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ELİG
GÜRKAYNAK
Attorneys at Law

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

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Preface to the June 2022 Issue

The June 2022 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.

Starting with Corporate Law, this issue comprises three articles, focusing on the recent developments regarding foreign investments, approach to additional workplaces, as well as shedding light on the digitalization of signatures in accordance with the Ministry of Trade's recent integration activities.

The Competition Law section of the June 2022 issue discusses the recent developments in this area, with a focus on the Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board, deep diving into the amended merger control regime through four detailed articles. The particular articles on the Amendment Communiqué also analyze the sectoral exemptions in full detail to shed light on the extensive amendments. The section also explains the most favored nation clauses in light of the much anticipated E-Commerce Platforms Sector Inquiry Final Report, published on March 14, 2022. Lastly, this section presents the recent significant decisions of the Board through four articles, one of them being the Competition Board's reliance on the economic evidence through utilization of economic analysis in the absence of communication evidence.

Moreover, the Litigation section of the June 2022 issue explains the legal interest requirement in indeterminate *i.e.*, unquantified receivable claims, and its implication with respect to the right to access to court, in light of a recent decision of the Constitutional Court.

The Telecommunications Law section provides an all encompassing outlook on the recent amendments to the regulation on number portability and explains the current process in detail. The following section in white-collar crime summarise the whistleblower processes in the US and the EU. Lastly the IP Law section touches upon the rising phenomena of NFTs and their effect in terms of intellectual property rights.

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

June 2022

Corporate Law

Investing in Turkey: General Foreign Direct Investment Regime

I. Introduction

Like most emerging countries, Turkey has always endeavored to attract foreign direct investment ("**FDI**") into the country. Therefore, generally speaking, the approach to FDI in Turkey is based on the principle of freedom to invest. The information requests and notification requirements by public authorities on the FDI have been regulated as post-closing steps in order to bring further flexibility to potential investors and streamline investment process. This article will outline and describe the Turkish FDI regime in general.

II. Foreign Investment

As per the Foreign Direct Investments Law No. 4875 ("**FDI Law**"), a foreign investor is defined as "a (i) real person who is of non-Turkish nationality, or a Turkish citizen residing abroad, or (ii) legal entities and international organizations incorporated under foreign laws, who engage in foreign direct investments in Turkey." Foreign direct investment itself has been defined as *"(a) setting up a new company or branch office of a foreign entity, or (b) joining the shareholding of a private company by way of acquiring shares outside the securities exchanges (regardless of the size of shareholding) or by acquiring at least 10% shareholding or the voting rights of a public company from a securities exchange, provided that the investment is made through economic assets imported to Turkey from abroad such as cash capital, company securities (excluding state securities), machinery and equipment, industrial and intellectual property rights; or profit, revenue, cash receivable used in reinvestment, other rights having monetary value or other rights as to exploring or extracting natural resources, by foreign investors*".

III. National Security

Article 3 of the FDI Law stipulates that foreign investors can invest in Turkey directly and they must be treated equally, *i.e.*, as local investors. Moreover, the Turkish FDI regime does not stipulate further restrictions for certain nationalities. On the other hand, Turkish laws are not intended to be *numerus clausus* and there could be additional limitations based on the various sectors, scope of work, etc. Particular industries such as maritime, broadcasting, insurance and banking are regulated more strictly and investments concerning such sectors may be subject to certain restrictions in order to protect public security and public interest.

According to Law No. 7262 on Preventing the Financing of Proliferation of Weapons of Mass Destruction, those persons, entities or organizations named in the resolutions of the United Nations Security Council, or persons or entities controlled directly or indirectly by them, acting on their behalf or for their account, are prohibited from carrying out activities in Turkey, directly or indirectly, for the purpose of preventing the financing of terrorism.

IV. Applicable Transactions

Applicability of the FDI Law and the Regulation on the Implementation of the Foreign Direct Investment Law No. 4875 ("**FDI Regulation**") (collectively "**General FDI Legislation**") is based on the element of foreignness. Transactions falling under the definition of foreign investment are subject to the General FDI

Legislation. Furthermore, each investment and transaction must be reviewed on a case-by-case basis depending on its sector, due to the sector-specific approach.

Joining the shareholding of a private company by way of acquiring shares outside the securities exchanges (regardless of the size of shareholding) or by acquiring at least 10% shareholding or voting rights of a public company from a securities exchange by a foreign investor would be subject to the General FDI Legislation. It should be noted that the General FDI Legislation would not be applicable if the acquisition falls below this threshold.

Although not directly related to General FDI Legislation, depending on the structure of the transaction, certain post-notification requirements may arise in terms of Turkish corporate law.

V. Relevant Authorities

Under Article 5 of the Regulation, under certain circumstances, those companies and branch offices falling under the scope of the FDI Law are obliged to notify the Ministry's General Directorate of Incentive Practices and Foreign Capital ("**General Directorate**") through an online system, namely the Electronic Incentive Practices and Foreign Capital ("**E-TUYS**") system. The General Directorate can be considered as the main authority, however, due to numerous sector-specific legislations, further approvals from relevant authorities such as the Ministry of Environment and Urbanization, Energy Market Regulation Authority, Ministry of Treasury and Finance, and Banking Regulation and Supervision Agency might be required depending on the business activity of the investor.

VI. Notification Requirement

Where a transaction is caught by the FDI regime, notification is mandatory. However, the General FDI Legislation does not stipulate any sanctions if the notification is not made. The notification is sought just for recording and statistical purposes.

The FDI regime is based on the principle of freedom to invest; therefore under the General FDI Legislation notifying the authorities after the relevant transaction as a post-closing requirement. Foreign-capitalized companies, or companies who become foreign-capitalized as a result of the transaction, are responsible for filing the notifications.

VII. Notification Process

Notifications are made online via E-TUYS. Currently, there are no other alternatives to application through E-TUYS. In order to use E-TUYS, foreign-capitalized company must have an active registered e-mail account ("**KEP**") and also, it must appoint an E-TUYS user, who shall obtain and use their e-signature via KEP of the company. Templates of undertaking and authorization forms are available through the General Directorate's website.

Once the particular E-TUYS user is appointed, the relevant sections of E-TUYS shall need to be filled-out within 1 (one) month following the transaction which triggers the foreign direct investment filing. The foreign-capitalized company must also fill other relevant section of E-TUYS on an annual basis and submit the annual notification form until the end of May every year.

As for disclosure of confidential information: FDI notifications are not publicised by the General Directorate. Accordingly, notification details can be reviewed by only the relevant public

officers. On the other hand, most of the corporate actions which trigger FDI filings such as company/branch incorporation, share capital increase and certain share transfers are already published at the trade registry gazette following their registration at the relevant trade registry. In addition, granting and revoking of permits/licenses/approvals etc. due to sector-specific requirements, may be also made public by the relevant governmental authorities.

VIII. Timing

The FDI regime is based on post-closing notification procedure, rather than prior approval/review procedure. Therefore, the transactions will not be subject to the prior approval of the General Directorate. Having said this, if they meet the thresholds, the foreign investors must make necessary notifications to General Directorate post-closing.

Appointment of E-TUYS users and their authorisation processes are reviewed and concluded approximately within 2 (two) to 10 (ten) business days, depending on the workload of the General Directorate. Filling-out the relevant sections in E-TUYS may be easily completed within approximately 40 (forty) minutes. Then, once the user submits the completed forms via his/her e-signature, E-TUYS will be updated immediately.

IX. Specific Sectors

As mentioned above, certain sectors such as civil aviation, maritime, broadcasting, insurance, education and banking are regulated more strictly and investments concerning such sectors may require further reviews. Therefore requirements of each sector should be reviewed on case-by-case basis.

X. Conclusion

Turkey is an investor-friendly country and is welcoming to foreign investors. Current General FDI legislation sets forth post-notification requirement however there are no sanctions for failing to duly notify. It is not expected for the FDI regime to become more restrictive. Nevertheless, applicable sector-specific legislation must not be disregarded as some sectors are heavily regulated.

"Additional Workplaces" to be Converted to Branch Offices

Before the Turkish Commercial Code numbered 6102 ("**TCC**") entered into force, additional offices and stores of legal entities (*i.e.* limited liability companies and joint-stock companies) were being registered with trade registries as "additional workplaces". However, according to the TCC, the only corporate concept for an entity to open various other additional offices and stores under the same legal entity is by incorporating a "branch". Accordingly, with the entry into force of the TCC in July 1, 2012, trade registries have considerably ceased the registration of such additional workplaces and they required the applicant entities to establish their additional business premises as branches.

As a result of the previous practice on this matter, currently there are many active additional workplaces which were registered mostly before the TCC entered into force. Recently, after examining their records, the trade registry offices have started to send notification letters to those legal entities with registered additional workplaces, requesting them either to convert their additional workplaces to

branches or to close them down within a certain time period.

In order for the legal entities to be able to plan their next steps, the definition of "branch" should be examined first, since every additional workplace cannot be converted into a branch. According to Article 118 of the Regulation of Trade Registry, branch is defined as a *"place and commercial store that can conduct the industrial or commercial activity by itself, regardless of whether it has a separate share capital or accounting".*

Within this scope, it can be inferred that workplaces and stores which have industrial or commercial activities are subject to registration as branches. This being the case, the existing additional workplaces which were already registered with the trade registry and fall under the foregoing definition and scope should be converted into branches. Such conversion should be registered with the trade registry as a "new branch" incorporation. This means that the trade registries usually require the submission of the usual branch incorporation documents (*e.g.* notarized corporate body resolution, petition, and acceptance letter of the relevant branch manager regarding their appointment) for the conversion process.

On the other hand, those additional workplaces that are used as warehouses or any other place where no industrial or commercial activity is carried out, are not subject to the requirement of branch incorporation and therefore, they should be deregistered. For the deregistration, trade registry offices usually request a notarized resolution of the relevant corporate managing body, and a cover letter petition. In the event of deregistration, one alternative that may be also considered to keep these workplaces active and physically open is by registering them as workplaces with the tax authorities. It would be advisable to check implementation of this method and its tax-related consequences with local tax advisors.

In the event that the conversion or deregistration process is not completed within the time period granted by relevant trade registry, an administrative monetary fine approximately EUR 300 (for 2022) may be imposed as per the Article 33 of TCC for each additional workplace.

All in all, companies that have registered additional workplaces with trade registries should convert their "additional workplaces" into branches or completely close them down for compliance purposes to the TCC and its secondary legislation, even if no letter of notification has been sent by the trade registries.

Digitalization of Signature Declarations

In the Turkish corporate law practice, the "signature declaration" refers to a document which sets out the particular signature that the relevant person shall use, with three specimen signatures of the relevant signatory side by side. For signatories who were Turkish citizens and residing in Turkey, these signature declarations were issued by the signaory appearing in person before the Turkish public notaries and/or trade registries. As we will focus on and explain in this article, the novelties introduced to the Turkish Commercial Code No. 6102 ("**TCC**") and its secondary legislation has changed this previous practice.

With the Law on Amendment of Technology Development Zones Law and Certain Other Laws, numbered 7263 and

published in the Official Gazette on February 3, 2021, it has been stipulated in Article 40/2 of the TCC that signatures of individual tradespersons and those who are authorized to sign on behalf of legal person commercial entities would be obtained digitally from the databases of public institutions and organizations, and recorded in the trade registry file under the central common database. Then, on February 7, 2022, the Ministry of Trade ("**Ministry**") announced that the integration works carried out in the digital signature declarations were completed and a guide on digital signatures has become available. The trade registries also announced on their websites that they would start to receive digital signature declarations for the appointment of authorized signatories and incorporation applications to be made through Central Registration System ("**MERSIS**") as of March 1, 2022.

In light of the foregoing developments, signature declarations can be now obtained from the database of the General Directorate of Civil Registration and Nationality ("**CRN**") digitally, before the application to trade registries for registration purposes. CRN and MERSIS have been linked and integrated with each other.

It is important to note that CRN records specimen signatures of only Turkish citizens and those persons residing in Turkey holding the new type of Turkish identity cards. Accordingly, if these persons are appointed as directors or signatories to Turkish entities, they have to give their approval for such appointment and the transmission of their specimen signatures through MERSIS by logging into the system over e-Government Gateway Portal of Turkey. Upon the approval, if their digital signature declarations are successfully obtained from the CRN, they will no longer be required to visit trade registries/ notaries in person and submit a physical signature declaration.

On the other hand, those who do not have the new Turkish identity card (*i.e.*, Turkish citizens having the previous version of the Turkish identity card or foreign nationals residing outside of Turkey) or whose specimen signatures cannot be obtained from the CRN due to technical problems, are still required to submit physical signature declarations to the trade registries.

All in all, digital signature declarations are not yet applicable for the Turkish citizens who do not hold new Turkish identity cards or foreign nationals who are not officially residing in Turkey. The system still needs developing so that more individuals will be able to avail themselves of the convenience of digital signature declarations.

Banking and Finance Law

An Alternative Financing Method: Financial Leasing in Turkey

I. Introduction

Financial leasing is an alternative method for financing of mid-term to long-term assets for companies and other commercial entities. The fixed rent protects the lessee against any fluctuations due to inflation and other economic conditions. Financial leasing is mainly governed by the Financial Leasing, Factoring, Financing and Savings Financing Companies Law No. 6361 ("**Law**") and its relevant secondary legislation.

II. Financial Leasing

Under the Law, financial leasing is defined as "*provided that it is based on a financial lease, a leasing transaction constituting one of the following: where the lessor is an authorised entity pursuant to the Law or its relevant legislation, which stipulates to transfer an asset's ownership at the end of the lease period for financing purposes; to vest the lessee with pre-emption right entitling them to purchase the asset at a price lower than its market value; and where the lease period is determined as a duration longer than the 80% of the asset's economic life, or the total present value of the rent payments to be made under the lease is higher than 90% of the asset's fair market value".*

According to the Law, the lessor can be a participation bank, a development and investment bank or a financial leasing company which must be a joint-stock company with minimum TRY 50,000,000 (fifty million Turkish Liras) paid-in share capital. Details regarding the incorporation requirements and activities of the lessors are set forth under the Law and its secondary legislation.

