares in BSRM fired market exceed the market share thresholds provided by the Guidelines with an insignificant margin, since Kümaş does not hold a dominant position in the relevant product market and the HHI level is below the thresholds provided by the Guidelines, the effective competition would not be significantly impeded with regard to the BSRM fired market.

With respect to the vertical relationship between CCM and iron and steel, the Board stated that calcined magnesite is used in the iron and steel sector with small amounts and it is not an imperative input. Therefore, the Board decided that the notified transaction would not significantly

[24] The Board noted that while it is possible to further segment these markets, such segmentation would not change the essence of its assessment and it did not provide a further segmented market definition.

impede effective competition regarding the calcined magnesite market, either.

As regards the vertical relationship between BSRM unfired and iron and steel, the Board noted that Kümaş has more than double of the amount of market shares its closest competitor has, and that it holds a dominant position in the relevant market. The Board decided that although both value and volume-based HHI levels are below the thresholds provided in the Guidelines, a detailed assessment regarding vertical effects of the transaction was necessary considering Kümaş's and its competitors' market shares.

Although the Board remarked that vertical mergers and acquisitions may have positive effects, such as the reduction of transaction costs, efficiency gains, and reduction of prices, the Board also underlined that vertical concentrations may lead to unilateral and coordinated effects. Moreover, such unilateral effects include anti-competitive market foreclosure, which occurs in cases where the merged entity has the ability and the incentive to prevent the access of its competitors to the supply. The Board emphasized that as per the Guidelines, market foreclosure is subdivided into supply foreclosure and customer foreclosure.

Accordingly, the Board remarked that the assessment regarding the vertical concentration in the BSRM unfired market concerns the determination of input foreclosure effect. Following this line of reasoning, the Board evaluated the transaction parties' market shares in the affected markets, the significance of the input for the downstream market, and scrutinized whether the merged entity would have the ability and incentive to refuse to sell input, thereby increasing the ultimate product prices for customers.

In its assessment, the Board noted that although the merged entity will not hold a dominant position in the upstream BSRM unfired market, it will still control a considerable amount of the relevant market. That said, the Board emphasized that although iron and steel production increased over the past years, the pace of production of refractory products did not match the pace of the iron and steel sector. Thus, the Board concluded that although refractory products still retain their importance as inputs and BSRM unfired products are irreplaceable for Erdemir's iron and steel production, their share in the total input costs has decreased.

For the purposes of assessment on input foreclosure effects, the Board also considered the established procurement practices in the refractory market. The Board emphasized the fact that each customer procures refractories from at least 2 or 3 suppliers which are selected from among 6-10 suppliers through a tender process. Therefore, the Board stated that in the event that OYAK procures refractories within its body, the rest of the input by the other suppliers will become alternative supplies for the producers in the downstream market. Therefore, refractory producers can easily be changed and it is unlikely that prices of the refractory products will increase as a result of the notified transaction.

Additionally, the Board highlighted that with new producers' entry into the market inputs can be supplied by numerous companies operating at a national or global scale, therefore the likelihood of input foreclosure is decreased.

Consequently, the Board assessed that it is unlikely that the transaction will lead to input foreclosure effects and increase the costs for the competitors operating in the

downstream market or the price of the product since, (i) despite the growth in the iron and steel sectors, the refractory products market does not indicate a growth trend, (ii) refractory products have a very small share in the iron and steel production costs, (iii) the number of enterprises operating in the upstream market increased in recent years, (iv) the amount of imports of refractory products has been continuously increasing, (v) the iron and steel manufacturers work with more than one supplier at the same time, (vi) there are no exclusive relations in the market.

The Board further evaluated customer foreclosure effects and indicated that customer foreclosure and thereby a market foreclosure is not likely since, (i) OYAK does not have enough power to restrict its competitors operating in the upstream market from reaching the customers in the downstream market considering the market range for iron and steel products, (ii) various undertakings operating at a national or global scale are active in the downstream market, (iii) each customer procures refractories from at least 2 or 3 suppliers selected from among 6-10 suppliers in tenders, (iv) undertakings operating in the downstream market can also export their products.

In light of the foregoing, the Board ultimately concluded that the notified transaction would not cause a significant impediment of effective competition in the markets. Thus, the Board granted unconditional approval to the relevant transaction. The decision of the Board provides valuable insights in terms of the assessment to be made on mergers and acquisitions, in which the relationship between the parties to the concentration is only vertical (*i.e.,* as supplier and customer).

The Acquisition of 34 Stores of CarrefourSA by Migros through the Transfer of Tenancy Rights was Unconditionally Cleared by the Turkish Competition Board Following a Thorough Assessment on the Relevant Geographic Markets

The Turkish Competition Board ("***Board***") published its reasoned decision [25] concerning the acquisition of 34 stores of CarrefourSA Carrefour Sabancı Ticaret Merkezi A.Ş. ("***CarrefourSA***") located in Diyarbakır, Elazığ, Erzincan, Hatay, Malatya, Mardin, Şanlıurfa and Van by Migros Ticaret A.Ş. ("***Migros***") through the transfer of tenancy rights.

Before delving into its substantive analysis, the Board first defined the relevant product market as the transaction was expected to affect the competitive structure of the markets relating to the fast-moving consumer goods ("***FMCG***") organized retail sector, both vertically and horizontally. To that end, the Board found that the transaction is expected to have vertical effect as Migros` ultimate parent company, Anadolu Group, is active as supplier in the FMCG upstream markets, *i.e.*, the alcoholic (off-trade beer) and non-alcoholic beverages market, the fruit and vegetables market, and the wholesale and retail markets; and horizontal effect in the organised FMCG retail market where Migros and Carrefour activities coincide.

The Board categorized the vertical markets that were expected to be affected by the proposed transaction in line with its previous decisions and defined the relevant

[25] Turkish Competition Board*'s CarrefourSA/Migros* decision dated May 4, 2021, 21-25/307-140.

vertically affected markets as “cola drink”, “soda pop”, “mineral water”, “packaged water”, “sparkling water”, “fruit juice”, “iced tea”, “sports drink”, “energy drink”, “off-trade beer”, “stationery equipment”, “fresh vegetables and fruits” and “wholesale retail”. The Board defined the horizontally affected market as the FMCG organized retail market.

The Board stated that the determining factor in defining the relevant geographic market in terms of the retail market is the consumer attraction field of the markets, in other words, how far the consumers travel to make their everyday purchases. As per the European Commission’s decisions, the geographic market was determined as the areas within 10-15 minutes of driving distance, and these driving distances might vary based on the framework of the product market definitions that were divided into subcategories based on the store area. As a result of the assessment in the EU member countries, it was stated that on average, small supermarkets that are located within 5 minutes, medium-sized supermarkets that are located within 10 minutes, and large supermarkets (1000 square meters and more) that are located within 15 minutes of driving distance are able to create competitive pressure on other stores.

On the other hand, as stated in the Board’s decision, definition of the geographical markets tends to narrow following the increased urbanization problems, traffic jam and parking spot deficiency. In this context, the Board found that in terms of the transaction, determining the specific districts where the subject stores were located as relevant geographical market would be in line with the approach taken in prior Board decisions. However, the Board indicated that increased concentration and consolidation alongside the changes in the structure of the organized FMCG retail sector in the recent years might necessitate narrower geographical market definitions to be defined. The Board highlighted that it was more important than ever to determine the presence of discount markets and regional/local retailers, which were seen as competitors to highly concentrated organized retail channels, are operating at sufficient numbers and accessible distances, to maintain the competitive structure of the market. The Board evaluated that in a sector that has been expected to continue experiencing progressively increasing concentration and has become more concentrated compared to the past, there were sufficient grounds for narrowing the geographical market definition.

Furthermore, the Board assessed that the stores with area between 0 – 400 square meters appeal to a narrower field in terms of customer attraction power due to the small scale of their sales area and said stores are most preferred by the customers who reside in 0 to 1000 meters of walking distance because of their physical capacity. Stores sized between 400 – 1000 square meters were acknowledged to have a wider field of attraction and in terms of these stores, 0 to 3000 meters of walking distances, both near and far, were designated as the geographical field. It was determined that stores with 1000 square meters or more sales area, which are subject of the transaction in this case, have wider customer attraction power than the other two groups of stores due to their physical capacity and the amenities available (some are located at shopping malls, offer parking areas etc.) and therefore, in terms of these stores, 0 to 5000 meters of distance was designated as the geographical field.

As for the supply market, which was the second market to be evaluated within the specifics of the case, the Board defined the relevant geographic market as "Turkey", since the market entry conditions, the access to supply sources, production, distribution, marketing and sale in terms of the product in the relevant product market did not differ on the regional scale.