As per Article 18 of the Law, financial leasing is an agreement which stipulates that the lessor shall transfer the possession of an asset which was purchased by the lessee from a third party or directly from the lessor, or acquired some other way, to the lessee in exchange for the rent set out under the lease. Both moveable and immovable properties may be subjects of the lease. The rent may be collected as of the starting date of the agreement, even if the asset in question is not manufactured or delivered to the lessee yet, provided that it is expressly stated in the agreement. Unless otherwise stated, the leased asset must be delivered to the lessee within 2 (two) years as of the date of the lease.

III. Cross-Border Financial Leasing

As per Article 21 of the Law, financial leasing agreements concluded abroad are subject to registration before the Association of Financial Institutions ("**Association**"). These agreements are governed under the Circular on Registration of Financial Leasing from Abroad (the "**Circular**"). As per Article 4 of the Circular, the leases concerning aircraft, ship, medical device and high technology product which is certified by a university in Turkey, can be registered. In addition, the average total sum of annual rent must be minimum USD 100,000 (one hundred thousand US dollars).

IV. Formalities

Financial leasing agreements can be executed in writing or by distance contract through media or any other informatics, or electronic communication device enabling client authentication. Financial leasing agreements concerning immovable properties must be registered with the relevant land registry and the other financial leasing agreements concerning movable properties having their own registers must be registered with or annotated under the relevant registry and the lessee must also notify the Association. Leases concerning immovable properties which are not registered with any registries, shall be registered under a special registry kept by the Association. As per Article 22/3 of the Law, this special registry is publicly accessible and it is not possible for anyone to claim that they are not aware of a lease recorded under the registry.

V. Rights and Obligations of the Parties to Financial Leasing Agreements

The lessee is the possessor of the relevant asset and has the right to benefit from it in any way during term of the financial lease. Unless otherwise stipulated in the lease, the lessee shall remain responsible for any kind of maintenance and protection of the asset and shall bear all maintenance and repair costs. As per Article 24/4 of the Law, the leased asset is required to be insured. The party who will complete the insurance process is determined in the lease agreement; however, in any case insurance premium shall be paid by the lessee. The lessee's liability in case of any damage or loss shall be limited to the amount remaining uncovered by the paid insurance. However, if the lessee chose to acquire the asset from a third party or directly from itself, then the lessor cannot be held liable for the asset's defects.

Under a financial leasing, the lessor will remain as the owner of the asset in question. On the other hand, parties may determine that the lessee shall have the right to purchase the ownership of the asset at the expiry date of the lease. In such a case, if the lessee does not exercise their right to purchase for 30 (thirty) days as of the date such right becomes exercisable and if the asset was not returned to the lessor as per Article 32 of the Law, the lessor may unilaterally carry out transfer transactions to the lessee.

VI. Transfer of Possession and Ownership

The lessee can transfer its lessee title or its rights or obligations arising out of the financial leasing, provided that it obtains prior permission from the lessor in writing. Such transfer shall also need to be duly registered or annotated, as the case may be. Transfer of possession of assets may be carried out by notifying the lessor, if the financial leasing concerns housing finance. Under other types of financial leasing, the lessee may transfer the agreement by transferring possession of the assets, provided that the financial leasing agreement includes such a provision.

As per Article 27 of the Law, the lessor cannot transfer the ownership of the asset to a third person unless such right is granted under the financial leasing agreement. If such a transfer is made, the new lessor will be bound by the lease. However, the transfer will bind the lessee only if the lessee is informed about the transfer.

VII. Breach of Financial Leasing Agreement

The lessor will be entitled to terminate the lease, in case the defaulting lessee fails to pay the rent within the 30 (thirty) days granted by the lessor under a notice to be sent to the lessee. However, this period granted by the lessor cannot be less than 60 (sixty) days if the parties had agreed that the lessee shall acquire the ownership of the asset at the end of the lease period. If the lessee was sent such notices due to failing to pay 3 (three) or more rent payments in a given year, or 2 (two) times consecutively in 1 (one) year, the lessor will be entitled to terminate the lease immediately.

In case of a breach where the other party cannot be expected to continue the lease, the financial leasing agreement can also be terminated.

VIII. Automatic Termination of Financial Leasing Agreement

Unless otherwise stipulated in the agreement, finance leasing agreement shall automatically terminate upon the expiration of the lease term, bankruptcy of the lessee, lessee's death or lessee's loss of capacity. Each party is entitled to request the renewal of the lease with same or different terms, at least 3 (three) months prior to the expiration date.

The lessee is obliged to return the asset (provided that the right to purchase is not exercised) once the lease terminates.

IX. Conclusion

Records of financial leasing are kept by the Association. It is important to duly register the financial leasing transaction with the relevant registries and with the Association. It is also possible to execute cross-border financial leasing in accordance with the current legislation.

Capital Markets Law

Contracts of Guarantee under Turkish Capital Markets Law

The Capital Market Law numbered 6362 ("**CML**") defines "capital market instruments" as securities, derivative instruments, other capital market instruments designated in this context by the Capital Markets Board, as well as investment contracts. On the other hand, capital market instruments that can create financial collateral may only be securities and other instruments that fall under the scope of capital markets. In this regard, it could be inferred that derivative instruments are not suitable for creation of financial collaterals as these do not have a function of currency.[1]

In addition to the above, in terms of the CML, while securities refer to (i) shares, other securities similar to shares and depositary receipts related to the said shares, (ii) debt instruments or debt instruments based on securitized assets and income, and depositary receipts related to the said securities, excluding money, cheques, bills of exchange and bonds; other capital market instruments cover all the instruments that are not securities or derivatives, but traded in the capital market, if they are recognized by the CML.

Contracts of guarantee relating to capital market instruments are regulated in Article 47 of the CML. According to the CML, contracts of guarantee based on capital market instruments that are monitored in a dematerialized form by the Central Registry Agency ("**CRA**") shall be made in written form.

Ownership of the capital market instruments underlying these contracts of guarantee may be transferred to the guarantee taker according to legal procedures set out in the framework of the contract, or it may remain with the guarantee provider, as the case may be. In cases where this matter is not regulated in the contract, ownership of capital market instruments underlying the guarantee shall not be deemed to be transferred to the guarantee taker.

Accordingly, Article 47 of the CML can be divided into 2 (two) types of contracts of guarantee, where (i) the ownership of the instruments are transferred to the guarantee taker and (ii) ownership remains with the guarantee provider.

[1] Benli, Erman, "Sermaye Piyasası Araçlarını Konu Alan Teminat Sözleşmeleri", p.14.

Pursuant to Article 47/2 of the CML, in contracts of guarantee; where ownership is transferred to the guarantee taker, the guarantee taker shall takeover the ownership rights of capital market instruments underlying the guarantee by complying with the necessary legal procedures. Upon the termination of the contract of guarantee, guarantee taker shall return ownership of the underlying capital market instruments or their equivalents to the guarantee provider.

On the other hand, in the second type of contracts of guarantee where the ownership remains at the guarantee provider, parties shall come to an agreement regarding the scope in which the guarantee may be used, including the sale of the underlying capital market instrument. Upon termination of the contract of guarantee, guarantee taker shall return to guarantee provider underlying capital market instruments or their equivalents if s/he has used these instruments.

In case of default, or when a receivable is recovered by utilising the guarantee as per the reasons stipulated in the law or the provisions of the contract, the type of the contract should be taken into consideration first.

In this regard, in contracts of guarantee where ownership is transferred to guarantee taker; unless otherwise provided in the contract between the parties, guarantee taker holds the right to sell capital market instruments underlying the guarantee and recover its receivables from the sale amount, provided that this value is not below the values on the relevant securities exchange or other organised markets if they are listed in these markets, or the right to set-off the value of these instruments against the liabilities of the guarantee provider.

On the other hand, in contacts of guarantee where ownership remains at the guarantee provider; the guarantee taker, holds the right to sell the capital market instruments underlying the guarantee to meet his receivables, provided that this value is not below the values on the exchange or other organised markets if they are listed in these markets; or the right to set-off the value of these capital market instruments against the liabilities of the debtor by assuming ownership of these instruments. In order for the guarantee taker to be able to assume ownership of the capital market instruments underlying the guarantee, the fact that this right may be used and how the valuation should be made if the capital market instrument is not listed in the exchange or in other organised markets shall be expressly stated in the contract of guarantee concluded between the parties.

In connection with above, in cases where a receivable would be recovered from the guarantee, there is no obligation to make any notification or warning, grant a period, obtain permission or approval from judicial or administrative authorities or without the obligation to fulfil any pre-condition such as liquidation of the guarantee, through auctioning or another method.

A contract of guarantee gives the creditor the opportunity to recover its receivables swiftly and without the necessity to apply to any judicial or administrative body. When all these are taken into consideration, it is also clear that the rights of the guarantee taker and the guarantee provider are protected with the relevant CML regulation. As a matter of fact, Article 47 of the CML diverges from the principle of prohibition of "*lex*

commissoria" under Turkish law, which prevents forfeiture of the pledged asset when a loan is not repaid to the lender. It should be also noted that Article 47 of the CML is not applicable for ordinary guarantee agreements which are subject to special regulations other than the CML.

Competition / Antitrust Law

An overview of Turkish Merger Control Regime in Light of the Recent Legislative Amendments and the Turkish Competition Board's Decisional Practice

I. Introduction

On March 4, 2022 the Turkish Competition Authority ("***Authority***" or *"**Competition Authority**"*) published the Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board ("***Amendment Communiqué***"). The Amendment Communiqué introduced new thresholds and regulations to the Turkish merger control regime, which came into force as of May 4, 2022.

Prior to the amendments, on 7 January 2022, the Authority published its Mergers and Acquisitions Insight Report for 2021. This report sheds light on the Authority's decisional practise regarding mergers and acquisitions and provides factual data by way of detailed statistical analyses.

II. The Transactions Covered by the Turkish Merger Control Regime

The Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***") defines the scope of notifiable transactions in Article 5 as follows:

(a) a merger of two or more undertakings; or

(b) the acquisition of direct or indirect control over all or part of one or more undertakings by one or more undertakings or persons which currently control at least one undertaking, through (i) the purchase of assets or some or all of its shares; (ii) an agreement; or (iii) another instrument.

As regards joint ventures, the Turkish merger control rules applicable to joint ventures are akin to-if not the same as-the EU rules. Article 5 of the Communiqué No. 2010/4 provides a definition of joint venture, which does not fall far from the definition used in the EU law. To qualify as a concentration subject to merger control, a joint venture must be of a full-function character and satisfy two criteria: (i) existence of joint control in the joint venture and (ii) the joint venture being an independent economic entity established on a lasting basis (*i.e.*, having adequate capital, labour and an indefinite duration). Additionally, regardless of whether the joint venture is full-function or not, the joint venture should not have as its object or effect the restriction of competition among the parties or between the parties and the joint venture itself within the meaning of Article 4 of Law No. 4054 on Protection of Competition ("***Law No. 4054***") which prohibits restrictive agreements. If the parent undertakings of a joint venture operate in the same market or the downstream or upstream or neighbouring market as the joint venture, it could lead to coordination between independent undertakings restricting competition within the meaning of Article 4 of the Law No 4054.

In case the nature of the JV turns out not to be full-functional, although these are not under a mandatory merger control filing, such non-full function JVs may still fall under Article 4 of Law No 4054, which prohibits restrictive agreements. The parties are able to conduct a self-assessment test for individual exemption, which is set out under Article 5 of Law No. 4054, on whether the JV meets the conditions of individual exemption (which are also very similar to, if not the same as the EU regime). Notifying the transaction for individual exemption is not a positive duty of the parties, but it is an option granted to them.

So long as there is a change in control on a lasting basis involving a full-function joint venture and the turnover thresholds under Article 7 of Communiqué No. 2010/4 are met, the transaction at hand would require a mandatory merger control filing before the Authority and there are no exceptions to avoid the filing requirement. To that end, as long as the parents of a greenfield joint venture meet the jurisdictional thresholds, a greenfield joint venture is also subject to mandatory merger control filing. The settled decisional practice of the Turkish Competition Board (the "***Board***") clearly demonstrates that concentrations would be notifiable despite their lack of effects in Turkey (*i.e.*, even if the JV is not and will not be active in Turkey).

1. Definition of "Control"

Communiqué No. 2010/4 provides the definition of "control" which is akin to the definition in Article 3 of Council Regulation No. 139/2004.

According to Article 5(2) of Communiqué No. 2010/4, control can be constituted by rights, agreements or any other means that – either separately or jointly, *de facto* or *de jure* – confer the possibility of exercising a decisive influence on an undertaking, particularly by ownership or the right to use all or part of the assets of an undertaking, or by rights or agreements that confer decisive influence on the composition or decisions of the organs of an undertaking.

Acquisition of minority interests can amount to a merger, if and to the extent that it leads to a change in the control structure of the target entity. In other words, if minority interests acquired are granted certain veto rights that may influence the management of the company (*e.g.*, privileged shares conferring management powers), then the nature of control could be deemed changed (from sole to joint control) and the transaction could be subject to filing. As specified under the Guideline on the Concept of Control, such veto rights must be related to strategic decisions on the business policy, and they must go beyond normal 'minority rights', *i.e.*, the veto rights normally accorded to minority shareholders to protect their financial interests.

2. The Jurisdictional Thresholds

The Authority has recently amended the legislation relating to the Turkish merger control regime through an amendment communiqué: Communiqué No. 2022/2 Amending Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board ("***Amendment Communiqué***") which was published in Official Gazette on March 4, 2022 and entered into force on May 4, 2022.

Accordingly, for transactions closed (*i.e.*, the concentration is realized) before May 4, 2022 (*i.e.*, the date in which the updated Communique No. 2010/4 came into force)

the turnover thresholds under the earlier merger control regime were applicable. Under the current regime, a transaction would be notifiable in case one of the following alternative turnover thresholds set out under Article 7 of the Communiqué No. 2010/4 is triggered:

(a) The combined aggregate Turkish turnover of all the transaction parties exceeds TRY 750 million (approximately EUR 71.9 million or USD 84.9 million) and the Turkish turnover of each of at least two of the transaction parties exceeds TRY 250 million (approximately EUR 23.9 million or USD 28.3 million), or

(b) (i) The Turkish turnover of the transferred assets or businesses in acquisitions exceeds TRY 250 million (approximately EUR 23.9 million or USD 28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY 3 billion (approximately EUR 287.9 million or USD 339.7 million) or;

(ii) The Turkish turnover of any of the parties in mergers exceeds TRY 250 million (approximately EUR 23.9 million or USD 28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TRY 3 billion (approximately EUR 287.9 million or USD 339.7 million)

That said, the Amendment Communiqué also introduced a new merger control regime for undertakings active in certain sectors. Further to the Amendment Communiqué, *"the TRY 250 million Turkish turnover thresholds"* mentioned above will not be sought for the acquired undertakings active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies or assets related to these fields, if they (i) operate in the Turkish geographical market or (ii) conduct research and development activities in the Turkish geographical market or (iii) provide services to Turkish users. Therefore, the mere fact that the Turkish turnover figure of a target remains below the relevant jurisdictional threshold would not allow the parties to rule out a mandatory notification requirement. In this respect, if the target has activities in the sectors mentioned above somewhere in the world, and if it is also commercially active in Turkey, the exception to the local threshold will apply and a mandatory notification requirement could still be triggered solely by the worldwide turnover figures of the other parties to the transaction.

To clarify the meaning and the scope of these sectors exempted from the use of local turnover thresholds (and therefore have been rendered almost categorically notifiable in Turkey), please find below a non-exhaustive list of activities which correspond to the sectors referred to in the definition of the Amendment Communiqué. Please note that ELIG Gürkaynak drew up the list below merely in an effort to provide insight and guidance in identifying this scope, thus the list is not exhaustive. Identification of the scope of activity of the client should in any case be carried out on a case-by-case basis in accordance with the definitions of the Amendment Communiqué provided above, and the information to be obtained from the client as to the areas of activity of the transaction parties:

(a) Digital platforms: Digital platforms are systems and interfaces that form a commercial network or market facilitating business-to-business (B2B), business-to-customer (B2C) or even customer-to-

customer (C2C) transactions. Digital platforms include but are not limited to social media platforms, knowledge sharing platforms, media sharing platforms, service-oriented platforms, online marketplaces and digital content aggregators.

(b) Software and gaming software: Software relates to a set of instructions, data or programs used to operate computers and execute specific tasks, while gaming software concerns software customised for gaming. Software and gaming software include but are not limited to the activities below.

(i) writing and publishing of software and gaming software (including publishing of computer games) *(NACE Rev. 2: 58.2),*

(ii) wholesale, retail sale, distribution and marketing of software (both customised and non-customised) and gaming software *(NACE Rev. 2: 46.51, 47.41),*

(iii) reproduction from master copies of software *(NACE Rev. 2: 18.2),*

(iv) manufacture of electronic games with fixed (non-replaceable) software *(NACE Rev. 2: 32.40),*

(v) translation or adaptation of software and gaming software *(NACE Rev. 2: 58.29),*

(vi) computer programming activities (designing the structure and content of, and/or writing the computer code necessary to create and implement systems software (including updates and patches), software applications (including updates and patches), databases, web pages, customising of software *(NACE Rev. 2: 62.01),*

(vii) software installation services *(NACE Rev. 2: 62.09),*

(c) Financial technologies: Financial technologies refer to technology-enabled innovation in financial services. Undertakings which sit at the crossroads of financial services and technology fall into the scope of this definition. In brief, the term "financial technologies" is used to define software and other technology aiming to modify, enhance or automate financial services for businesses or consumers. Financial technologies include but are not limited to technologies and software developed for the following fields:

(i) financial services activities (monetary intermediation, financial leasing, other credit granting) *(NACE Rev. 2: 64.1, 64.9),*

(ii) insurance, reinsurance, pension funding *(NACE Rev. 2: 65),*

(iii) activities auxiliary to financial services, insurance and pension funding (administration of financial markets (futures commodity contracts exchanges, securities exchanges, stock exchanges, stock or commodity options exchanges), security and commodity contracts brokerage (dealing in financial markets on behalf of others (*e.g.*, stock broking) and related activities, securities brokerage, commodity contracts brokerage, activities of bureaux de change etc.), risk and damage evaluation, activities of insurance agents and brokers, fund management activities, financial transaction processing and settlement, investment advisory activities, activities of mortgage advisers and brokers *(NACE Rev. 2: 66),*

(iv) accounting, bookkeeping and auditing activities, tax consultancy (recording of commercial transactions from businesses or others, preparation or auditing of financial accounts, examination of accounts and certification of their

accuracy, preparation of personal and business income tax returns, advisory activities and representation on behalf of clients before tax authorities) *(NACE Rev. 2: 69.2),*

(v) digital lending, payments, blockchain and digital wealth management.

(d) Biotechnology*:* Biotechnology refers to the technology that utilizes biological systems, living organisms or parts of this to develop or create different products. The sector includes but is not limited to the activities below:

(i) research and experimental development on biotechnology *(NACE Rev. 2: 72.11),*

- DNA/RNA (genomics, pharmacogenomics, gene probes, genetic engineering, DNA/RNA sequencing/ synthesis/amplification, gene expression profiling, and use of antisense technology),

- proteins and other molecules (sequencing/synthesis/engineering of proteins and peptides (including large molecule hormones); improved delivery methods for large molecule drugs; proteomics, protein isolation and purification, signalling, identification of cell receptors),

- cell and tissue culture and engineering (cell/tissue culture, tissue engineering (including tissue scaffolds and biomedical engineering), cellular fusion, vaccine/immune stimulants, embryo manipulation,

- process biotechnology techniques (fermentation using bioreactors, bioprocessing, bioleaching, biopulping, biobleaching, biodesulphurisation, bioremediation, biofiltration and phytoremediation,

- gene and RNA vectors: gene therapy, viral vectors),

- bioinformatics (construction of databases on genomes, protein sequences, modelling complex biological processes, including systems biology),

- nanobiotechnology (applies the tools and processes of nano/microfabrication to build devices for studying biosystems and applications in drug delivery, diagnostics etc.),

(ii) manufacture of biotech pharmaceuticals such as plasma derivatives *(NACE Rev. 2: 21.20).*

(e) Pharmacology: Pharmacology, a biomedical science, deals with the research, discovery, and characterization of chemicals which show biological effects and the elucidation of cellular and organismal function in relation to these chemicals. In other words, pharmacology refers to the science of how drugs act on biological systems and how the body responds to the drug. The study of pharmacology encompasses the sources, chemical properties, biological effects and therapeutic uses of drugs. Pharmacology includes but is not limited to the biomedical studies and R&D activities conducted in the areas below:

(i) Pharmacodynamics (relationship of drug concentration and the biologic effect (physiological or biochemical),

(ii) Pharmacokinetics (interrelationship of the absorption, distribution, binding, biotransformation, and excretion of a drug and its concentration at its locus of action),

(iii) Clinical Pharmacology and Therapeutics (understanding what a drug is doing to the body, what happens to a drug

in the body, and how drugs work in terms of treating a particular disease),

(iv) Pharmacotherapy (treatment of a disorder or disease with medication)(v) Neuropharmacology (understanding how drugs affect cellular function in the nervous system),

(vi) Psychopharmacology (use of medications in treating mental disorders),

(vii) Cardiovascular pharmacology (understanding how drugs influence the heart and vascular system.),

(viii) Molecular pharmacology (investigates the molecular mode of action of drugs, among others using genetic and molecular biology methods),

(ix) Radiopharmacology (study and preparation of radioactive pharmaceuticals),

(x) Manufacture and R&D of pharmaceuticals (antisera and other blood fractions, vaccines, diverse medicaments, including homeopathic preparations), pharmaceutical preparations and medicinal chemicals (manufacture of medicinal active substances to be used for their pharmacological properties in the manufacture of medicaments: antibiotics, basic vitamins, salicylic and O-acetylsalicylic acids etc.); wholesale, retail sale, distribution and marketing of pharmaceuticals, pharmaceutical preparations and medicinal chemicals; growing of drug and narcotic crops *(NACE Rev. 2: 21.1 and 21.2),*

(f) Agricultural chemicals: Agricultural chemicals refer to chemicals used in agriculture to control pests and disease or control and promote growth; such as pesticides, herbicides, fungicides, insecticides, and fertilizers. The sector includes but is not limited to the activities below:

(i) mining of chemical and fertiliser minerals *(NACE Rev. 2: 08.91),*

(ii) support activities for other mining and quarrying (where it relates to agricultural chemicals and fertilizers) *(NACE Rev. 2: 09.90),*

(iii) manufacture of fertilisers (straight or complex nitrogenous, phosphatic or potassic fertilisers; urea, crude natural phosphates and crude natural potassium salts), nitrogen compounds (nitric and sulphonitric acids, ammonia, ammonium chloride, ammonium carbonate, nitrites and nitrates of potassium) *(NACE Rev. 2: 20.15),*

(iv) manufacture of organic and inorganic basic chemicals (where it relates to agricultural chemicals and fertilizers) *(NACE Rev. 2: 20.13, 20.14),*

(v) manufacture of pesticides and other agrochemical products (manufacture of insecticides, rodenticides, fungicides, herbicides, acaricides, molluscicides, biocides, manufacture of anti-sprouting products, plant growth regulators, manufacture of disinfectants (for agricultural and other use) *(NACE Rev. 2: 20.2),*

(vi) wholesale, retail sale, distribution and marketing of fertilisers and agrochemical products *(NACE Rev. 2: 46.75).*

(g) Health technologies: Health technologies are the application of organized knowledge and skills in the form of medicines, medical devices, vaccines, procedures and systems developed to solve a health problem and improve quality of life. They refer to any technology, including medical devices, IT systems,

algorithms, artificial intelligence (AI), cloud and blockchain, designed to support healthcare organizations and patients. Health technologies include but are not limited to technologies and software developed or being developed for the following fields:

(i) human health activities (hospital activities, medical (medical consultation and treatment) and dental practice activities (dentistry, endodontic and pediatric dentistry; oral pathology, orthodontic activities) *(NACE Rev. 2: 86),*

(ii) residential healthcare activities (residential nursing care activities, residential care activities for mental retardation, mental health and substance abuse, residential care activities for the elderly and disabled) *(NACE Rev. 2: 87),*

(iii) manufacture of medical and dental instruments (*e.g.*, operating tables, examination tables, hospital beds with mechanical fittings, dentists' chairs, surgical appliances*) (NACE Rev. 2: 32.5).*

Please note that a merger control filing is mandatory if the above-explained applicable turnover thresholds are exceeded.

3. Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if the turnover thresholds are triggered. Communiqué No. 2010/4 does not seek the existence of an "affected market" in assessing whether a transaction triggers a notification requirement. However, the concept of affected market carries weight in terms of the substantive competitive assessment and the notification form. To that end, even if the relevant undertakings do not have local subsidiaries, branches, sales outlets, etc, in Turkey, the transaction can still be subject to merger control if the relevant undertakings have sales in Turkey and thus have effects on the relevant Turkish market.

4. Exemptions

Once the thresholds are exceeded, it is mandatory to file a notification with the Authority. There is no exception for filing a notification. There is no *de minimis* exception or other similar exceptions which would provide derogation under the Turkish merger control regime, except for a certain type of merger in the banking sector.

Banking Law No. 5411 provides an exception for mergers and acquisitions taking place in the banking sector. Mergers and acquisitions of the banks in accordance with Banking Law No. 5411 are exempted from the scrutiny of the Competition Board, provided that the market share of their total assets is lower than 20%, as per Article 19 of Banking Law No. 5411.

With respect to the exemption in the banking sector, in practice, the Competition Board distinguishes between: (i) transactions involving foreign acquiring banks with no operations in Turkey, to which Law No. 4054 is fully applied; and (ii) foreign acquiring banks already operating in Turkey, to which Law No. 4054 is not applied if the conditions for the application of the Banking Law exception are fulfilled. Therefore, while the Board applies Competition Law to mergers and acquisitions where the foreign acquiring bank does not have any operations in Turkey, it does not apply Competition Law if the foreign acquiring bank already has operations in Turkey under the exception rule in the Banking Law.

Please note that the Turkish Competition Law legislation does not leave any discretion to the Competition Authority in assessing transactions that do not meet the merger control thresholds. All of the turnover thresholds within the framework of Turkish merger control regime are laid down under Article 7 of Communiqué No. 2010/4. On the other hand, as explained above, as per the Article 2/2 of the Amendment Communiqué, "the TRY 250 million Turkish turnover thresholds" will not be sought for the acquired undertakings active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies or assets related to these fields, if they (i) operate in the Turkish geographical market or (ii) conduct research and development activities in the Turkish geographical market or (iii) provide services to Turkish users.

Moreover, the Authority is always able to review transactions if they are found to be restrictive in terms of Article 4 and 6 of Law No. 4054. For instance, if a joint venture does not meet the jurisdictional thresholds, it may still be reviewed in terms of anticompetitive agreements and abuse of dominant position doctrine.