The Board found that the transaction would cause both horizontal overlaps and vertical links. In terms of the markets expected to be affected horizontally, the Board stated that within the framework of principles in the Guidelines on the Assessment of Horizontal Merger and Acquisitions, the primary criteria to take into consideration in evaluating a merger and acquisition within the scope of Article 7 of Law No. 4054 are the parties' pre- and post-transaction market shares and the concentration level of the market. The Board stated that, in the competition law literature, market share thresholds in relation to the substantial lessening of competition in concentration, *i.e.*, a market share of 50% or more is presumed to indicate the existence of a dominant position on its own, save for the exceptional cases. The Board also stated that competitive concerns may still arise due to the presence of certain other factors even in cases where the post-transaction market share of the undertaking remains below the 50% threshold. Within this specific case, the Board decided to set the critical threshold as 40% in terms of the districts as well as the narrower geographical fields that were within the relevant walking and/or driving distances.

In light of the foregoing, the Board calculated the market shares of the stores active in FMCG retailing market based on their sizes (sales area) as well as the relevant walking and/or driving distance and it conducted an HHI test in order to lay out the competitive effects of the transaction in the market. The Board came to the conclusion that the transaction would not raise any concerns since the concentration ratio of each specific store did not meet the critical threshold and thus the transaction would not significantly impede effective competition.

The Board also evaluated whether new entries to the market were possible. The Board stated that in the recent years no large-scale entries were recorded in the organized retail sector, growth was mostly seen by way of acquisitions, or new store establishments by chain stores mostly via the discount retail market channel. Although it is increasingly difficult to find a suitable area or a building as saturation point is being reached at important locations in big cities, since the market structure is mostly based on discount retailers opening a new store with a small sales area, the Board concluded that there were no difficulties for the existing competitors to increase their capacity by doing the same, due to the availability of suitable places and the ease of obtaining legal permits.

Furthermore, the Board evaluated the effects of the transaction in the vertically affected off-trade beer market. The Board stated that the beer market was subject to strict advertisement regulations. Therefore, the only engagement points of the consumers and the suppliers are the off-trade sales points and as a result of that, chain stores have become more important. In this respect, the Board found that Anadolu Group, the parent company of Migros, would have no incentive to foreclose Migros' and CarrefourSA's rivals by way of input foreclosure in the beer market and thus any concerns relating

to the input foreclosure would not be realistic.

The Board further evaluated that although in theory it was possible for Migros` parent company to engage in customer foreclosure, Migros was likely to continue purchasing products from competitor suppliers in the upstream market in order to maintain its product range, as the variety of products in the store are considerable, and it is a desirable factor influencing consumer preferences. Taking this into account, the Board found that the transaction would not cause any customer foreclosure effecs in the beer market.

All in all, the Board ultimately found that the transaction would not significantly impede effective competition and thus unconditionally approved the proposed transaction. The Board's reasoned decision provides a thorough analysis and constitutes a valuable resource for competition law practitioners, given that it provides detailed assessment with regards to the geographic market definition.

Were you benefiting from the block exemption mechanism for vertical agreements? Make sure you double-check your market share this year…

As we approach the end of the year, the Turkish Competition Authority ("***Authority***") introduced some important legislative changes regarding vertical agreements. The Authority decreased the market share threshold set for the block exemption mechanism applicable to vertical agreements, aligning its assessment with the EU rules. These amendments came into force without going through a public consultation period. A summary of the recent changes is provided below.

Background to the legislative change

Although, as a rule, vertical restraints are prohibited under Article 4 of the Law on the Protection of Competition No. 4054 ("***Law No. 4054***") certain vertical restraints may benefit from the block exemption mechanism, provided that they meet the conditions set out in the Block Exemption Communiqué on Vertical Agreements ("***Communiqué No. 2002/2***"). Additionally, undertakings may also avail themselves of other block exemption mechanisms for specific sectors and agreements. Besides the block exemption mechanism, there is also an individual exemption mechanism that may be applicable subject to the conditions set out under Article 5 of Law No. 4054.

Under the block exemption mechanism applicable to vertical agreements in general, the first condition pertains to the market share of the parties to the vertical agreement. Previously, Communiqué No. 2002/2 on Vertical Agreements provided a protective cloak for agreements where the respective parties' market shares did not exceed 40%, so long as they also satisfied the other conditions. Now, this market share threshold assessment has been changed with the Communiqué numbered 2021/4 ("***the Amendment Communiqué No. 2021/4***"), which was published in the Official Gazette dated

November 5, 2021[26] and entered into force on the same day.

Market share thresholds, before and after the amendment

Before the Amendment Communiqué No. 2021/4 came into force, the supplier that is a party to the vertical agreement was required to have a market share of 40% or less within the relevant market concerning the goods and services subject to the vertical agreement, in order for the agreement to benefit from the protective cloak provide via the relevant block exemption mechanism under the Communiqué No. 2002/2. As for the vertical agreements containing exclusive supply clauses, the block exemption mechanism would be applicable only where the buyer`s market share did not exceed the 40% threshold in the relevant market concerning the goods and services subject to the vertical agreement.

That said, with the changes introduced by the Amendment Communiqué No. 2021/4, the thresholds set for the market shares of the respective suppliers and buyers concerning the application of the block exemption mechanism on vertical agreements were lowered to 30%, in compliance with the EU competition law rules.

Calculation of the market shares and changes to market shares in subsequent years

Overall, the method for calculating the market shares remained unchanged. Indeed, similar to the previously applicable provisions, Article 2 of the Amendment Communiqué No. 2021/4 provides that the market share is to be calculated by using the previous year`s data, and on the basis of all goods and services provided to the affiliated distributors for sale.

Furthermore, according to the Amendment Communiqué No. 2021/4, in the event that the undertaking`s market share subsequently exceeds 30%, the block exemption will remain valid (i) for a period of two years starting from the year when the threshold was first exceeded, provided that the relevant market share exceeds the 30% threshold yet remains below 35%, and (ii) for a period of one year starting from the year when the threshold was first exceeded, if the relevant market share exceeds 35%.

Transition period and expected increase in assessments

Under Article 3 of the Amendment Communiqué No. 2021/4, a six-month transition period is granted to undertakings for complying with the changes to the thresholds. Accordingly, in this period, the prohibition under Article 4 of Law No. 4054 will not be applicable to vertical restraints that benefit from block exemption. In other

[26] Official Gazette dated 05.11.2021 and numbered 31650, available at: https://www.resmigazete.gov.tr/eskiler/2021/11/20211105-12.htm (last accessed: 16.11.2021)

words, to the extent the relevant market shares do not exceed 40%, vertical agreements that currently benefit from the block exemption will continue to be exempt until the beginning of May 2022.

That said, the parties may subsequently need to modify their agreement to comply with the Amendment Communiqué No. 2021/4, conduct a self-assessment, or seek the Authority's assessment via an application for individual exemption as per Article 5 of Law No. 4054.

The changes are expected to increase vertical agreement-related assessment applications by undertakings in the upcoming months and perhaps, may also increase the Authority's own assessments on this front.

Turkish Competition Board's Hub and Spoke Approach in Light of Recent Developments

Hub-and-spoke arrangements are cartels in triangular scheme that involves undertakings at different levels of supply chain (which are called the spokes, at one level of the supply chain, and a common partner in trade on another level of the supply chain, which is called the hub) and also contains both vertical and horizontal elements. They involve competitively sensitive information exchanges as well.[27]

Although the case law on hub and spoke agreements is rather rare considering that they are an atypical cartel example and mostly hard to prove even compared to other cartels. On the other hand the Turkish Competition Authority ("***Authority***") seems to have a tendency to consider whether or not hub and spoke arrangement is the case when it observes information exchange between different parties active at different levels of the supply chain. After decisions in which the Authority analysed whether or not hub and spoke is the case without the conclusion of such by the Turkish Competition Board ("***Board***"), in its recent decision, the Board decided that five retailers and one supplier violated Law No. 4054 on the Protection of Competition ("***Law No. 4054***") via a hub-and-spoke cartel and fined a total of TRY 2.7 billion, after investigating around 30 undertakings comprising of retailers (markets) and suppliers (of the markets) in Turkey.[28]

I. Defining the Line

Indirect information exchange through vertical relations within the scope of cartel or concerted practices is not clearly regulated within the framework of Turkish competition law and the Board's case-law on the subject is very limited. However, this concept has been elaborated in detail by the United Kingdom competition authority, Office of Fair Trading ("***OFT***").

OFT brought hub and spoke collusions to light for the first time during the mid-2000s and gained global recognition with

[27] "Hub-and-spoke arrangements – Note by the European Union", Directorate For Financial And Enterprise Affairs Competition Committee of OECD, 13 November 2019, parag. 1,2.

[28] Turkish Competition Board's decision dated October 28, 2021, 21-53/747-360. The Board also concluded that the hub of the hub-and-spoke cartel has infringed the Article 4 of the Law No. 4054 via resale price maintenance (RPM). Discussions on whether or not this will be deemed controversial from the perspective of "ne bis in idem" principle and what distinguishes it from RPM are expected to be more intense once the reasoned decision is published.

its decisions on the retail market called *Replica Kit* decision and *Hasbro* decision. Due to lack of major precedent cases worldwide, the Authority [29] alongside competition authorities of EU countries[30] used UK precedents for guidance.

In *Replica Kit* decision, which is its first-ever hub and spokes case, OFT found that retailers and suppliers in the sportswear market had entered into price fixing agreements for replica football kits through a trading partner they have in common and fined the parties. [31] When one of the fined undertakings appealed the decision, the United Kingdom Competition Appeal Tribunal ("***CAT***") stated that illegal concerted actions existed and dismissed the appeal. OFT evaluated that hub and spoke arrangements exist "*if one retailer A, privately discloses to a supplier B, its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer C"* and created the reasonable foreseeability test.[32]

However, the legal test formulated by the OFT has been claimed to be excessively broad and harsh in terms of retailers who may be unaware of the supplier's motive to exchange confidential information to its competitor with anti-competitive motives and the case was appealed to the Court of Appeal. Even though the Court of Appeal upheld the decision of the CAT, stated that intent is essential for such infringement and formulated a more nuanced legal test with three criteria;

i. *"retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one),*

ii. *B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and*

iii. *C does, in fact, use the information in determining its own future pricing intentions then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition."*[33]

OFT adopted the same approach in its subsequent investigation for Hasbro UK Ltd., Argos Ltd and Littlewoods Ltd. In its *Hasbro* decision,[34] the agreements between and the alleged sharing of information about the prices of Hasbro products were examined. OFT found that there were two bilateral agreements, one between Hasbro and Argos and one between Hasbro and Littlewood. When the decision is appealed, Court of Appeal held that *"concerted practices can take many forms, and courts have always been careful not to define or*

[29] "Hub-and-spoke arrangements – Note by Turkey", Directorate For Financial And Enterprise Affairs Competition Committee of OECD, 4 December 2019, parag. 4.

[30] "Hub-and-spoke arrangements – Note by the European Union", Directorate For Financial And Enterprise Affairs Competition Committee of OECD, 13 November 2019,

[31] OFT's decision numbered CA98/06/2003 and dated August 1, 2003.

[32] CAT's judgement numbered 1021/1/1/03 and dated November 21, 2005.

[33] United Kingdom Court of Appeal's judgement numbered 2005/1071, 1074 and 1623 and dated October 19, 2006.

[34] OFT decision numbered CA98/8/2003 and dated November 21, 2003.

limit what may amount to a concerted practice".[35]

In addition to these decisions, the *Tesco* decision of OFT in 2011, can be considered as the most recent decision of OFT on competition law infringement based on hub and spoke and vertical information exchange.

In August 2011, the OFT found that nine supermarkets and dairy processors had shared confidential commercial information with the intent of increasing retail prices of dairy products in 2002 and 2003.[36] Tesco appealed the decision before the CAT. It has been examined whether Tesco shared information about the future price trend with rival undertakings through vertically related suppliers, based on the legal test adopted in the Hasbro decision. CAT concluded that only some of the communications that were subject to the claim that Tesco was indirectly sharing information with its competitors through its suppliers could be proven and ultimately upheld the OFT's decision to limit competition to Tesco's British-produced cheddar and regional cheese markets, noting that Tesco had violated competition law in three of the 14 titles examined in total.[37]

II. The Board's Hub and Spoke Precedents

As mentioned above, in terms of practice in Turkey, hub and spoke arrangements are not clearly regulated within the framework of Turkish competition law. However, the Authority's approach to the alleged hub and spoke arrangements does not differentiate from the disclosed OFT precedents. As a matter of fact, the Board benefited from the criteria set forth in the *Tesco* decision of OFT in the analysis of alleged infringement, as seen in the two cases that hub and spoke arrangements are cited.

The *Aral* decision[38] was adopted after an investigation on Aral Game and its retailers in computer and video game consoles market and consumer electronics. In *Aral* decision Board has referred to the *Replica Kit* decision using the three criteria test and stated that in order to acknowledge the existence of a hub and spoke infringement, three criteria must be fulfilled and a conscious and joint adoption of common intention is required. Therefore the Board noted when the suppliers are using sensitive information to negotiate prices, it would not be appropriate to conclude that suppliers behaving anti-competitively in terms of intent. Hence the Board only fined Aral Game and the retailers who requested their suppliers to warn other retailers to accommodate resale prices, taking that other price adjusting retailers were not in a position to know the source of the requests and therefore stated the case at hand did not constitute a cartel.

In *LASID* decision, [39] the Board investigated Tire Industrialists and Importers Association ("***LASID***") and major tire suppliers for information exchange between competitors through retailers, an association and a research company about the sales volume and the increase in prices. This time, the Board

[35] United Kingdom Court of Appeal's judgement numbered 2005/1071, 1074 and 1623 and dated October 19, 2006.
[36] OFT's decision numbered CA98/03/2011 and dated July 26, 2011.
[37] CAT's judgement numbered 1188/1/1/11and dated December 20, 2021

[38] Turkish Competition Board's decision dated November 7, 2016, 16-37/628-279.
[39] Turkish Competition Board's decision dated October 28, 2021, 21-53/747-360.

referred to the criteria set forth in *Tesco* decision;

i. supplier A should give future sale prices to retailer X with the intention of affecting its competitor supplier B's market attitudes;

ii. retailer X should give these pricing information to supplier B;

iii. supplier B which should absolutely know that this information belongs to A will settle its own pricing policy using this information obtained from retailer X.

Even though the Board evaluated that two out of three criteria are fulfilled, it conveyed that sensitive information was exchanged as a bargaining factor in order to demand a discount or a campaign to buy tires at a more affordable price. In this respect, it has been evaluated that the dealers, which acted as hubs, did not restrict competition in terms of intent. Also the information exchanged through LASID and the research company, was from the supplier level and therefore, not competitively sensitive or confidential. The Board also conducted an impact analysis for the case and examined prices and adjustments for certain types of tires for a period of time and concluded that competition is not restricted through information exchange by effect.

On October 28, 2021, the Board announced its latest decision on hub and spoke arrangements, the *Retailers* decision, by imposing a total administrative fine of TRY 2.682.539.594 to five retailers and a supplier due to infringement of Article 4 of the Law No. 4054 via a hub and spoke cartel. However only the supplier company is imposed with an administrative fine of TRY 11,105,499.32 for resale price maintenance activities with the rest of the fine, TRY 2.671.434.094,38, being imposed for hub and spoke activities.

In the *Retailers* decision, the Board investigated around 30 undertakings comprising of retailers (markets) and suppliers (of the markets) in Turkey and concluded that there is a hub and spoke cartel between markets where the hub is a supplier of edible oils. Therefore, since the reasoned decision is not published yet, it is clear how the Board will rationalize the arrangement of the markets in only one product they resale among thousands of other products.

Furthermore, it seems that, as indicated by the markets and the supplier during the oral hearing, none of the argued cartelists has enjoyed any financial benefits of the argued cartel as they mostly incurred financial losses from the Turkish sales of edible oils in the past few years. The fact that the markets have their own edible oil branded products and resell edible oil from other suppliers seem also create questions on the cartel structure.

Moreover, the Board also imposed a separate administrative monetary fine to the hub of the argued cartel due to resale price maintenance which might be also controversial as the supplier is both the cartelist and the one who forces resale prices even though it is a well-known fact that the markets have significant buyer power against their suppliers.[40] Once the reasoned decision is published, the academic discussions will be particularly interesting considering that the 13th Chamber of the Council of State considered that the applicability of RPM in this market is less likely but also in terms

[40] Preliminary Sector Study Report Regarding Fast-Moving Consumer Goods Retailing, parag. 146-154

of discussions of *ne bis in idem* as recently discussed by the 13th Chamber of the Council of State. [41]

III. Conclusion

The Board has not yet announced its reasoned decision, therefore details of the reasoning behind the decision are currently unclear and whether the Board's approach in this case can be considered as a precedent for future will be more obvious once the reasoned decision is published. As noted above, the reasoned decision is expected to trigger several different academic discussions in terms of the applicability of hub and spoke cartel and RPM in this specific market, what distinguishes hub and spoke arrangements from RPM practices, the rationality of a cartel that seems not to be supported by financial evidence and whether the hub can be fined both for the hub-and-spoke cartel and RPM practices and whether this approach contradicts with the *ne bis in idem* principle. Because of these reasons and also since the case will be appealed by the relevant parties (*e.g.* Migros,[42] BİM[43]), it can be expected that the case will remain in the midst of competition law discussions for the next few years.

A First-Time Ever Decision in Light of Algorithmic Assessment: The Turkish Competition Authority Announces Interim Measures Against Trendyol

When there is a possibility of serious and irreparable damages until the adoption of the final decision, the Turkish Competition Board ("***Board***") is entitled to apply interim measures [44] to preserve the status before the violation and prevent irreparable damage to the competition in the relevant market until the end of the investigation conducted by the Turkish Competition Authority ("***Authority***").