III. The Filing Process

In principle, a filing can be made by either of the parties to the transaction, or jointly. However, it is the responsibility of the acquirer since the legal status risks and the administrative monetary fine risks of not filing a notifiable transaction fall entirely on the acquirer. Accordingly, in practice, the majority of notifications are made by the acquirer only. Joint notifications are not uncommon, but "seller only" notifications are relatively rare. If the notification is made by one party only, that party should notify the other party of the filing.

Furthermore, there are no exemptions or expedited options in the Turkish merger control regime. Neither Law No. 4054 nor Communiqué No. 2010/4 foresees a "fast-track" procedure to speed up the clearance process. Aside from close follow-up with the case handlers reviewing the transaction, the parties have no available means to speed up the review process.

1. The Timing of Merger Control Filing

In Turkish Competition Law, there is an explicit suspension requirement (*i.e.*, a transaction cannot be closed before obtaining the approval of the Competition Board, if the transaction is notifiable), set out under Article 11 of Law No. 4054 and Article 10(5) of Communique No. 2010/4. Under Article 10(8) of Communique No. 2010/4, a transaction is deemed to be realized (*i.e.*, closed) on the date when the change in control occurs.

If the parties to a notifiable transaction fail to comply with the suspension requirement, in other words, close a notifiable transaction without the approval of the Board or do not notify the notifiable transaction at all, the Competition Board has no chance other than enforcing the sanctions and legal consequences set forth under the Turkish merger control regime.

Pursuant to Article 16 of Law No. 4054, failure to comply with the suspension requirement results in an administrative monetary fine amounting to 0.1% of the turnover generated during the financial year preceding the decision date. In addition, if the transaction is viewed as problematic under the SIEC test, Article 11(b) of Law No. 4054 entitles the

Competition Authority to launch an investigation *ex officio* and order structural as well as behavioural remedies to restore the situation as before the closing (*restitutio in integrum*). In that case, the Competition Board may impose a turnover-based fine up to 10% of the parties' annual turnover.

Please also note that, unlike the EU regime, there is no pre-notification process under the Turkish merger control regime. All of the transactions (that are subject to a mandatory filing) should be notified to the Authority by way of a uniform notification form.

2. Timeline for the Notification Process

a. Notification

Under the Turkish merger control regime there is no specific deadline for filing. However, there is an explicit suspension requirement, as explained above.

The notification is deemed filed when the Authority receives it in its complete form. Therefore, if the information initially provided to the Competition Board is incorrect or incomplete, the notification is deemed filed only on the date when such information is completed upon the Competition Board's subsequent request for further data.

b. Obtaining the Decision

Upon its preliminary review (*i.e.*, Phase I) of the notification, the Board will decide either to approve or to investigate the transaction further (*i.e.*, Phase II).

The Board notifies the parties of the outcome within 30 calendar days following a complete filing. There is an implied approval mechanism where, if the Board does not react within 30 calendar days upon a complete filing, it is deemed to be a tacit approval. However, in practice, the Board almost always reacts within the 30-day period, either by sending a written request for information or – very rarely – by rendering its decision within the original 30-day period. The Authority's written information requests for missing or additional information will reset the clock on the review period, so that the 30-day period will start anew on the submission date of the responses.

It is a very standard practice for the case handlers of the Authority to demand at least one set of additional information requests even for non-problematic and straight forward transactions. Therefore, it is recommended that the filing be done at least 60 calendar days before the projected closing, allowing an appropriate period of time for review, so that the decision of the Turkish Competition Board does not hold-up the closing of the transaction.

As a side note, the Authority can send written requests to the parties of the transaction, to any other party related to the transaction, or to third parties such as competitors, customers or suppliers.

If a notification is found to be problematic under the significant impediment to effective competition test ("***SIEC test***") it turns into a full-fledged investigation (Phase II) which, under Turkish law, takes about six months. If deemed necessary, this period may be extended only once, for an additional period of up to six months by the Board. In practice, only extremely exceptional cases require a Phase II review.

For completeness, Communiqué No. 2013/2 prescribes an additional pre-notification process that applies to privatisations in which the turnover of the

undertaking, asset or unit intended for the production of goods or services to be privatised exceeds TRY 30 million (approximately EUR 2.8 million). Statutory sales to public institutions and organisations, including local governments, are excluded for the purposes of this calculation. If the threshold is met, a pre-notification should be filed with the Authority before the public announcement of the tender specifications. The Board will issue an opinion that will serve as the basis for the preparation of the tender specifications. This opinion does not mean that the transaction is to be cleared. Following the tender, the winning bidder will still have to make a merger filing and obtain clearance before the Privatisation Administration's decision on the final acquisition.

3. The Time Required to Make a Merger Control Filing

As explained above, unlike the EU regime, there is no pre-notification process under the Turkish merger control regime. All of the transactions (that are subject to a mandatory filing) should be notified to the Authority by way of a standardised notification form.

Communiqué No. 2010/4 provides a complex notification form, which is similar to the Form CO of the European Commission. The notification form and its annexes need to be submitted to the Competition Board. Additional documents, such as the executed or current copies, and sworn Turkish translations of the foreign language transaction documents, financial statements of the parties, and, if available, market research reports for the relevant market are also required. In addition, a signed, notarised and apostilled power of attorney is required to be able to represent the party before the Authority.

Moreover, a case-by-case analysis is required to provide an estimate of the time it would take to put together the filing. Nevertheless, under both scenarios (regardless of whether a deal raises certain competition concerns or not), the timeframe required to prepare and finalize a notification form depends heavily on the effectiveness of the information flow and the responsiveness of the transaction parties.

It is worth noting that there is not a specific fast-track merger control filing procedure in Turkey similar to the one in the EU. That being said, for transactions which do not result in any affected markets in Turkey (*i.e.*, where there is no overlap between the activities of the transaction parties in Turkey, bearing in mind that as long as the parties' activities overlap horizontally or vertically in Turkey, there would be affected market(s) for the purposes of the Turkish merger control filing, irrespective of the parties' market shares in the relevant markets), the scope of the information to be provided within the merger control filing would be limited to general information such as the parties' global and Turkish activities and management structure, description of the transaction, description on the relevant product markets, etc. (the short-form notification).

There is no filing fee in Turkey for a merger control filing before the Turkish Competition Authority.

IV. Organization of the Authority and Statistical Data on the Board's Decisions on Mergers and Acquisitions

The Turkish Competition law legislation is enforced by the Authority, a legal entity

with administrative and financial autonomy, which consists of the Board, the Presidency and service departments. The Board is the competent decision-making body of the Authority and is responsible for, inter alia, reviewing and resolving merger and acquisition notifications. The Board consists of seven members and is located in Ankara.

The Main Service Units consist of five supervision and enforcement departments, a department of decisions, an economic analyses and research department, an information management department, an external relations, training and competition advocacy department, a strategy development, regulation and budget department, a press department and a cartel on-the-spot inspections support division. There is a 'sectoral' job definition of each supervision and enforcement department.

Other authorities may get involved in the review of mergers in certain sectors. For example, the Authority is statutorily required to get the opinion of the Turkish Information and Communication Technologies Authority for mergers that concern the telecommunication sector and of the Turkish Energy Markets Regulatory Authority in energy mergers.

The Authority is empowered to contact certain regulatory authorities around the world to exchange information, including the European Commission. In this respect, Article 43 of Decision No. 1/95 of the EC-Turkey Association Council (Decision No. 1/95) authorises the Authority to notify and request the European Commission (Competition Directorate-General) to apply relevant measures if the Board believes that transactions realised in the territory of the European Union adversely affect competition in Turkey. Such provision grants reciprocal rights and obligations to the parties (EU-Turkey), and thus the European Commission has the authority to request the Board to apply relevant measures to restore competition in relevant markets.

Moreover, the research department of the Authority makes periodic consultations with relevant domestic and foreign institutions and organisations. The European Commission has been reluctant to share any evidence or arguments with the Authority, in a few cases where the Authority explicitly asked for them.

Apart from those, the Competition Authority has international cooperation agreements with several antitrust authorities in other jurisdictions. Additionally, the Competition Authority develops training programmes for cooperation purposes. In recent years, programmes have been organised for the board members of Pakistani Competition Authority, top managers of the National Agency of the Kyrgyz Republic for Anti-Monopoly Policy and Development of Competition, members of the Mongolian Agency for Fair Competition and Consumer Protection, and board members of the Turkish Republic of Northern Cyprus's Competition Authority. Similar programmes have also been developed in cooperation with the Azerbaijan State Service for Antimonopoly Policy and Consumers' Rights Protection, the State Committee of the Republic of Uzbekistan on De-monopolisation and Ukrainian Anti-Monopoly Committee. These programmes were held according to the bilateral cooperation agreements.

1. Statistics on the Board's Decisions on Mergers and Acquisitions

According to the 2021 Mergers and Acquisition Insight Report ("***Insight Report***") published by the Turkish Competition Authority, the transactions notified to the Competition Authority in 2021 were resolved within 11 days of final submission, on average. However, this does not reflect the extent of the time period between the initial notification and the resolution of the filing. As explained above, the Authority generally issues at least one set of additional information requests after the initial submission of a filing (even in straight-forward transactions) which delays the final submission date. As a result, the 11-day average reflects the period starting from the completion of a filing – including the submission of all responses to any additional information requests from the Authority – until its resolution.

Until 2013, the Board has dealt with a significant number of merger control cases. Since the notification threshold was increased by Communiqué No. 2012/3 on the Amendment of Communique No. 2010/4, this trend has changed and the number of transactions reviewed by the Authority has gradually decreased since 2013. As expected, the Competition Board shifted its focus from merger control cases to concentrate more on the fight against cartels and cases of abuses of dominance.

The Board, upon its preliminary review (*i.e.*, Phase I) of the notification may decide either to approve or to investigate the transaction further (*i.e.*, Phase II).

According to the Insight Report, the Competition Board has assessed 309 transactions in 2021. In 2020, the Board had evaluated 220 transactions. A total of 291 transactions have been reviewed under Phase I review in 2021[2]. The Insight Report also indicates that 3 transactions were approved with remedies and 2 transactions have been approved under Phase II review in 2021. The Competition Board has not prohibited any transaction in 2021[3].

The average number of the transactions notified to the Authority each year, within the last 5 years (2017-2021) is 229. In this regard, the number of notifications to the Authority increased by 40% compared to last year and the number of notifications in 2021 have been 35% higher than the average of the last 5 years.

As mentioned above, foreign-to-foreign mergers also fall under the remit of Law No. 4054 as long as the jurisdictional thresholds are met. Therefore, regardless of the parties' physical presence in Turkey, sales in Turkey may trigger the notification requirement to the extent that the turnover thresholds are met. Article 2 of Law No. 4054 sets out the effects criterion, that is, whether the undertakings concerned affect the goods and services markets in Turkey. Even if the undertakings concerned have no local subsidiaries, branches or sales outlets in Turkey, the transaction could still be subject to Turkish competition legislation if the goods or services of the participating undertakings are sold in Turkey and the transaction would thus affect the relevant Turkish market.

According to the Insight Report, a total of 173 transactions were foreign to foreign

[2] Turkish Competition Authority, "*Birleşme ve Devralma Görünüm Raporu 2021*" (Mergers and Acquisitions Insight Report 2021), 7 January 2022, *available at* https://www.rekabet.gov.tr/Dosya/birlesme-devralma-gorunum-raporlari/2021-bd-gorunum-raporu-20220107102033815-pdf

[3] *Id*, at 22.

out of a total of 309 transactions reviewed by the Board in 2021, which is approximately 56% of all transactions reviewed in that year[4].

V. The Risks of Not Filing When the Thresholds are Met

If the Authority finds out about a deal which met the thresholds but was not duly notified to the Authority before closing, there are two scenarios, depending on whether the deal raises competition issues:

a) If the Competition Board decides that the transaction is not within the scope of Article 7 of the Law No. 4054 (the transaction does not significantly impede effective competition in any market for goods or services within the whole or part of the country), a monetary fine of 0.1% of the acquirer's Turkish turnover shall be imposed. The minimum amount of this fine is set at TRY 47,409 (approx. EUR 3,000 until December 31, 2022) for 2022 and is revised annually. In the event of a merger, the fine is imposed on both parties. All the parents of a full-function JV are considered as separate acquirers and would thus be imposed a fine. Once the Competition Board detects the failure to notify, it will impose the monetary fine automatically. The transaction will also be deemed invalid with all its legal consequences insofar as the Turkish jurisdiction is concerned (although the invalidity point is more a theoretical than a real legal risk).

b) In addition to the monetary fine applicable to the violation of the suspension requirement above, if the Competition Board decides that the transaction is within the scope of Article 7 of the Law No. 4054, *i.e.*, if the transaction is deemed problematic under the SIEC test applicable in Turkey, Article 11 of Law No. 4054 allows the Authority to (i) *ex officio* initiate an investigation in case the suspension requirement is violated, (ii) order structural and/or behavioural remedies to restore the situation as before the closing (*restitution in integrum*) and (iii) impose a turnover-based fine on the incumbent parties (up to 10% of the incumbent parties' annual Turkish turnover including the export sales). Each of the executive members of the incumbent parties who are deemed to have played a significant role in the infringement may also be fined up to 5% of the fine imposed on the incumbent parties, as a result of implementing a problematic transaction without obtaining approval of the Board.

In such a scenario, if the parties have already closed the transaction, the Board would impose a turnover-based administrative monetary fine (of up to 10% of the incumbent parties' annual Turkish turnover including the export sales) on the incumbent parties. The wording of Law No. 4054 allows the Board to impose this fine, in case a transaction, which has been found to result in a significant lessening of effective competition within the relevant markets in Turkey, is closed.

Furthermore, if the transaction in question is found to be problematic, the Turkish Competition Board may deem it necessary to take interim measures to protect the competition in the relevant market.

[4] *Id*, at 4.

Accordingly, if the parties do not comply with the measures the Board has taken, as per Article 17 of the Law No. 4054, the Board may further impose a daily administrative fine of 0.05% of annual gross revenues of the relevant undertakings in Turkey (including the export sales), until the Parties comply with the Board's decision.

If a notifiable transaction has not been notified, the Competition Board may investigate the transaction on its own initiative, regardless of how it became aware of the transaction.

For the purpose of fine calculation, the Competition Board will rely on the Turkish turnover (including export sales) that is achieved in the financial year preceding the date of the fining decision. If this is not possible, the Competition Board will rely on the turnover generated in the financial year closest to the date of the fining decision.

Additionally, there is an explicit suspension requirement set out under Article 11 of Law No. 4054 and Article 10(5) of Communiqué No. 2010/4. Accordingly, the Turkish merger control regime classifies the implementation of a notifiable transaction before obtaining the approval of the Board as "gun-jumping". Closing of a notifiable transaction before obtaining the approval of the Board may trigger the administrative monetary fines and/or legal risks and structural/behavioural remedies that are set out under Article 16 of Law No. 4054, as explained above.

As per Article 11 of the Law No. 4054, the implementation of a notifiable transaction in Turkey is suspended until clearance by the Board is obtained. Therefore, a notifiable merger or an acquisition –by law– cannot be legally valid until the approval of the Board, and such notifiable transaction cannot be closed in Turkey before the clearance of the Board.

Please also note that the legal consequences of violation of the suspension requirement are also applicable with respect to foreign-to-foreign transactions. In other words, when it comes to violation of suspension requirement, the Board does not treat the transactions differently in terms of sanctions and imposes administrative fines to foreign-to-foreign/pure offshore transactions as well. The Fairless-Simsmetal (*09-42/1057-269, 16.09.2009*) and Longsheng (*11-33/723-226, 02.06.2011*) decisions are clear examples whereby the Board imposed turnover based monetary fines on the foreign-to-foreign transactions. Based on this, if the parties violate the suspension requirement (close the transaction before or without the approval of the Board) and the violation of the suspension requirement is detected, the Authority is obliged to enforce the administrative monetary fine applicable for gun-jumping on the acquirer (a turnover-based administrative monetary fine based on the Turkish turnover including the export sales generated in the financial year preceding the date of the fining decision at a rate of 0.1%).

In case of a merger, both merging parties would be sanctioned, in the event of gun-jumping. In case of an acquisition, the fine would be imposed solely on the acquirer. In case of formation of a joint venture (which is deemed an acquisition under Turkish merger control regime), both controlling parents would be considered as "acquirers" and face the prospect of administrative monetary fine.

As a final note, the wording of article 16 of Law No. 4054 does not give the

Competition Board discretion on whether to impose a monetary fine in case of a violation of suspension requirement. In other words, once the violation of the suspension requirement is detected, the monetary fine will be imposed automatically.

2. The Board's Decisions

Against this background and based on the review over the decisions of the Competition Board (among the decisions published at the official web-site of the Authority), the Competition Board did not impose any monetary fines for gun jumping in 2021, while in 2020, the Competition Board imposed a monetary fine in one case amounting to 0.1% of Brookfield's 2018 Turkish turnover because of closing the transaction before obtaining the approval of the Competition Board[5].

As mentioned above, the foreign to foreign nature of the transaction does not prevent imposition of any administrative monetary fine (either for breach of the suspension requirement or for violation of Article 7 of Law No. 4054 in and of itself). In this regard, there are many cases in which the Competition Board imposed fine for the gun-jumping on foreign to foreign mergers.

The Authority does not provide specific statistical information on the number of cases in which it imposed fines to the parties for gun jumping on foreign-foreign mergers in the past 5 years. That said, based on the review of the past decisions of the Competition Board that are published on the official web-site of the Authority, in the last 5 years, the Competition Board did impose fines for gun jumping in foreign to foreign transactions[6].

In its most recent precedent on gun-jumping, in *Brookfield/Johnson Controls* the Competition Board ultimately granted an unconditional approval to the transaction but also imposed a monetary fine amounting to 0.1% of Brookfield's 2018 Turkish turnover because of closing the transaction before obtaining the approval of the Competition Board.

Apart from this, in the not so distant past, in *Labelon/A-Tex Holding* [7] the Competition Board ultimately granted an unconditional approval to the transaction but also imposed a monetary fine amounting to 0.1% of Labelon's 2015 Turkish turnover. In *Simsmetal/Fairless* [8] where both parties were only exporters into Turkey, the Competition Board imposed an administrative monetary fine on Simsmetal East LLC (*i.e.*, the acquirer) as per Article 16 of Law No. 4054, totalling %0.1 of Simsmetal East LLC's gross revenue generated in the fiscal year 2009, because of closing the transaction before obtaining the approval of the Competition Board.

Similarly, the Competition Board's *Longsheng* [9], *Flir Systems Holding/Raymarine PLC* [10], and *CVRD Canada/Inco* [11] decisions are examples whereby the Competition Board imposed a turnover-based monetary fine based on the violation of the suspension requirement in a foreign to foreign transaction.

[5] The Board's *Brookfield Asset Management Inc/Johnson Controls* decision numbered 20-21/278-132 and dated 30.04.2020.

[6] The Board's *Brookfield Asset Management Inc/Johnson Controls* decision numbered 20-21/278-132 and dated 30.04.2020.

[7] The Board's decision numbered 16-42/693-311 and dated 06.12.2016.

[8] The Board's decision numbered 09-42/1057-26 and dated 16.09.2009.

[9] The Board's decision numbered 11-33/723-226 and dated 02.06.2011.

[10] The Board's decision numbered 10-44/762-246 and dated 17.06.2010.

[11] The Board's decision numbered 10-49/949-332 and dated 08.07.2010.

VI. Conclusion

The Turkish merger control regime has changed over the past decades with the legislative amendments and the decisional practise of the Board. The most recent changes introduced by the Amendment Communiqué have created a new regime for the Turkish merger control rules and the scope of the transactions that are notifiable to the Authority.

Competition Authority Raises the Jurisdictional Turnover Thresholds and Puts Transactions in Certain Markets Under the Spotlight[12]

I. Introduction

Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 (Communiqué No. 2010/4) on the Mergers and Acquisitions Subject to the Approval of the Competition Board (the Amendment Communiqué) was published on the *Official Gazette* on 4 March 2022 and will enter into force on 4 May 2022.

This article provides an overview of the substantive amendments introduced by the Amendment Communiqué.

II. Raised merger control thresholds

The Amendment Communiqué raised the Turkish merger control thresholds. Further to the Amendment Communiqué, if a transaction is closed (ie, the concentration is realised) as of or after 4 May 2022, that transaction will be required to be notified in Turkey if one of the following alternative turnover thresholds is met:

- the aggregate turnover of the transaction parties exceeds 750 million Turkish Liras (approximately EUR 7.19 million or USD 84.9 million) and the turnover of at least two of the transaction parties each exceeds 250 million Turkish Liras (approximately EUR 23.9 million or USD 28.3 million); or

- the turnover of the transferred assets or businesses in acquisitions exceeds 250 million Turkish Liras and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion Turkish Liras (approximately EUR 287.9 million USD 339.7 million) or the Turkish turnover of any of the parties in mergers exceeds 250 million Turkish Liras and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion Turkish Liras.

In summary, the Amendment Communiqué updates the Turkish merger control thresholds as follows:

- the previous threshold of 30 million Turkish Liras (approximately EUR 2.8 million or USD 3.3 million) has been raised to 250 million Turkish Liras;

- the previous threshold of 100 million Turkish Liras (approximately EUR 9.5 million or USD 11.3 million) has been raised to 750 million Turkish Liras (approximately EUR 71.9 million or USD 84.9 million); and

[12] This article first appeared in ILO as "*Competition Authority prepares to raise jurisdictional turnover thresholds and catch killer acquisitions" (https://www.lexology.com/commentary/competition-antitrust/turkey/elig-gurkaynak-attorneys-at-law/competition-authority-prepares-to-raise-jurisdictional-turnover-thresholds-and-catch-killer-acquisitions)*

- the previous threshold of 500 million Turkish Liras (approximately EUR 47.9 million or USD 56.6 million) has been raised to 3 billion Turkish Liras.

(All currency conversions are based on the Turkish Central Bank's applicable average buying exchange rates for the financial year 2021.) Before 4 May 2022, the current regime will apply.

These new notification thresholds have updated the previous thresholds, which had remained in force for more than nine years. During that period, the exchange and inflation rates increased significantly. Based on the US dollar and euro equivalents of the applicable thresholds at the time of their introduction, the update will serve as an equaliser, as the new dollar and euro thresholds are close to the levels that were applicable when the previous updates were enacted.

The previous update on notification thresholds was made in February 2013, which means that the national competition law enforcement regime has used the same thresholds for more than nine years. Before the February 2013 amendments, the older figures had remained in use for only a little more than two years.

In February 2013, the US dollar and euro equivalent of the applicable thresholds were, respectively, in the vicinity of:

- USD 57 million – EUR 42 million;
- USD 17 million – EUR 13 million; and
- USD 286 million – EUR 210 million.

The corresponding figures in dollars and euros are now very close to the figures that were applicable in February 2013:

- USD 53 million – EUR 48 million;
- USD 18 million – EUR 16 million; and
- USD 212 million – EUR 192 million.

Therefore, the Amendment Communiqué has closely aligned the figures with their 2013 levels in order to correspond with the increases in exchange and inflation rates.

III. New merger control regime for undertakings active in certain markets/sectors

Due to both rapid changes in the technology industry, the Amendment Communiqué has also introduced a new merger control regime for undertakings active in certain markets/sectors. Further to the Amendment Communiqué, the "Turkish turnover threshold of 250 million Turkish Liras" mentioned above will not be sought for the acquired undertakings active in the numerous fields or assets related to these fields if they:

- operate in the Turkish geographical market;
- conduct research and development activities in the Turkish geographical market; or
- provide services to Turkish users.

The fields and related assets include:

- digital platforms;
- software or gaming software;
- financial technologies;

- biotechnology;
- pharmacology;
- agricultural chemicals; and
- health technologies.

IV. Turnover calculations

The Amendment Communiqué also updated the rules that apply to the calculation of turnover of financial institutions in accordance with recent changes to financial regulations. The recent updates to article 9 of Communiqué No. 2010/4 are as follows:

- the calculation of financial institutions' turnovers. The Amendment Communiqué aligns the wording and terms in view of the applicable banking and financial regulation – namely, it excludes the term "participation banks" and refers to the term "banks" in general, which covers all legal forms of banks; and
- the names and references of the relevant regulations issued by the Banking Regulatory and Supervisory Agency and the Capital Markets Board.

V. E-Devlet

Under Communiqué No. 2010/4, the notification form and its attached documents are submitted to the Competition Authority's headquarters in Ankara by physical delivery. The recent updates allow notifying parties to submit the notification form via e-Devlet, an elaborate system of web-based services, one of which is electronic submission. E-Devlet was already made available for submissions, with increased usage during the pandemic period. Communiqué No. 2010/4 explicitly mentions this alternative methods of submission in order to make it official.

VI. Dominance testing

In June 2020, the dominance test that is applicable to the review of mergers was reformulated from the "creation or strengthening of a dominant position, thereby significantly lessening of competition" test into the significant impediment to effective competition (SIEC) test. In order to align with this modification in the underlying regulation, the Amendment Communiqué now provides that:

> *[m]ergers and acquisitions which would result in a significant lessening of effective competition within the entirety or a portion of the country, particularly in the form of creating or strengthening a dominant position are prohibited.*

This reflects the recently introduced SIEC test, as the wording of "one or more undertakings with a view to creating a dominant position" has been replaced with "particularly in the form of creating dominant position".

VII. Notification form

The Amendment Communiqué also revises the structure and content of the notification form, which is annexed to the Amendment Communiqué. In terms of the definition of "affected markets", the Amendment Communiqué excludes the expression: "possibly affected by the transaction subject to the notification"; instead, it provides that:

> *in Turkey affected markets consist of all the relevant product markets and geographical markets where a) two*

or more of the parties are engaged in commercial activities in the same product market (horizontal relationship), b) At least one of the parties are engaged in commercial activities in the downstream or upstream market of any product market in which the other operates (vertical relationship).

Communiqué No. 2010/4 provided that the information requested under sections 6, 7 and 8 of the notification form (*e.g.*, import conditions, supply structure, demand structure, market entry conditions and potential competition and efficiency gains) was not required in cases where:

- the aggregate market share of the parties did not exceed 20% in terms of the horizontal relationships; and
- the market share of one of the parties did not exceed 25% in terms of the vertical relationships within the affected markets.

On the other hand, the new template form requires parties to provide some of the detailed information that was sought under sections 6, 7 and 8 of the former template form in cases where there are affected markets in Turkey, irrespective of market shares held by the parties in such markets.

Further, the Amendment Communiqué requires that information subject to a request for confidential treatment be highlighted in red, which was not necessary on the previous template notification form.

The template form emphasises that the transaction value reflects the value of all assets and pecuniary and non-pecuniary benefits (denominated in Turkish Liras) that the acquirer has acquired or will acquire from the seller within the scope of the transaction. In this respect, the transaction value now includes all pecuniary payments to be made within the scope of:

- the transaction;
- voting rights;
- securities;
- movable and immovable assets;
- conditional payments;
- additional payments for non-compete obligations (if any); and
- obligations of the acquirer.

VIII. Comment

Updated local turnover thresholds of notification were due for a long time. The last update was nine years ago, in 2013. The adjustment of the applicable thresholds (*i.e.*, an increase by five times for the worldwide turnover thresholds and by seven times for the Turkish turnover thresholds) has returned the equivalent value in US dollars and euros close to their 2013 levels. However, the Competition Authority has now clarified with the threshold exemptions in the new regulation that it wants to review the transactions of companies that reach the following markets (and users), regardless of whether they exceed Turkish thresholds:

- digital platforms;
- software;
- fintech;
- biotech;
- pharmacology;

- agriculture chemicals; and
- health technology.