On September 30, 2021, the Authority announced its decision to issue interim measures against DSM Grup Danışmanlık İletişim ve Satış Ticaret A.Ş. ("***Trendyol***") for its practices in the multi-category online marketplaces market. This is the second interim measure decision in 2021 that the Authority issued regarding the digital markets sector. Whether or not it is a coincidence that the Board utilized interim measures in digital markets one after the other, or whether it utilized the use of interim measures as a tool to keep up with the rapid developments in digital markets, will be more apparent in the near future.

Nonetheless, the Trendyol decision is highly remarkable as it might become a milestone in terms of determining the Board's approach going forward, as it was the first instance in which the Board decided to impose interim measures in an investigation conducted on algorithm-based competition law violations

I. The Board's Trendyol Decision

With the decision of the Board, a preliminary investigation was initiated against Trendyol on whether it violated Article 4 (Agreements, Concerted Practices and Decisions Limiting Competition) and Article 6 (Abuse of Dominant Position) of the Law No. 4054

[41] Judgement of the 13th Chamber of the Council of State dated 04 March 2020 and numbered 2019/2944E., 2020/424K.
[42] Migros Ticaret A.Ş.'s public announcement on KAP dated October 29, 2021.
[43] BİM Birleşik Mağazalar A.Ş.'s public announcement on KAP dated October 30, 2021.

[44] Article 9 of the Law No. 4054.

on the Protection of Competition ("***Law No. 4054***").

As a result of the on-site inspection and the analysis conducted during the preliminary investigation phase based on the data in the algorithms and information systems, the Authority found that Trendyol:

i. Acts as the intermediary for the third-party sellers, as well as conducting the sales of its own brands such as TrendyolMilla, TrendyolMan and TrendyolKids,
ii. Interferes with the listing algorithm in a way that gives its own products an unfair advantage,
iii. Uses the data obtained in scope of the marketplace activities in the creation of the marketing strategy of its own brands, and,
iv. Discriminates between sellers in the marketplace by interfering with the algorithms.

In light of the above and considering that Trendyol has gained significant market share in recent years in all categories within the market for multi-category marketplaces and particularly the fashion category, the Board decided to apply interim measures in the context of Article 9 of the Law No. 4054 since such violations have the potential to cause serious and irreparable damages until the final decision is rendered.

Within this scope, the Board decided that Trendyol shall:

i. End all kinds of actions, behaviour and practices, which provide an advantage against its competitors including the interventions made through algorithms and coding, for other products and services within the context of the marketplace activity; and avoid such actions during the investigation,
ii. Stop sharing and using all kinds of data obtained and produced from the marketplace activity for other products and services under its economic unity and avoid such actions during the investigation,
iii. End all kinds of actions, behaviour and practices, which may discriminate among sellers in the marketplace including interventions made through algorithms and coding, and avoid such actions during the investigation,
iv. Take all necessary technical, administrative and organizational measures to ensure the auditability of the above-listed interim measures,
v. Retain the data on the parametric and structural changes made on all algorithm models used for product search, seller listing, seller score calculation, etc. for at least 8 years, with all versions and irrefutable accuracy within Trendyol,
vi. Retain the source codes of all software that has been specifically developed for use within Trendyol, for at least 8 years, with all versions and irrefutable accuracy, and,
vii. Retain the user access and authorization records and manager audit records for all software used within the scope of the business activities being conducted within Trendyol, for at least 8 years, with irrefutable accuracy.

II. Obstacles to Algorithm Assessments and the Authority's Previous Position on Algorithms

Algorithms, like most technology-based mechanisms, are used in a variety of ways, some more advanced and complex than others. For an outsider, in many cases, it is not fully possible to understand how the mathematical processes of algorithms work or what role undertakings play in driving their algorithms towards a particular pricing strategy, especially when it comes to artificial intelligence.[45]

While investigating a certain violation, the burden of proof must be satisfied in order to turn an allegation into a fact. In principle, the burden of proof is on the authority that is conducting the investigation. Therefore, in cases where the Authority is alleging a violation made through algorithms, it must first analyse the algorithm's object, implementation and changes over time, the undertaking's responsibility from the algorithmic behaviour, the scope of a suspected violation, and intent or negligence of the undertaking. The Authority can also analyse the information from the input data used by the algorithm when assessing whether there is a restriction by object.[46]

Furthermore, information on the output of the algorithm and the decision-making process connected with it might be useful in detecting collusions through a pricing algorithm, by assessing whether a potential infringement can be attributed to an undertaking and determining whether the algorithmic behaviour was intended or foreseeable by such undertaking. Therefore, linking these algorithmic processes to illegal behaviour or holding undertakings accountable for using algorithms in a way that restricts competition is not always an easy task.[47]

Even if the steps mentioned above are taken, whether there is an actual theory of harm is debatable, when it comes to undertakings with their algorithms.[48] In cases where the algorithm is independently and autonomously learning from itself or co-operating with other algorithms and adjusting itself accordingly, resulting in profit maximizations through price coordination, is it really possible for an authority to prove such action is attributable to the undertaking at hand?[49]

Assessing liability for algorithmic actions for undertakings can result in two outcomes:

i. Holding an undertaking liable for anticompetitive conduct through developing/using an algorithm that takes actions which end with anticompetitive results, or
ii. Holding an undertaking liable for not complying with reasonable care and foreseeability regarding this conduct.[50]

[45] Gönenç Gürkaynak, Burcu Can & Sinem Uğur, Algorithmic Collusion: Fear of the Unknown or too Smart to Catch? (November 1, 2020). THE EVOLUTION OF ANTITRUST IN THE DIGITAL ERA: Essays on Competition Policy, Volume 1, Competition Policy International, November 2020, Available at SSRN: https://ssrn.com/abstract=3775095

[46] *Ibid*.

[47] Avigdor Gal, *It's a Feature, not a Bug: On Learning Algorithms and What They Teach Us*, Roundtable on Algorithms and Collusion, Jun. 21-23, 2017, DAF/COMP/WD(2017)50.

[48] Salil Mehra, *Antitrust and the Robo-seller; Competition in the Time of Algorithms*, 100 MINN. L. REV. 1323 – 1375 (2016).

[49] Crandall, J.W., Oudah, M., Tennom et al. *Cooperating with machines. Nat Commun* 9, 233 (2018). https://doi.org/10.1038/s41467-017-02597-8.

[50] Autorité de la concurrence &

Until the Trendyol investigation, there has not been a case where the Authority inspected algorithmic commercial behaviours. Therefore, such examination constitutes a milestone for on-site investigations since the Authority has analysed the algorithms of an undertaking in detail for the first time. While this might the case, it must be noted that the Trendyol investigation is not the first time the Board has faced algorithms as a tool for infringement.

From 2015 to 2020, the Authority started investigating online platforms with dominant positions in the market such as *Yemeksepeti* [51] and *Booking.com.* [52] Even though the Authority dealt with online platforms in the digital sector in its earlier decisions, it abstained from examining the algorithms the platforms used. In the Board's *Booking.com* decision dated 2017 the Board evaluated Booking.com's "best-price" guarantee practices by examining the "most favoured customer" clause in their agreements and asessing whether its effects on the market were anticompetitive.

Algorithm related allegations were also assessed within the Board's *Google AdWords* decision[53] in 2020, where it can be seen that the Board became more interested in the digital platform's algorithms by investigating whether Google had violated Law No. 4054 by making changes in its algorithm. The investigation in the case covered algorithm related allegations, as well as others.

Nonetheless, the Board concluded that (i) *"based on the findings reached within the scope of the case at hand, it is not possible to come to a conclusion that Google causes a violation of competition through changing the algorithms and giving incomplete information regarding these changes"* (ii) *"at this stage, no determination was made that would require intervention as per Law No. 4054, within the scope of the allegations that Google changed the algorithm with the intention of deliberately excluding organic search results from the market, and the allegations that the text advertising of the websites affected their ranking in the organic results.*"

Additionally, according to the 2020 OECD Notes, the Authority empowered its Strategy Development Department to catch up on digital developments in the economy to be able to monitor the effects of algorithms usage on both the consumers and the markets.[54] More specifically, the OECD notes state that "*It is stated by TCA that in recent years, there have been significant developments in the digital economy both in national and international level, which requires competition authorities to closely monitor the effects of multi-sided platforms and the use of algorithms on both consumers and markets*."

In April 2021, the Authority published its preliminary report on the e-marketplace platforms sector. In the report, the Authority highlighted the concerns on algorithms, their effect on the marketplaces

Bundeskartellamt, *Working Paper – Algorithms and Competition*, Nov. 2019, available at https://www.autoritedelaconcurrence.fr/sites/default/files/algorithms-and-competition.pdf.

[51] Turkish Competition Board's *Yemeksepeti* decision dated January 28, 2021, 21-05/64-28.

[52] Turkish Competition Board's *Booking.com* decision January 5, 2017, 17-01/12-4.

[53] Turkish Competition Board's *Google AdWords* decision November 12, 2020, 20-49/675-295.

[54] OECD's Consumer data rights and competition – Note by Turkey dated May 25, 2020 and numbered DAF/COMP/WD (2020)55.

and signaled that the Authority is on its way to dive deeper into the world of algorithms.

III. Global Trends of other Competition Authorities

The infringement allegations arising out of algorithms and codes are also increasing globally. In 2015, in David Topkins' Poster Cartel judgement [55] in the USA, it was determined that David Topkins used a pricing algorithm that collects competitor information in order to coordinate the sales prices of the posters in the Amazon marketplace. The court held David Topkins liable for price fixing with other sellers and the case was highlighted as the first criminal prosecution against conspiracy through algorithms, specifically targeting e-commerce.

In 2017, following the insolvency of Air Berlin, the German competition authority Bundeskartellamt initiated an investigation against Lufthansa, saying that the company abused its dominant position in the market through conducts of abusive pricing. [56] However in its defense, Lufthansa claimed that it did not use abusive pricing because its prices are established by a completely automated booking system that analyses market demand on its own. While the Bundeskartellamt decided not to pursue an abusive pricing case, it also overlooked the issue of whether the increases in pricing under investigation were carried out by an algorithm or involved human input. Andreas Mundt, the President of the Bundeskartellamt signalled their attitude toward future cases involving algorithmic behaviour by stating that *"the use of an algorithm for pricing naturally does not relieve a company of its responsibility"* because algorithms are created by humans and require human intervention in order to attain specific outputs.

In February 19, 2020, Spain's competition authority CNMC launched a full-fledged investigation against seven undertakings in online real estate brokerage sector for fixing prices. [57] The investigation's major focus was on whether this coordination between undertakings was facilitated by real estate brokerage software and the algorithms embedded in them. According to its press release, the CNMC is also investigating *"whether the conduct has been facilitated by firms specialized in IT solutions through the design of real estate brokerage software and the algorithms embedded in them."*

IV. Outcome for Today

Algorithms with all their different types, levels of development and outcomes may be too much to tackle at once. It is an ongoing debate among competition law experts whether or not competition enforcers have the necessary tools to address concerns in digital markets [58] or new measures are needed for certain types of misconduct. [59] , [60] Either way, interim

[55] United States District Court of the Northern District of California in San Francisco Judgement dated April 30, 2016 and numbered CR 15-00201.

[56] Bundeskartellamt's judgement dated May 2018, numbered B9-175/17.

[57] CNMC's press release dated February 19, 2020 https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/20202019%20NP%20Intermediation%20Market%20EN.pdf

[58] *See, e.g.* Michal S. Gal & Niva Elkin-Koren, *Algorithmic Consumers*, 30 Harv. J.L. & Tech. 38 (2017), at 38.

[59] *See, e.g.* Salil K. Mehra, *De-Humanizing Antitrust: The Rise of the Machines and the Regulation of Competition* (Aug. 21, 2014), Temple University Legal Studies Research Paper No. 2014-43, at 2.

measures are among the recommended tools by certain scholars[61] (either after the legal bar on their use is lowered or as they are regulated already in competition law policies).

For now, it seems that the Authority has clearly taken algorithms and codes that may lead to competition infringements under its radar and is not hesitant to dive deeper into technical aspects of algorithms to assess such infringement. Nonetheless, whether interim measures are considered by the Board as an effective tool against rapidly evolving digital markets is expected to be more apparent in the near future.

Employment Law

The High Court of Appeals Clarifies the Debate in Calculation of Annual Leave

Under Turkish labor law, Saturdays are workdays, in principle. However, there were varying approaches by different chambers of the High Court Appeals regarding the consideration of Saturdays in annual leave calculations, in cases where the leave period used by the employee included Saturday(s) and it was not stipulated in the employment agreement whether Saturdays would be deducted from annual leave days. The High Court of Appeals recently rendered a principle precedent upon unification of the relevant chambers, by which settled these different approaches and determined conclusively whether Saturdays should be taken into account as weekend day or as a workday.

I. Previous approaches of different chambers of High Court of Appeals

According to the allocation of duties in the High Court, employment related disputes are examined by both 9th and 22nd Civil Chambers, which sometimes leads to varying practices being adopted by different chambers. The consideration of Saturdays in annual leave calculation was one of those matters, as follows:

The earlier decisions on the matter issued by the 22nd Civil Chamber, ruled that even though Saturdays are accepted as a weekend day, if it has been stated in the employment agreement that Saturdays shall be taken into account as workdays in annual leave calculation, then Saturdays should be deducted from the annual leave days. On the other hand, the approach of 9th Civil Chamber of High Court of Appeals tended to favor that if Saturdays are clearly agreed as a weekend day, then the provisions that provide otherwise would not be legally acceptable.

Aside from these conflicting approaches of different chambers of High Court of Appeals, as of September 2, 2020 all employment-related cases were merged under the appellate jurisdiction of the 9th Civil Chamber of High Court of Appeals. Accordingly the 9th Civil Chamber issued a unification of practices decision on the

[60] Gönenç Gürkaynak, Burcu Can & Sinem Uğur, Algorithmic Collusion: Fear of the Unknown or too Smart to Catch? (November 1, 2020). THE EVOLUTION OF ANTITRUST IN THE DIGITAL ERA: Essays on Competition Policy, Volume 1, Competition Policy International, November 2020, Available at SSRN: https://ssrn.com/abstract=3775095

[61] A new competition framework for the digital economy Report by the Commission 'Competition Law 4.0', (September 2019), Federal Ministry for Economic Affairs and Energy (BMWi), at 7 & 71. Available at https://www.bmwi.de/Redaktion/EN/Publikationen/Wirtschaft/a-new-competition-framework-for-the-digital-economy.pdf?__blob=publicationFile&v=3

issues which the two Chambers had diverged upon, including the matter at hand.

II. The background of the dispute which is evaluated by High Court of Appeals after the unification of practices decision

Upon the merger of the 9th and 22nd chambers, the issue of how Saturdays will be considered in the annual leave calculation was evaluated by 9th Civil Chamber of High Court of Appeals. In essence, the matter in question was whether the Saturdays should be deducted from the annual leave, since it is only the weekend days that should not be deducted from annual leave and Saturdays are contractually agreed as rest days.[62] In the particular dispute assessed by the High Court, the first instance labor court had accepted that Saturdays should not be deducted. The reasoning of this decision was that both Saturdays and Sundays are non-working days as per the employment agreement, and therefore these days should not be deducted from annual leave.

This decision of the first instance labor court was first reviewed by the Regional Court of Appeals. In this stage of review, the Regional Court of Appeals concluded that the right to rest is under constitutional protection, thus it should not be integrated with other paid leaves. The Regional Court of Appeals added that since the weekend days can be increased in favor of the employee, even though Saturdays are not specifically mentioned as a weekend day, it should carry the same consequences as any other weekend day, *i.e.*, as it is not a working day it should not be deducted from the annual leave.

III. The decision of 9th Civil Chamber of the High Court of Appeals

In its decision, 9th Civil Chamber of the High Court of Appeals first explains its approach regarding Saturdays in cases where it is agreed by the parties in the employment agreement that a Saturday is a contractual rest day and concludes that it is legally possible to acknowledge Saturdays as a weekend day. In such a case, Saturdays should not be deducted from annual leave as per article 56/5 of Labor Law. However, if it has been clearly stated in the employment agreement that "*Saturdays shall be deemed as a workday in annual leave calculation*" or "*Saturdays shall be deducted from annual leave*", then these types of provisions are deemed valid and applicable, too.

Accordingly, in the subject matter dispute Saturdays are determined as "*contractual rest day*", which means that Saturdays are not regulated as "*weekend day*", and thus, the only weekend day is Sunday. Based on the foregoing, the 9th Civil Chamber ruled that even though the workdays are referred as days from Mondays to Fridays, when Saturdays are not clearly stipulated as "weekend day" in the employment agreement or there is no stipulation stating that Saturdays - *or in general terms, the "contractual" rest day(s)* - shall not be deducted from annual leave, then Saturdays should be considered as a work

[62] The terms "weekend day" and "contractual rest day" have different meanings in this context. Under Turkish labor law, the parties are entitled to designate any day of a week, (other than Sundays) as "weekend day" and in such a case, the designated day will be considered as a weekend day. The contractual rest day on the other hand is different from weekend day, as it does not bear the statutory consequences of a weekend day, especially regarding annual leave calculation. In that sense, unlike a "weekend day," "contractual rest day" is merely a day when the employee is not obliged to perform their contractual duties.

day in annual leave calculation and should be deducted from annual leave.