Analysis of Categorically Notifiable Sectors Under the New Merger Control Regime in Turkey[13]

As announced last week, the Turkish Competition Authority has recently amended the legislation relating to the Turkish merger control regime through an amendment communiqué. This piece of additional analysis is to explore the scope of sectors that will be exempt from certain local turnover thresholds, and therefore the concentrations in which will be notifiable in Turkey regardless of magnitude of Turkish operations.

Before May 4th, the current regime will apply. If a transaction will be closed (*i.e.* the concentration will be realized) as of or after May 4, 2022, that transaction will be required to be notified in Turkey if one of the following alternative turnover thresholds is met:

a. The combined aggregate Turkish turnover of all the transaction parties exceeds TL 750 million (approximately EUR 71.9 million or USD 84.9 million) and the Turkish turnover of each of at least two of the transaction parties exceeds TL 250 million (approximately EUR 23.9 million or USD 28.3 million), or

b. The Turkish turnover of the transferred assets or businesses in acquisitions exceeds TL 250 million (approximately EUR 23.9 million or USD 28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 287.9 million or USD 339.7 million) OR the Turkish turnover of any of the parties in mergers exceeds TL 250 million (approximately EUR 23.9 million or USD 28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 287.9 million or USD 339.7 million)

That said, the Amendment Communiqué also introduced a new merger control regime for undertakings active in certain markets/sectors. Further to the Amendment Communiqué, "the TL 250 million Turkish turnover thresholds" mentioned above will not be sought for the acquired undertakings *active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies or assets related to these fields, if they* (i) operate in the Turkish geographical market or (ii) conduct research and development activities in the Turkish geographical market or (iii) provide services to Turkish users.

To clarify the meaning and the scope of these sectors exempted from the use of local turnover thresholds (and therefore have been rendered almost categorically notifiable in Turkey), please find below a non-exhaustive list of activities which correspond to the sectors referred to in the definition of the Amendment

[13] This article first appeared in Mondaq as "*Analysis on the Scope of Sectors Where Concentrations Will Almost Categorically Be Notifiable in Turkey After 4 May 2022 Under The New Regime*" (https://www.mondaq.com/turkey/antitrust-eu-competition-/1169770/analysis-on-the-scope-of-sectors-where-concentrations-will-almost-categorically-be-notifiable-in-turkey-after-4-may-2022-under-the-new-regime)

Communiqué. Please note that ELIG Gürkaynak drew up the list below merely in an effort to provide insight and guidance in identifying this scope, thus the list is not exhaustive. Identification of the scope of activity of the client should in any case be carried out on a case-by-case basis in accordance with the definitions of the Amendment Communiqué provided above, and the information to be obtained from the client as to the areas of activity of the transaction parties:

a. ***Digital platforms:*** Digital platforms are systems and interfaces that form a commercial network or market facilitating business-to-business (B2B), business-to-customer (B2C) or even customer-to-customer (C2C) transactions. Digital platforms include but are not limited to social media platforms, knowledge sharing platforms, media sharing platforms, service-oriented platforms, online marketplaces and digital content aggregators.

b. ***Software and gaming software:*** Software relates to a set of instructions, data or programs used to operate computers and execute specific tasks, while gaming software concerns software customised for gaming. Software and gaming software include but are not limited to the activities below.

    i. writing and publishing of software and gaming software (including publishing of computer games) (NACE Rev. 2: 58.2),

    ii. wholesale, retail sale, distribution and marketing of software (both customised and non-customised) and gaming software (NACE Rev. 2: 46.51, 47.41),

    iii. reproduction from master copies of software (NACE Rev. 2: 18.2),

    iv. manufacture of electronic games with fixed (non-replaceable) software (NACE Rev. 2: 32.40),

    v. translation or adaptation of software and gaming software (NACE Rev. 2: 58.29),

    vi. computer programming activities (designing the structure and content of, and/or writing the computer code necessary to create and implement systems software (including updates and patches), software applications (including updates and patches), databases, web pages, customising of software (NACE Rev. 2: 62.01),

    vii. software installation services (NACE Rev. 2: 62.09).

c. ***Financial technologies:*** Financial technologies refer to technology-enabled innovation in financial services. Undertakings which sit at the crossroads of financial services and technology fall into the scope of this definition. In brief, the term "financial technologies" is used to define software and other technology aiming to modify, enhance or automate financial services for businesses or consumers. Financial technologies include but are not limited to technologies and software developed for the following fields:

    i. financial services activities (monetary intermediation,

financial leasing, other credit granting) (NACE Rev. 2: 64.1, 64.9),

ii. insurance, reinsurance, pension funding (NACE Rev. 2: 65),

iii. activities auxiliary to financial services, insurance and pension funding (administration of financial markets (futures commodity contracts exchanges, securities exchanges, stock exchanges, stock or commodity options exchanges), security and commodity contracts brokerage (dealing in financial markets on behalf of others (e.g. stock broking) and related activities, securities brokerage, commodity contracts brokerage, activities of bureaux de change etc.), risk and damage evaluation, activities of insurance agents and brokers, fund management activities, financial transaction processing and settlement, investment advisory activities, activities of mortgage advisers and brokers (NACE Rev. 2: 66),

iv. accounting, bookkeeping and auditing activities, tax consultancy (recording of commercial transactions from businesses or others, preparation or auditing of financial accounts, examination of accounts and certification of their accuracy, preparation of personal and business income tax returns, advisory activities and representation on behalf of clients before tax authorities) (NACE Rev. 2: 69.2),

v. digital lending, payments, blockchain and digital wealth management.

d. ***Biotechnology***: Biotechnology refers to the technology that utilizes biological systems, living organisms or parts of this to develop or create different products. The sector includes but is not limited to the activities below:

i. research and experimental development on biotechnology (NACE Rev. 2: 72.11),

- DNA/RNA (genomics, pharmacogenomics, gene probes, genetic engineering, DNA/RNA sequencing/ synthesis/ amplification, gene expression profiling, and use of antisense technology),

- proteins and other molecules (sequencing/synthesis/engineering of proteins and peptides (including large molecule hormones); improved delivery methods for large molecule drugs; proteomics, protein isolation and purification, signalling, identification of cell receptors),

- cell and tissue culture and engineering (cell/tissue culture, tissue engineering (including tissue scaffolds and biomedical engineering), cellular fusion, vaccine/immune stimulants, embryo manipulation,

- process biotechnology techniques (fermentation using bioreactors, bioprocessing, bioleaching, biopulping, biobleaching, biodesulphurisation,

bioremediation, biofiltration and phytoremediation,

- gene and RNA vectors: gene therapy, viral vectors),
- bioinformatics (construction of databases on genomes, protein sequences, modelling complex biological processes, including systems biology),
- nanobiotechnology (applies the tools and processes of nano/microfabrication to build devices for studying biosystems and applications in drug delivery, diagnostics etc.),

ii. manufacture of biotech pharmaceuticals such as plasma derivatives (NACE Rev. 2: 21.20).

e. ***Pharmacology:*** Pharmacology, a biomedical science, deals with the research, discovery, and characterization of chemicals which show biological effects and the elucidation of cellular and organismal function in relation to these chemicals. In other words, pharmacology refers to the science of how drugs act on biological systems and how the body responds to the drug. The study of pharmacology encompasses the sources, chemical properties, biological effects and therapeutic uses of drugs. Pharmacology includes but is not limited to the biomedical studies and R&D activities conducted in the areas below:

i. Pharmacodynamics (relationship of drug concentration and the biologic effect (physiological or biochemical),

ii. Pharmacokinetics (interrelationship of the absorption, distribution, binding, biotransformation, and excretion of a drug and its concentration at its locus of action),

iii. Clinical Pharmacology and Therapeutics (understanding what a drug is doing to the body, what happens to a drug in the body, and how drugs work in terms of treating a particular disease),

iv. Pharmacotherapy (treatment of a disorder or disease with medication),

v. Neuropharmacology (understanding how drugs affect cellular function in the nervous system),

vi. Pyscopharmacology (use of medications in treating mental disorders),

vii. Cardiovascular pharmacology (understanding how drugs influence the heart and vascular system.),

viii. Molecular pharmacology (investigates the molecular mode of action of drugs, among others using genetic and molecular biology methods),

ix. Radiopharmacology (study and preparation of radioactive pharmaceuticals),

x. Manufacture and R&D of pharmaceuticals (antisera and other blood fractions, vaccines, diverse medicaments, including homeopathic preparations), pharmaceutical preparations and

medicinal chemicals (manufacture of medicinal active substances to be used for their pharmacological properties in the manufacture of medicaments: antibiotics, basic vitamins, salicylic and O-acetylsalicylic acids etc.); wholesale, retail sale, distribution and marketing of pharmaceuticals, pharmaceutical preparations and medicinal chemicals; growing of drug and narcotic crops (NACE Rev. 2: 21.1 and 21.2).

f. ***Agricultural chemicals:*** Agricultural chemicals refer to chemicals used in agriculture to control pests and disease or control and promote growth; such as pesticides, herbicides, fungicides, insecticides, and fertilizers. The sector includes but is not limited to the activities below:

   i. mining of chemical and fertiliser minerals (NACE Rev. 2: 08.91),

   ii. support activities for other mining and quarrying (where it relates to agricultural chemicals and fertilizers) (NACE Rev. 2: 09.90),

   iii. manufacture of fertilisers (straight or complex nitrogenous, phosphatic or potassic fertilisers; urea, crude natural phosphates and crude natural potassium salts), nitrogen compounds (nitric and sulphonitric acids, ammonia, ammonium chloride, ammonium carbonate, nitrites and nitrates of potassium) (NACE Rev. 2: 20.15),

   iv. manufacture of organic and inorganic basic chemicals (where it relates to agricultural chemicals and fertilizers) (NACE Rev. 2: 20.13, 20.14),

   v. manufacture of pesticides and other agrochemical products (manufacture of insecticides, rodenticides, fungicides, herbicides, acaricides, molluscicides, biocides, manufacture of anti-sprouting products, plant growth regulators, manufacture of disinfectants (for agricultural and other use) (NACE Rev. 2: 20.2),

   vi. wholesale, retail sale, distribution and marketing of fertilisers and agrochemical products (NACE Rev. 2: 46.75).

g. ***Health technologies:*** Health technologies are the application of organized knowledge and skills in the form of medicines, medical devices, vaccines, procedures and systems developed to solve a health problem and improve quality of life. They refer to any technology, including medical devices, IT systems, algorithms, artificial intelligence (AI), cloud and blockchain, designed to support healthcare organizations and patients. Health technologies include but are not limited to technologies and software developed or being developed for the following fields:

   i. human health activities (hospital activities, medical (medical consultation and treatment) and dental practice activities (dentistry, endodontic and pediatric dentistry; oral pathology, orthodontic activities) (NACE Rev. 2: 86),

   ii. residential healthcare activities (residential nursing care

activities, residential care activities for mental retardation, mental health and substance abuse, residential care activities for the elderly and disabled) (NACE Rev. 2: 87),

iii. manufacture of medical and dental instruments (e.g. operating tables, examination tables, hospital beds with mechanical fittings, dentists' chairs, surgical appliances) (NACE Rev. 2: 32.5).

Sectoral Threshold Exception Explained: Concentrations in Certain Sectors Are Now Expected to be Way More Frequently Notifiable in Turkey[14]

I. Introduction

On March 4, 2022 the Turkish Competition Authority ("***Authority***") published the Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board ("***Amendment Communiqué***"). The Amendment Communiqué introduces certain new regulations concerning the Turkish merger control regime, which will fundamentally affect the notifiabiliy analysis of the transactions and the merger control notifications submitted to the Authority.

Pursuant to Article 7 of the Amendment Communiqué, the changes introduced by the Amendment Communiqué will become effective two months after the Amendment Communiqué's promulgation on the Official Gazette. Accordingly, the changes that Amendment Communiqué entails will be effective May 4, 2022 onwards. In this sense, the regulations introduced by the Amendment Communiqué, including the threshold exemptions for certain sectors, will not be applicable to the merger control notifications concerning the transactions closed prior to this date.

Prior to delving into the details of the Amendment Communiqué, it is important to note that two of the most significant developments that the Amendment Communiqué entails, inter alia, are the introduction of threshold exemption for undertakings active in certain markets/sectors and the increase of the applicable turnover thresholds for the concentrations that require mandatory merger control filing before the Authority. This article specifically aims to shed light on this new turnover thresholds and application of threshold exemption for certain sectors.

II. New Thresholds Introduced by the Amendment Communiqué

As per the Amendment Communiqué, if a transaction is closed (*i.e.* the concentration is realised) as of or after 4 May 2022, the transaction will be required to be notified in Turkey if one of the following increased turnover thresholds is met (all currency conversions are based on the Turkish Central Bank's applicable average buying exchange rates for the financial year 2021):

a) The aggregate Turkish turnover of the transaction parties exceeding TL 750 million (approximately EUR 71.9 million and USD 84.9 million) and the Turkish turnover of at least two of the transaction parties each exceeding TL 250

[14] This article first appeared in Mondaq (https://www.mondaq.com/turkey/antitrust-eu-competition-/1177060/sectoral-threshold-exception-explained-concentrations-in-certain-sectors-are-now-expected-to-be-way-more-frequently-notifiable-in-turkey)

million (approximately EUR 23.9 million and USD 28.3 million), or

b) The Turkish turnover of the transferred assets or businesses in acquisitions exceeding TL 250 million (approximately EUR 23.9 million and USD 28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 287.9 million and USD 339.7 million), or (ii) the Turkish turnover of any of the parties in mergers exceeding TL 250 million (approximately EUR 23.9 million and USD 28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approximately EUR 287.9 million and USD 339.7 million).

Accordingly, the Amendment Communiqué increased the previous thresholds of (i) 30 million Turkish Liras (approximately EUR 2.8 million or USD 3.3 million) to 250 million Turkish Liras (approximately EUR 23.9 million and USD 28.3 million); (ii) 100 million Turkish Liras (approximately EUR 9.5 million or USD 11.3 million) to 750 million Turkish Liras (approximately EUR 71.9 million or USD 84.9 million); and (iii) 500 million Turkish Liras (approximately EUR 47.9 million or USD 56.6 million) to 3 billion Turkish Liras (approximately EUR 287.9 million and USD 339.7 million).

Furthermore, the Amendment Communiqué introduced a threshold exemption for the undertakings active in certain markets/sectors. Pursuant to the Amendment Communiqué, "the TL 250 million Turkish turnover thresholds" mentioned above will not be sought for the acquired undertakings active in or assets related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies ("***Target Company(ies)***"), if they (i) operate in the Turkish geographical market or (ii) conduct research and development activities in the Turkish geographical market or (iii) provide services to Turkish users.

It is also noteworthy that the Amendment Communiqué does not seek a Turkish nexus in terms of the activities which renders the threshold exemption. In other words, it would be sufficient for the Target Company to be active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies anywhere in the world for the threshold exemption to become applicable, provided that the Target Company (a) generates revenue from customers located in Turkey or (b) conduct R&D activities in Turkey or (c) provide services to the Turkish users in any fields other than abovementioned ones. Accordingly, the Amendment Communiqué does not require (a) generating revenue from customers located in Turkey or (b) conducting R&D activities in Turkey or (c) providing services to the Turkish users concerning the fields listed above for the exemption on the local turnover thresholds to become applicable.

III. The Sectors Exempted from the Use of Local Turnover Thresholds

To clarify the meaning and the scope of these sectors exempted from the use of local turnover thresholds, a non-exhaustive

list of activities which correspond to the sectors referred to in the definition of the Amendment Communiqué is provided below. The below list reflects a mere effort to provide insight and guidance in identifying this scope, thus the list is not exhaustive:

a. Digital platforms: Digital platforms are systems and interfaces that form a commercial network or market facilitating business-to-business (B2B), business-to-customer (B2C) or even customer-to-customer (C2C) transactions. Digital platforms include but are not limited to social media platforms, knowledge sharing platforms, media sharing platforms, service-oriented platforms, online marketplaces and digital content aggregators.

b. Software and gaming software: Software relates to a set of instructions, data or programs used to operate computers and execute specific tasks, while gaming software concerns software customised for gaming. Software and gaming software include but are not limited to the activities below:

   i. writing and publishing of software and gaming software (including publishing of computer games) (NACE Rev. 2: 58.2),

   ii. wholesale, retail sale, distribution and marketing of software (both customised and non-customised) and gaming software (NACE Rev. 2: 46.51, 47.41),

   iii. reproduction from master copies of software (NACE Rev. 2: 18.2),

   iv. manufacture of electronic games with fixed (non-replaceable) software (NACE Rev. 2: 32.40),

   v. translation or adaptation of software and gaming software (NACE Rev. 2: 58.29),

   vi. computer programming activities (designing the structure and content of, and/or writing the computer code necessary to create and implement systems software (including updates and patches), software applications (including updates and patches), databases, web pages, customising of software (NACE Rev. 2: 62.01),

   vii. software installation services (NACE Rev. 2: 62.09).

c. Financial technologies: Financial technologies refer to technology-enabled innovation in financial services. Undertakings which sit at the crossroads of financial services and technology fall into the scope of this definition. In brief, the term "financial technologies" is used to define software and other technology aiming to modify, enhance or automate financial services for businesses or consumers. Financial technologies include but are not limited to technologies and software developed for the following fields:

   i. financial services activities (monetary intermediation, financial leasing, other credit granting) (NACE Rev. 2: 64.1, 64.9),

   ii. insurance, reinsurance, pension funding (NACE Rev. 2: 65),

iii. activities auxiliary to financial services, insurance and pension funding (administration of financial markets (futures commodity contracts exchanges, securities exchanges, stock exchanges, stock or commodity options exchanges), security and commodity contracts brokerage (dealing in financial markets on behalf of others (e.g. stock broking) and related activities, securities brokerage, commodity contracts brokerage, activities of bureaux de change etc.), risk and damage evaluation, activities of insurance agents and brokers, fund management activities, financial transaction processing and settlement, investment advisory activities, activities of mortgage advisers and brokers (NACE Rev. 2: 66),

iv. accounting, bookkeeping and auditing activities, tax consultancy (recording of commercial transactions from businesses or others, preparation or auditing of financial accounts, examination of accounts and certification of their accuracy, preparation of personal and business income tax returns, advisory activities and representation on behalf of clients before tax authorities) (NACE Rev. 2: 69.2),

v. digital lending, payments, blockchain and digital wealth management.

d. Biotechnology: Biotechnology refers to the technology that utilizes biological systems, living organisms or parts of this to develop or create different products. The sector includes but is not limited to the activities below:

i. research and experimental development on biotechnology (NACE Rev. 2: 72.11),

- DNA/RNA (genomics, pharmacogenomics, gene probes, genetic engineering, DNA/RNA sequencing/synthesis/amplification, gene expression profiling, and use of antisense technology),
- proteins and other molecules (sequencing/synthesis/engineering of proteins and peptides (including large molecule hormones); improved delivery methods for large molecule drugs; proteomics, protein isolation and purification, signalling, identification of cell receptors),
- cell and tissue culture and engineering (cell/tissue culture, tissue engineering (including tissue scaffolds and biomedical engineering), cellular fusion, vaccine/immune stimulants, embryo manipulation,
- process biotechnology techniques (fermentation using bioreactors, bioprocessing, bioleaching, biopulping, biobleaching, biodesulphurisation, bioremediation, biofiltration and phytoremediation,
- gene and RNA vectors: gene therapy, viral vectors),
- bioinformatics (construction of databases on genomes, protein sequences, modelling complex

biological processes, including systems biology),

- nanobiotechnology (applies the tools and processes of nano/microfabrication to build devices for studying biosystems and applications in drug delivery, diagnostics etc.),

ii. manufacture of biotech pharmaceuticals such as plasma derivatives (NACE Rev. 2: 21.20) .

e. Pharmacology: Pharmacology, a biomedical science, deals with the research, discovery, and characterization of chemicals which show biological effects and the elucidation of cellular and organismal function in relation to these chemicals. In other words, pharmacology refers to the science of how drugs act on biological systems and how the body responds to the drug. The study of pharmacology encompasses the sources, chemical properties, biological effects and therapeutic uses of drugs. Pharmacology includes but is not limited to the biomedical studies and R&D activities conducted in the areas below:

i. Pharmacodynamics (relationship of drug concentration and the biologic effect (physiological or biochemical),

ii. Pharmacokinetics (interrelationship of the absorption, distribution, binding, biotransformation, and excretion of a drug and its concentration at its locus of action),

iii. Clinical Pharmacology and Therapeutics (understanding what a drug is doing to the body, what happens to a drug in the body, and how drugs work in terms of treating a particular disease),

iv. Pharmacotherapy (treatment of a disorder or disease with medication),

v. Neuropharmacology (understanding how drugs affect cellular function in the nervous system),

vi. Pyscopharmacology (use of medications in treating mental disorders),

vii. Cardiovascular pharmacology (understanding how drugs influence the heart and vascular system.),

viii. Molecular pharmacology (investigates the molecular mode of action of drugs, among others using genetic and molecular biology methods),

ix. Radiopharmacology (study and preparation of radioactive pharmaceuticals),

x. Manufacture and R&D of pharmaceuticals (antisera and other blood fractions, vaccines, diverse medicaments, including homeopathic preparations), pharmaceutical preparations and medicinal chemicals (manufacture of medicinal active substances to be used for their pharmacological properties in the manufacture of medicaments: antibiotics, basic vitamins, salicylic and O-acetylsalicylic

acids etc.); wholesale, retail sale, distribution and marketing of pharmaceuticals, pharmaceutical preparations and medicinal chemicals; growing of drug and narcotic crops (NACE Rev. 2: 21.1 and 21.2).

f. Agricultural chemicals: Agricultural chemicals refer to chemicals used in agriculture to control pests and disease or control and promote growth; such as pesticides, herbicides, fungicides, insecticides, and fertilizers. The sector includes but is not limited to the activities below:

   i. mining of chemical and fertiliser minerals (NACE Rev. 2: 08.91),

   ii. support activities for other mining and quarrying (where it relates to agricultural chemicals and fertilizers) (NACE Rev. 2: 09.90),

   iii. manufacture of fertilisers (straight or complex nitrogenous, phosphatic or potassic fertilisers; urea, crude natural phosphates and crude natural potassium salts), nitrogen compounds (nitric and sulphonitric acids, ammonia, ammonium chloride, ammonium carbonate, nitrites and nitrates of potassium) (NACE Rev. 2: 20.15),

   iv. manufacture of organic and inorganic basic chemicals (where it relates to agricultural chemicals and fertilizers) (NACE Rev. 2: 20.13, 20.14),

   v. manufacture of pesticides and other agrochemical products (manufacture of insecticides, rodenticides, fungicides, herbicides, acaricides, molluscicides, biocides, manufacture of anti-sprouting products, plant growth regulators, manufacture of disinfectants (for agricultural and other use) (NACE Rev. 2: 20.2),

   vi. wholesale, retail sale, distribution and marketing of fertilisers and agrochemical products (NACE Rev. 2: 46.75).

g. Health technologies: Health technologies are the application of organized knowledge and skills in the form of medicines, medical devices, vaccines, procedures and systems developed to solve a health problem and improve quality of life. They refer to any technology, including medical devices, IT systems, algorithms, artificial intelligence (AI), cloud and blockchain, designed to support healthcare organizations and patients. Health technologies include but are not limited to technologies and software developed or being developed for the following fields:

   i. human health activities (hospital activities, medical (medical consultation and treatment) and dental practice activities (dentistry, endodontic and pediatric dentistry; oral pathology, orthodontic activities) (NACE Rev. 2: 86),

   ii. residential healthcare activities (residential nursing care activities, residential care activities for mental retardation, mental health and substance abuse, residential care activities for the elderly and disabled) (NACE Rev. 2: 87),

iii. manufacture of medical and dental instruments (e.g. operating tables, examination tables, hospital beds with mechanical fittings, dentists' chairs, surgical appliances) (NACE Rev. 2: 32.5),

If the Target Company's activities fall into the non-exhaustive scope of the above markets/sectors, the thresholds that would be applicable would be: "The aggregate Turkish turnover of the transaction parties exceeding TL 750 million (approximately EUR 71.9 million or USD 84.9 million)" or "the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (for 2021 approximately EUR 287.9 million or USD 339.7 million)". Accordingly, when an undertaking that falls within the definition and criteria above is being acquired, the transaction would be notifiable in case the aggregate Turkish turnover of the Target Company and the acquirer exceeds 750 million TL or the worldwide turnover of the acquirer exceeds 3 billion TL.

IV. Conclusion

The increased turnover thresholds and the exemption on the local turnover thresholds mechanism introduced by the Amendment Communiqué will seem to be altered the scope of the transactions that are notifiable to the Authority. On that note, the concentrations related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals or health technologies, will be scrutinized by the Authority.

New Merger Control Regime Increases Turnover Thresholds and Introduces Exemptions[15]

I. Introduction

On 4 March 2022, the Turkish Competition Authority (the Authority) published Communiqué No. 2022/2 to amend Communiqué No. 2010/4 on the mergers and acquisitions that are subject to the Competition Board's approval (the Amendment Communiqué). The Amendment Communiqué introduced certain new rules that concern the Turkish merger control regime, which fundamentally affect merger control notifications submitted to the Authority.

According to article 7 of the Amendment Communiqué, the changes introduced by the Amendment Communiqué became effective as of 4 May 2022. The most significant developments that the Amendment Communiqué includes are:

- the increase of the applicable turnover thresholds for concentrations that require mandatory merger control filing with the Authority; and
- the introduction of threshold exemption for undertakings active in certain markets or sectors.

II. New thresholds

The Amendment Communiqué requires that a transaction be notified to the Authority if one of the following increased turnover thresholds is met:

- the aggregate Turkish turnover of the transaction parties exceeds 750

[15] This article first appeared on ILO (https://www.lexology.com/commentary/competition-antitrust/turkey/elig-gurkaynak-attorneys-at-law/new-merger-control-regime-increases-turnover-thresholds-and-introduces-exemptions)

million Turkish Liras (approximately USD 84.9 million) and the Turkish turnover of at least two of the transaction parties each exceed 250 million Turkish Liras (USD 28.3 million); or

- the Turkish turnover of:
  - the transferred assets or businesses in acquisitions exceed 250 million Turkish Liras (approximately USD 28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion Turkish Liras (approximately USD 339.7 million); or
  - any of the parties in mergers that exceed 250 million Turkish Liras (approximately USD 28.3 million) and the worldwide turnover of at least one of the other parties to the transaction that exceeds 3 billion Turkish Liras (approximately USD 339.7 million).

Accordingly, the Amendment Communiqué increased the previous turnover thresholds of:

- 30 million Turkish Liras (approximately USD 3.3 million) to 250 million Turkish Liras (approximately USD 28.3 million);
- 100 million Turkish Liras (approximately USD 11.3 million) to 750 million Turkish Liras (approximately USD 84.9 million); and
- 500 million Turkish Liras (approximately USD 56.6 million) to 3 billion Turkish Liras (approximately USD 339.7 million).

Further, the Amendment Communiqué introduced a threshold exemption for undertakings that are active in certain markets or sectors. According to the Amendment Communiqué, the 250 million Turkish Liras turnover thresholds mentioned above will not be sought for the acquired undertakings (target companies) that are active in, or have assets related to, the following fields:

- digital platforms;
- software or gaming software;
- financial technologies;
- biotechnology;
- pharmacology;
- agricultural chemicals; and
- health technologies.