IV. Conclusion

This decision [63] is important as it constitutes a conclusive precedent to this on-going debate in labor law regarding the legal consideration of Saturdays (or any day stipulated as "contractual rest day" rather than "weekend day") in annual leave calculation; unifying the different practices of relevant High Court chambers under one principle. The decision clearly explains the conditions that are required for days designated as "contractual rest day" (instead of a "weekend day") to be deducted from annual leave. This is to say, if the parties do not agree to (i) consider the contractual rest day(s) (for instance, Saturday) as a weekend day, or (ii) deduct the contractual rest day(s) from annual leave under the contract; then contractual rest day(s) should be considered as workday and therefore deducted from annual leave.

All in all this decision is an important exception made by the High Court to the pro-employee approach of Turkish labor courts since the High Court, in this matter, required existence of a specific stipulation in the employment agreement in order for employee to enjoy a contractual rest day (*i.e., a day other than Sunday, the statutory weekend day, recognized in the employment relationship*) as a non-working day (as a weekend day) and not have it deducted in case the annual leave used by the employee covers that day, too.

[63] The decision of the 9th Civil Chamber of High Court of Appeals dated March 2, 2021 numbered 2021/897 E. 2021/5272 K.

Litigation

Protocol No. 15, Brings Changes to the Applications to the European Court of Human Rights and Admissibility Criteria

Adopted in June 2013, Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms ("***Convention***") has entered into force on 1 August 2021. It introduces substantial changes to the right to submit applications to the European Court of Human Rights ("***ECHR/Court***").

Protocol No. 15 brings some major changes to the process of lodging an application with the ECHR that sits in Strasbourg. First of all, the time limit for submitting application has been reduced from six months to four months following a final domestic decision. This curtailed time period is, however, subject to a transition rule under which the four-month application period will not be effective before 1 February 2022. The shorter application period will also not apply to cases where the final national decision was given prior to the entry into force of the Protocol, *i.e.,* before 1 August 2021, therefore the amendments on the application periods will only enter into force on 1 February 2022, whereas the other amendments are already in force as of the effective date of the Protocol, *i.e.,* 1 August 2021.

Another major change concerning the admissibility criteria of a human rights application is related to "significant disadvantage." With respect to the admissibility criterion of "significant disadvantage" (which allows the Court to reject the application), the wording "*provided that no case may be rejected on this ground which has not been duly*

considered by a domestic tribunal" is removed.

Following this amendment, accepting an application implies that the applicant must have suffered a significant disadvantage, even if the alleged human rights violation had not been duly considered by a domestic tribunal. Consequently, the ECHR will no longer process applications that can be characterised as insignificant.

Also, following the amendments, a Court Chamber may relinquish jurisdiction in favour of the Grand Chamber if a pending case raises a serious question affecting the interpretation of the Convention and its Protocols, or if the resolution of the question might be inconsistent with a judgement previously rendered by the Court. Per the Protocol, parties may no longer object to the relinquishment by a Chamber in favour of the Grand Chamber.

Additionally, the wording "*High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in the Convention and its Protocols, and that in doing so, they enjoy a margin of appreciation*" has been included in the Preamble of the Convention.

The Protocol introduces important changes to the application periods and admissibility criteria. All relevant individuals must carefully review the changes and take the necessary steps to ensure compliance in their applications to the Court.

Data Protection Law

Turkish Data Protection Board's Guidance on Processing Biometric Data

The Turkish Data Protection Board ("***Board***") has recently issued the Guidance on the Matters to be Taken into Consideration for Processing Biometric Data[64] ("***Guidance***") which was published on Turkish Data Protection Authority's ("***DPA")*** website on September 16, 2021.

In the Guidance, the Board has pointed out that even though biometric data is regulated as one of the special categories of data per Article 6 of the Law No. 6698 on Protection of Personal Data ("***DPL***"), the concept has not been defined by domestic regulation as of yet. As such, the Board made a reference to the Article 4 of the GDPR, wherein the most comprehensive definition of "biometric data" reads as follows:

Biometric data means personal data resulting from specific technical processing relating to the physical, physiological or behavioral characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data.

The Guidance is divided into two sections: (i) Principles for the processing of biometric data and (ii) administrative and technical measures that should be taken for the security of biometric data.

[64] https://kvkk.gov.tr/SharedFolderServer/CMSFiles/bd06f5f4-e8cc-487e-abe1-d32dc18e2d7e.pdf (Last accessed on October 25, 2021)

I. Principles for the Processing of Biometric Data

The Guidance indicates that the data controller may only process biometric data according to the general principles stipulated under the Article 4 of the DPL, and the conditions regulated in the Article 6 of the DPL, in accordance with the following:

(i) The essence of fundamental rights and freedoms should be protected, since the protection of personal data is a fundamental right regulated under the Constitution of the Republic of Turkey.

(ii) The method used in processing must be suitable for achieving the relevant purpose of processing, and the data processing activity should also be suitable for the intended purpose.

(iii) The biometric data processing method must be necessary for the purpose intended to be achieved. In other words, in case there is any alternative way other than processing biometric data, then such process of biometric data will be deemed as unnecessary. The Guide refers to the DPA's decisions[65] numbered 2019/81 and 2019/165 regarding the processing of biometric personal data by data controllers operating fitness centers, in tracking the entrances and exits of their members to the facilities. Moreover, the DPA provides an example to highlight the situations in which biometrical data may be deemed necessary. For instance, the Guidance states that processing biometric data might be suitable for controlling access to a nuclear power station, however a more suitable way might be chosen for entry to a fitness center.

(iv) There must a proportion between the tool used and the purpose to be achieved with biometric data processing. In order to proceed with biometric data processing, there should be proportionality between the severity of the intervention and the reasons justifying the intervention. For instance, processing biometric data in a laboratory where research is conducted on dangerous viruses might be considered suitable, and the data subjects' request not to process biometric data will be invalid.

(v) The biometric data must be kept only as long as it is necessary, and should be destroyed without any delay after the necessity disappears.

(vi) The processing activity must be limited in line with the purpose of processing and the data controller's obligation to inform should be fulfilled as per the Article 10 of the DPL.

(vii) If explicit consent is required, this must be obtained from the data subjects in accordance with the DPL. The Guidance states that data subjects should be informed on the consequences of their explicit consent. It is stated that it should not be prerequisite for providing services.

In addition to these principles, the Guidance states that the data controller should record and prove that the foregoing principles are met. In doing so, further principles regarding retention of biometric data are indicated as follows:

(i) Genetic data (blood, saliva, etc.) should not be taken along with the biometric data, if there is no requirement to do so.

(ii) In the selection of the type or types of biometrics (iris, fingerprint, vascular network of the hand, etc.), reasoning and documentation should be provided as to

[65] *See* https://www.kvkk.gov.tr/Icerik/5496/2019-81-165 (Last accessed on October 25, 2021)

why the preferred type or types of biometric data were chosen over others.

(iii) The maximum period for processing of personal data should be determined. This period could be based on the legislation, and also may be determined by the data controller, yet all variants of the biometric feature (raw data and derived records, etc.) must be processed only for the required time; the reasons for how long the relevant data will be kept, should be explained by the data controller in the personal data retention and destruction policy.

II. The Administrative and Technical Measures for Biometric Data Security

According to the Guidance, data controllers processing biometric data should pay attention to the issues related to personal data security contained in laws, regulations, communiqués and board decisions. In this regard, in processing special categories of personal data; it is required to take the measures specified in the DPA's decision [66] on "*Adequate Measures to be Taken by Data Controllers in the Processing of Special Categories of Personal Data"* dated 01/31/2018 and numbered 2018/10. Furthermore, appropriate measures should be taken into account in the guidance documents prepared by the Personal Data Protection Authority in order to guide data controllers.

In addition to the data security measures in the foregoing legislation and guides, data controllers should also take the following measures regarding biometric data processing:

(i) Technical Measures

-Biometric data should only be stored in cloud systems by using cryptographic methods.

-Derived biometric data should be stored in a way that does not allow the recovery of the original biometric feature.

-Biometric data and its templates should be encrypted in accordance with the current technology, with cryptographic methods that will provide adequate security. Encryption and key management policy should be clearly defined

-Before installing the system and after any changes, the data controller should test the system through synthetic (not real) data.

-During the test, data controller should limit the use of biometric data to the necessary ones. All data should be deleted at the end of the tests.

-The data controller should implement measures that warn the system administrator and/or delete and report biometric data in case of unauthorized access to the system.

-The data controller should use certified equipment, licensed and up-to-date software in the system, prefer open source software primarily and make the necessary updates in the system on time.

-The lifetime of devices that process biometric data should be traceable.

-The data controller should be able to monitor and limit user actions on the software that processes biometric data.

[66] *See* https://www.kvkk.gov.tr/Icerik/4110/2018-10 (Last accessed on October 25, 2021)

-Hardware and software tests of the biometric data system should be performed periodically.

(ii) Administrative Measures

-An alternative system should be provided for the persons who cannot use the biometric solution (biometric data is impossible to record or read, handicap situation that makes it difficult to use, etc.) or who do not have explicit consent to use it, without any restrictions or additional costs.

-An action plan should be established in case of failure or failure to authenticate with biometric methods (failure to verify an identity, lack of authorization to enter a secure area, etc.).

-Access mechanism to biometric data systems of authorized persons should be established, managed and those responsible should be identified and documented.

-Personnel involved in the biometric data processing process should be trained on the processing of biometric data and such training should be documented.

-A formal reporting procedure should be established, so that the employees can report possible security vulnerabilities in systems and services and threats that may arise as a result thereof.

-The data controller should establish an emergency procedure to be implemented in the event of a data breach and announce it to everyone concerned.

Internet Law

Amendments to the Dispute Resolution Mechanism Regarding Internet Domain Names

The Information Communications and Technologies Authority ("***ICTA***") is planning on certain amendments to the Communiqué on Dispute Resolution Mechanism concerning Internet Domain Names ("***Communiqué***")[67] with the Draft Communiqué Amending the Communiqué on Dispute Resolution Mechanism concerning Internet Domain Names ("***Draft Communiqué***"), [68] approved it within its decision of August 10, 2021 with number 2021/IK-BTD/220 and decided to seek public opinion until August 25, 2021. The Draft Communiqué is aimed to introduce new regulations regarding the activities of the Dispute Resolution Service Providers ("***DRSP***").

I. Qualifications and Obligations of DRSPs

The Draft Communiqué is bringing certain provisions to regulate the obligations of DRSPs and the conditions of being a DRSP.

The current version of the Communiqué has certain application requirements for organizations who intend to operate as a DRSP in Turkey. According to the Communiqué the applicant should **(i)** fill

[67] *See* https://www.resmigazete.gov.tr/eskiler/2013/08/20130821-28.htm (last accessed on October 25, 2021).

[68] *See* https://www.btk.gov.tr/uploads/boarddecisions/gorus-alinmasi-internet-alan-adlari-uyusmazlik-cozum-mekanizmasi-tebliginde-degisiklik-yapilmasina-dair-teblig-taslagi/220-2021-web.pdf (last accessed on October 25, 2021).

the application form attached to the Communiqué which is also amended by the Draft Communiqué, **(ii)** be established in accordance with the legislation of the Republic of Turkey, **(iii)** if it is established abroad, it should be one of the international organizations recognized by the Republic of Turkey and specialized in intellectual property law, dispute law or arbitration law, and have a representative office established in accordance with the legislation of the Republic of Turkey, and **(iv)** have the administrative and technical competence to successfully manage the dispute resolution process regarding domain names and should have at least ten arbitrators in their lists. As per the Communiqué, as a result of the examination made by the ICTA, those who meet the relevant conditions will be determined as a DRSP and their contact information will be published in the official website of the ICTA. With the Draft Communiqué, the ICTA is set to issue an activity certificate for those who meet these conditions to operate as a DRSP.

The Draft Communiqué also brings another condition for the arbitrators. According to the current version of the Communiqué, among other conditions, the arbitrators should be graduates of law, engineering, economics and administrative sciences or political sciences. With the Draft Communiqué, the requirement of being graduated from certain academic areas are removed and instead, graduating from higher education institutions recognized by the Higher Education Institute and offering at least four years of undergraduate education in Turkey or from higher education institutions abroad whose equivalence has been accepted by the Higher Education Institute will be deemed sufficient.

Another amendment is related to the publication of decisions. Pursuant to Article 14 of Communiqué, DRSPs are obliged to send their decision along with the reasoning which they are required to notify to TRABIS, which is a secure and continuous system that allows the processing of domain names with the TR extension and its database, creating a directory, updating and providing guidance, and real-time domain name application process, Registry Agency and the concerned parties within one day. In addition, DRSPs are obliged to promptly publish the internet domain name which is the subject of the dispute, the date of application, the date of the decision, the relevant parties and the entire text of the decision, unless otherwise stated in the decision. With Draft Communiqué, the publication obligation is changed and the DRSPs will be obliged to publish the text of the decision on its own website by taking the necessary measures for protection of personal data and the obligation to publish the internet domain name, the date of application, the date of the decision and the relevant parties is removed. Lastly, the Draft Communiqué indicates that if the complainant and the complainee are agreed on ending the arbitration process, the DRSPs should publish this fact on their websites by also notifying TRABIS and registry agencies. Accordingly the Draft Communiqué brings an additional notification obligation for DRSPs. It is also indicated that in such case, the fees already paid to the DRSP and arbitrators will not be refunded.

II. Fees

According to the current version of the Communiqué, the refund of the DRSP fee is at the discretion of DRSPs at any stage of the dispute resolution process (Article

20/3), and that, with the decision of the arbitrator or arbitral tribunal, the wrongful party will pay the fees of the DRSP and arbitrator fees, if any, to the other party. In addition, the Institution and the arbitrators do not have any intermediary role in this payment (Article 20/6). However, the Draft Communiqué removes these articles as whole.

III. Audits and Sanctions

The Draft Communiqué also amends Article 21 of the Communiqué titled "Audits and Sanctions". In the current version of the Communiqué, if the ICTA determines that a DRSP acts in breach of the relevant legislation, then the ICTA might warn the relevant DRSP and publish this on the ICTA's website. With the Draft Communiqué, the ICTA`s authority is extended to terminating the activities of the relevant DRPS instead of warning.

Accordingly, the dispute resolution processes carried out by the DRSP, whose activities have been terminated, will also be affected in line with the decision of the ICTA. In such a case; ***(i)*** the relevant dispute may be finalized by the same DRSP, ***(ii)*** the relevant dispute may be transferred to a different DRSP for finalization, or ***(iii)*** the already paid arbitrator fees and DRSP fees may be refunded by the DRSPs.

Similarly, it is foreseen that the DRSP might cease their activities by notifying the ICTA at least one month in advance and by also deciding on the resolution processes it carries out. The DRSPs cannot accept a complaint application after it has notified the ICTA that it is ceasing its activities. According to the Draft Communiqué, the DRSPs will also be liable to compensate any damage they cause by ceasing their activities or the termination of their activities by the ICTA.

IV. Additional Regulations

The Draft Communiqué also provides that in the absence of an actively operating DRSP, the alternative dispute resolution mechanism will be run by the party determined by the ICTA until a DRSP becomes operational in accordance with the Regulation. A certificate of activity will be issued to the said party in order to be able to operate as a DRSP and the related party will be subject to all obligations stipulated for DRSP in the Regulation, Communiqué and other relevant legislation. In addition, it is regulated in the Draft Communiqué that the alternative dispute resolution mechanism will only be applied to the domain names allocated after TRABIS became operational, or those are renewed after that date.

Telecommunications Law

A Glimpse into the Regulation on the Establishment and Operation of National Mobile Warning System and the Obligations of the Relevant Actors

National Mobile Warning System has entered into force on February 26, 2021 in order to create a system to alert the citizens of urgencies related to disasters, emergencies, public order, national security and national cyber security. The Regulation on the Establishment and Operation of National Mobile Warning System ("***Regulation***") does not just concern the operators, but also the manufacturers, importers and producers, albeit limited to the transition period.

I. Methods

Four methods are used for the warning system:

(i) CMAS (Commercial Mobile Alarm System) is a system at ETSI TS 122 268 standard or a national and international standard replacing it. CMAS enables users having a device with the necessary technical specifications to receive a notification in case of disasters, emergencies, public order, national security and national cyber security.

(ii) CBS (Cell Broadcast System) is a system at ETSI TS 123.041 standard or a national and international standard replacing it. CBS is a technology which allows all users in a certain area to be delivered a text message.

(iii) SMS is the well-known text communication method that does not exceed 160 characters including operator code in mobile devices.

(iv) Pre-call Announcement is the voice recording that is played to the subscribers before starting a call in a mobile electronic communication network.

II. Obligations of the Operators

The Regulation obliges the operators to first make sure that their systems and networks are adapted for the notification system to operate efficiently, and secondly to ensure its security. Accordingly;

(i) Operators are obliged to establish and operate the technical infrastructure that will ensure complete and free delivery of the alert notifications, which are sent by the national mobile warning system through CMAS, CBS, SMS and pre-call announcement methods as stated in the Regulation, and within the defined periods and performance criteria.

(ii) Operators shall cooperate with manufacturers, producers or importers to ensure that their devices are compatible with the system.

(iii) Operators shall use the CBS capacity without obstructing the national mobile warning system, prioritize the alert notifications within the scope of the Regulation and shall not use the channels assigned to alert notifications in any other scope or for any other purpose.

(iv) Operators shall take precautions such as limiting the maximum number of messages within a specific period of time, restricting recipient subscriber numbers etc. for controlled use of the capacity, if the SMS capacity formed for national mobile warning system is used commercially.

(v) Operators shall not use any of the data, including location data that they may obtain for all types of alert notifications under the national mobile warning system for any other purpose or share them with third parties, unless required by legislation.

(vi) In order to raise awareness and inform users about the subject, operational status of the system infrastructure shall be checked by the operator on a date to be determined by the Information and Communication Technologies Authority (ICTA) with alert notifications sent at least once a year in a preset method and including a preset content. Operators shall inform ICTA of the system's operational status before and after the relevant alert notification.

(vii) Operators shall take the necessary technical, administrative and managerial measures to ensure system security,

information security and cyber security for the establishment and operation of national mobile warning system. If deemed necessary, the Authority may impose additional obligations to the relevant operators in this context.

(viii) ICTA is authorized to determine target and performance criteria for the establishment and operation of national mobile warning system and alert notification methods

(viii) ICTA may determine new additional methods and sub methods for the identified alert notification methods by taking into account technological developments, national security and public policy requirements. Operators are responsible for the integration of the additional new methods and sub methods into the national mobile warning system.

If the operator fails to comply with the articles of the regulation, the Regulation of Administrative Sanctions of ICTA will be applied.

III. CMAS Method Requirements

Alert notifications under the CMAS method will be made in four categories; (i) state alert notification, (ii) life threat alert notification, (iii) amber alert notification and (iv) test alert notification and all of these alert notifications are assigned specific channels separately for Turkish and secondary languages. The Regulation also states that it may be left to the users' choice to receive the alert notifications under the categories (ii), (iii) and (iv). However, opting out from state alert notification is prohibited. Titles of the alert notifications shall be determined by ICTA. Alert notifications must be maximum 360 characters long and operators shall broadcast the notifications sent by the authorized user through CMAS method, to be sent to the users, within five (5) minutes at most, following the completion of all approval processes in the notification approval procedure. Operators shall make sure that alert notifications made via the CMAS method fulfill these requirements at a minimum of 95% compliance rate each calendar year.The Regulation also defines the "authorized user" as the representative of institution and organization authorized to identify alert notifications to be made under this Regulation.

IV. SMS Method Requirements

Notifications to be made by SMS method within the scope of the national mobile warning system can be made on the basis of the selected geographical region, province, district and area. The Regulation also provides a formula to calculate the time in which the operators are required to send the notifications by SMS. Again, operators shall make sure that alert notifications they make through SMS fullfill the set calculation requirements with a minimum of 95% compliance each calendar year.

V. Pre-call Announcement Requirements

Pre-call announcement content is uploaded to the national mobile warning system in the format determined by ICTA, by the relevant authorized user. The information about how long the recorded message will be, is set by the operator and the number of consecutive calls of a subscriber to be played within this period are entered into the national mobile warning system by the relevant authorized user. Operators should prepare their systems for alert notifications to be sent through the pre-call

announcement method within one hour after all approval processes in the notification approval process are completed; with the content of the announcement up to a maximum of fifteen (15) seconds to be conveyed by maximum three consecutive calls to the subscribers. Operators shall ensure they attain 95% compliance on the requests conveyed to it within a calendar year. Operators shall also make sure that pre-call announcement is played to the subscribers at a minimum of 99% of total calls sent out (limited to the consecutive call number indicated in the alert notification of each subscriber) within the period the alert warning will be applied. Operators shall broadcast the alert notifications made through pre-call announcement to their own subscribers within Turkey. Pre-call announcement method shall not be used in emergency calls.

VI. CBS Requirements

The operator shall broadcast the notifications to be sent by the CBS method to the users, by processing it within five (5) minutes after all approval processes in the notification approval procedure are completed, independent of the geographical area notified by the authorized user. Again, operators shall make sure to comply with 95% of the requests conveyed to it within a calendar yearunder this method.

VII. Requirements Concerning Devices

The devices to be supplied to the market by the device manufacturer, producer or importer (i) must have features that allow usage of CMAS method within the scope of the CMAS requirements set in the Regulation and (ii) must conform with ETSI TS 122 268 standard or a national and international standard replacing it and technical specifications set in such standard(s). A sentence explicitly indicating the foregoing standard conformance requirement in their introduction and operating manuals must be included under the instruction and operating manuals of devices within the scope of this Regulation, by manufacturers, producers or importers. The relevant sentence may also be presented to users in a supplemental information page included in the package of the device for one (1) year from the Regulation`s entry into force. Manufacturers, producers and importers should adapt the adaptable devices (that are already in the market or will be introduced to the market within three (3) months as of February 26, 2021) within six (6) months following the Regulation`s entry into force to enable the use of the CMAS method. Three (3) months after the entry into force, those devices that do not meet the requirements under the Regulation will not be allowed to enter the market.

As of the publication of this LIQ, all of these transition deadlines have passed. Market supervision and audit operations regarding the compliance of the devices with the requirements set forth under this Regulation will be carried out within the scope of Wireless Devices Regulation and Regulation on Market Supervision and Audit of Wireless and Telecommunication Terminal Devices. The administrative sanctions included in the applicable legislation will be applied against the producer, manufacturer or importer, if it is determined that the device does not comply with the provisions of this Regulation.

Internal Investigations Continued: Document Review and Concluding the Investigation

In conducting any investigation, the two most important sources of information are witness interviews and document reviews. These sources are invariably interconnected, and each must be managed effectively. Particularly, in internal investigations where the issue being investigated was not a recent occurrence, the document reviews carry further significance in shedding light to the events. In this sense, it is also crucial that the document review is conducted carefully and thoroughly in order to cover the underlying facts of the issue.

In structuring and conducting the document review, the investigation team or the counsel who will be managing documents will need to become familiar with the documents that might be relevant to the investigation and from the outset, they must ensure that relevant documents are collected and preserved, by also implementing a system for tracking the documents that have been collected. The investigation process could be impaired by a failure to secure a specific document that is highly relevant for the issue being investigated. For this reason, the scope of any document preservation notice should be over-inclusive, rather than aiming for a simpler and narrower scope.

The key documents related to an investigation can be gathered through the company records and information systems. However, in collection of documents, the employees' role is also highly critical as they might be in a position to provide documents and data specifically related to the issue being investigated. Employees can be provided a comprehensive list of types of documents which the investigation team seeks and specific instructions should also be given for provision of all relevant documents including drafts, notes, and finalized documents. They should also be encouraged to contact the investigation team for any question they might have in this regard.

It is also critical that employees are asked for any documents they might possess which they may have not have previously provided to the investigation team, such as documents kept at their homes or on their personal devices. Further, all employees should be instructed to not alter, discard, destroy or conceal any document that might be related to the issue being investigated. For such reasons, the investigation team could consider obtaining the employees' written confirmation that they have provided all documents and data that might be relevant to the issue being investigated and that they have abstained from altering, discarding, destroying or concealing any documents.

While it may not appear as practical, having the documents scanned, categorized and logged after they are collected will provide the investigation team with a certain level of visibility and will enable them to search through the data more easily. This will also allow the investigation team the convenience of sorting and reviewing the documents for relevance and client-attorney privilege, since access to privileged documents should be limited to certain persons within the company.

After the document review phase is completed, in practice, internal

investigations generally conclude with a written report. The report should preferably contain (i) background information as to the allegations and potential violation, (ii) a description of the steps taken, including information on persons who have been interviewed and the scope of the documents reviewed, (iii) a factual discussion and an analysis of facts in light of the relevant laws and regulations, and (iv) recommendations regarding the required steps or measures to be taken.

The contents of the report will also depend on a variety of factors specific to the investigation, including the violations that were found, the addressees of the report or any requirements regarding third party disclosures by also considering the possibility of future submission of the report to governmental authorities, if and when requested.

The section containing the findings of an internal investigation could be the most crucial as it will be the culmination of all the work undertaken throughout the investigation process. This section should lay out a detailed and comprehensive description of the facts in chronological order or by grouping them, by also noting the areas where the information gathered is unsubstantiated or unverified, since the contents therein will serve as the basis for the recommendations that follow.

It would also help preserve the attorney client privilege and work product doctrine to mark the report with the disclaimer “Attorney-Client Privilege” and “Attorney Work Product.” At the beginning of the report, a summary may be included explaining that the necessary warnings were made to the employees involved in the internal investigation and that the report contains the impressions of the investigation team garnered from the interviews and documents.

In the end, investigations prove to be reliable compliance tools when the investigation process is managed properly, especially in presenting the results of the investigation. Both during and at the end of the investigation, aspects of the internal investigation must be decided on, including the form of the report, compliance with the company`s internal rules and policies, remediation and disclosure requirements. As a last step, the investigation team should ensure that the results of the investigation are communicated to the relevant persons within the company, however when deciding on whether and how to share the results of the investigation, they should always consider the potential impact of any disclosure.

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