Such target companies must:

- operate in the Turkish geographical market;
- conduct research and development (R&D) activities in the Turkish geographical market; or
- provide services to users in the Turkish geographical market.

The Amendment Communiqué does not seek a Turkish nexus in terms of the activities which render the threshold exemption. In other words, it would be sufficient for the target company to be active in the above fields anywhere in the world in order for the threshold exemption to apply, provided that the target company:

- generates revenue from customers located in Turkey;
- conducts R&D activities in Turkey; or

- provides services to Turkish users in any fields other than those mentioned above.

Accordingly, the Amendment Communiqué does not require target companies to generate revenue from customers who are located in Turkey, conduct R&D activities in Turkey or provide services to Turkish users in the fields listed above in order for the exemption on thelocal turnover thresholds to apply.

III. Sectors exempted from local turnover thresholds

In order to clarify the meaning and the scope of the sectors that are exempted from the use of local turnover thresholds, non-exhaustive lists of the activities that correspond to the sectors referred to in the definition of the Amendment Communiqué are provided below.

Digital platforms

These are systems and interfaces that form a commercial network or market facilitating business-to-business, business-to-customer or even customer-to-customer transactions. Digital platforms include:

- social media platforms;
- knowledge sharing platforms;
- media sharing platforms;
- service-oriented platforms;
- online marketplaces; and
- digital content aggregators.

Software and gaming software

"Software" relates to a set of instructions, data or programs used to operate computers and execute specific tasks, while "gaming software" concerns software customised for gaming. Software and gaming software include:

- writing and publishing of software and gaming software, including the publishing of computer games (Nomenclature générale des Activités économiques dans les Communautés Européennes Revision (NACE Rev) 2: 58.2);
- wholesale, retail sale, distribution and marketing of software (both customised and non-customised) and gaming software (NACE Rev 2: 46.51 and 47.41);
- reproduction from master copies of software (NACE Rev 2: 18.2);
- manufacture of electronic games with fixed (non-replaceable) software (NACE Rev 2: 32.40);
- translation or adaptation of software and gaming software (NACE Rev 2: 58.29);
- computer programming activities, such as:
    - designing the structure and content of, and/or writing the computer code necessary to create and implement, systems software (including updates and patches);
    - software applications (including updates and patches);
    - databases;
    - web pages; and
    - customising of software (NACE Rev 2: 62.01); and

- software installation services (NACE Rev 2: 62.09).

Financial Technologies

These refer to technology-enabled innovations in financial services. Undertakings that encompass both financial services and technology fall into the scope of this definition. In brief, the term "financial technologies" is used to define software and other technology that aims to modify, enhance or automate financial services for businesses or consumers. Financial technologies include technologies and software that has been developed for the following fields:

- financial services activities (monetary intermediation, financial leasing and other credit granting) (NACE Rev 2: 64.1 and 64.9);
- insurance, reinsurance and pension funding (NACE Rev 2: 65);
- under NACE Rev 2: 66:
  - activities auxiliary to financial services;
  - insurance and pension funding;
  - administration of financial markets (futures commodity contracts exchanges, securities exchanges, stock exchanges and stock or commodity options exchanges);
  - security and commodity contracts brokerage (dealing in financial markets on behalf of others (eg, stockbroking) and related activities, securities brokerage, commodity contracts brokerage and bureaux de change);
  - risk and damage evaluation;
  - activities of insurance agents and brokers;
  - fund management activities;
  - financial transaction processing and settlement;
  - investment advisory activities; and
  - activities of mortgage advisers and brokers;
- Under NACE Rev 2: 69.2:
  - accounting, bookkeeping and auditing activities;
  - recording commercial transactions from businesses or others, preparation or auditing of financial accounts;
  - examination of accounts and certification of their accuracy;
  - preparation of personal and business income tax returns; and
  - advisory activities and representation on behalf of clients before tax authorities); and
- digital lending, payments, blockchain and digital wealth management.

Biotechnology

This refers to the technology that utilises biological systems, living organisms or parts thereof to develop or create different products. The sector includes the below activities in the research and experimental development on biotechnology (NACE Rev 2: 72.11):

- deoxyribonucleic acid or ribonucleic acid (DNA/RNA) – namely:
  - genomics;

- pharmacogenomics;
- gene probes;
- genetic engineering;
- DNA/RNA sequencing, synthesis and amplification;
- gene expression profiling; and
- the use of antisense technology;
- proteins and other molecules – namely:
- sequencing, synthesis and engineering of proteins and peptides (including large molecule hormones);
- improved delivery methods for large molecule drugs;
- proteomics;
- protein isolation and purification; and
- signalling, identification of cell receptors;

- process biotechnology techniques – namely:
  - fermentation using bioreactors;
  - bioprocessing;
  - bioleaching;
  - biopulping;
  - biobleaching;
  - biodesulphurisation;
  - bioremediation;
  - biofiltration; and
  - phytoremediation; and

- gene and RNA vectors, such as gene therapy and viral vectors;
- bioinformatics – namely:
  - construction of databases on genomes;
  - protein sequences; and
  - modelling complex biological processes, including systems biology; and
- nanobiotechnology, which applies the tools and processes of nanofabrication and microfabrication to build devices for studying biosystems and applications in drug delivery and diagnostics.

Biotechnology also refers to manufacturing biotech pharmaceuticals, such as plasma derivatives (NACE Rev 2: 21.20).

Pharmacology

This a biomedical science that deals with the research, discovery and characterisation of chemicals that show biological effects and the elucidation of cellular and organismal function in relation to these chemicals. In other words, pharmacology refers to the science of how drugs act on biological systems and how the body responds to the drug. The study of pharmacology encompasses the sources, chemical properties, biological effects and therapeutic uses of drugs. According to NACE Rev 2: 21.1 and 21.2, pharmacology includes biomedical studies and R&D activities conducted in the below areas:

- pharmacodynamics – the relationship of drug concentration and the biologic effect (physiological or biochemical);

- pharmacokinetics – the interrelationship of the absorption, distribution, binding, biotransformation and excretion of a drug and its concentration at its locus of action;
- clinical pharmacology and therapeutics – understanding what a drug is doing to the body, what happens to a drug in the body and how drugs work in terms of treating a particular disease;
- pharmacotherapy – the treatment of a disorder or disease with medication;
- neuropharmacology – the understanding how drugs affect cellular function in the nervous system
- psychopharmacology – the use of medications in treating mental disorders;
- cardiovascular pharmacology – the understanding how drugs influence the heart and vascular system;
- molecular pharmacology – the investigation of the molecular mode of action of drugs, among other things, using genetic and molecular biology methods;
- radiopharmacology – the study and preparation of radioactive pharmaceuticals;
- the manufacturing and R&D of pharmaceuticals, such as:
    - antisera and other blood fractions;
    - vaccines;
    - various medications, including homeopathic preparations;
- pharmaceutical preparations and medicinal chemicals, such as the manufacture of medicinal active substances to be used for their pharmacological properties in the manufacture of medicaments, including:
    - antibiotics;
    - basic vitamins;
    - salicylic; and
    - O-acetylsalicylic acids;
- the wholesale, retail sale, distribution and marketing of pharmaceuticals, pharmaceutical preparations and medicinal chemicals; and
- the growth of drugs and narcotic crops.

Agricultural chemicals

These refer to chemicals used in agriculture to control pests and disease or control and promote growth, such as:

- pesticides;
- herbicides;
- fungicides;
- insecticides; and
- fertilisers.

The sector includes the below activities:

- mining for chemical and fertiliser minerals (NACE Rev 2: 08.91);
- supporting activities for other mining and quarrying (where it relates to agricultural chemicals and fertilisers) (NACE Rev 2: 09.90);
- manufacturing fertilisers, such as:

- straight or complex nitrogenous;
- phosphatic or potassic fertilisers;
- urea;
- crude natural phosphates; and
- crude natural potassium salts;

- manufacturing nitrogen compounds, such as:
  - nitric and sulphonitric acids;
  - ammonia;
  - ammonium chloride;
  - ammonium carbonate;
  - nitrites; and
  - nitrates of potassium (NACE Rev 2: 20.15);
- manufacturing organic and inorganic basic chemicals (where it relates to agricultural chemicals and fertilisers) (NACE Rev 2: 20.13, 20.14);
- manufacturing pesticides and other agrochemical products, such as:
  - insecticides;
  - rodenticides;
  - fungicides;
  - herbicides;
  - acaricides;
  - molluscicides;
  - biocides;
  - anti-sprouting products;
  - plant growth regulators; and
  - disinfectants (for agricultural and other use) (NACE Rev 2: 20.2); an
- wholesale, retail sale, distribution and marketing of fertilisers and agrochemical products (NACE Rev 2: 46.75).

Health technologies

Health technologies are the application of organised knowledge and skills in the form of medicines, medical devices, vaccines, procedures and systems developed to solve a health problem and improve quality of life. They refer to any technology, including medical devices, IT systems, algorithms, artificial intelligence and cloud and blockchain, that is designed to support healthcare organisations and patients. Health technologies include technologies and software developed or being developed for the following fields:

- human health activities (hospital activities, medical (medical consultation and treatment) and dental practice activities, such as:
  - dentistry;
  - endodontic and paediatric dentistry;
  - oral pathology; and
  - orthodontic activities (NACE Rev 2: 86);
- residential healthcare activities, such as:
  - residential nursing care activities;
  - residential care activities for mental retardation;
  - mental health and substance abuse; and

- residential care activities for the elderly and disabled (NACE Rev 2: 87); and

- manufacture of medical and dental instruments, such as:
  - operating tables;
  - examination tables;
  - hospital beds with mechanical fittings; and
  - dentists' chairs; and surgical appliances (NACE Rev 2: 32.5).

Applicable thresholds

If the target company's activities fall into the above markets or sectors, the applicable thresholds will be:

- the aggregate Turkish turnover of the transaction parties exceeds 750 million Turkish Liras (approximately USD 84.9 million); or

- the worldwide turnover of at least one of the other parties to the transaction exceeds 3 billion Turkish Liras (approximately USD 339.7 million).

Accordingly, when an undertaking that falls within the above definition and criteria is being acquired, the transaction will be notifiable if the aggregate Turkish turnover of the target company and the acquirer exceeds 750 million Turkish Liras or the worldwide turnover of the acquirer exceeds 3 billion Turkish Liras.

IV. Comment

The increased turnover thresholds and the exemption on the local turnover threshold mechanism that the Amendment Communiqué has introduced alter the scope of the transactions that are notifiable to the Authority. Therefore, the Authority will scrutinise concentrations in the following fields:

- digital platforms;
- software or gaming software;
- financial technologies;
- biotechnology;
- pharmacology;
- agricultural chemicals; and
- health technologies.,

The New Merger Control Regime in Turkey Entered into Force as of May 4, 2022: Sectoral Threshold Exception Explained: Concentrations in Certain Sectors Are Now Expected To Be Way More Frequently Notifiable in Turkey[16]

I. Introduction

On March 4, 2022 the Turkish Competition Authority ("Authority") published the Communiqué No. 2022/2 on the Amendment of Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board (the "Amendment Communiqué"). The Amendment Communiqué introduced certain new rules concerning the Turkish merger control regime, which fundamentally affect merger control notifications submitted to the Authority.

Pursuant to Article 7 of the Amendment Communiqué, the changes introduced by the Amendment Communiqué became

[16] This article first appeared in Mondaq (https://www.mondaq.com/turkey/antitrust-eu-competition-/1190626/the-new-merger-control-regime-in-turkey-entered-into-force-as-of-may-4-2022-sectoral-threshold-exception-explained-concentrations-in-certain-sectors-are-now-expected-to-be-way-more-frequently-notifiable-in-turkey)

effective as of May 4, 2022. One of the most significant developments that the Amendment Communiqué entails, inter alia, is the increase of the applicable turnover thresholds for the concentrations that require mandatory merger control filing before the Authority and the introduction of threshold exemption for undertakings active in certain markets/sectors.

II. New Thresholds Introduced by the Amendment Communique

Further to the Amendment Communiqué, as of May 4, 2022, a transaction will be required to be notified before the Authority; if one of the following increased turnover thresholds is met:

(a) The aggregate Turkish turnover of the transaction parties exceeding TL 750 million (approx. EUR 71.9 million or USD 84.9 million) and the Turkish turnover of at least two of the transaction parties each exceeding TL 250 million (approx. EUR 23.9 million or USD 28.3 million), OR

(b) (i) The Turkish turnover of the transferred assets or businesses in acquisitions exceeding TL 250 million (approx. EUR 23.9 million or USD 28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approx. EUR 287.9 million or USD 339.7 million), or (ii) the Turkish turnover of any of the parties in mergers exceeding TL 250 million (approx. EUR 23.9 million or USD 28.3 million) and the worldwide turnover of at least one of the other parties to the transaction exceeds TL 3 billion (approx. EUR 287.9 million and USD 339.7 million).

Accordingly, the Amendment Communiqué increased the previous turnover thresholds of (i) 30 million Turkish Liras (approx. EUR 2.8 million or USD 3.3 million) to 250 million Turkish Liras (approx. EUR 23.9 million or USD 28.3 million), (ii) 100 million Turkish Liras (approx. EUR 9.5 million or USD 11.3 million) to 750 million Turkish Liras (approx. EUR 71.9 million or USD 84.9 million), and (iii) 500 million Turkish Liras (approx. EUR 47.9 million or USD 56.6 million) to 3 billion Turkish Liras (approx. EUR 287.9 million or USD 339.7 million).

Furthermore, the Amendment Communiqué introduced a threshold exemption for the undertakings active in certain markets/sectors. Pursuant to the Amendment Communiqué, "the TL 250 million Turkish turnover thresholds" mentioned above will not be sought for the acquired undertakings active in or assets related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies ("Target Company(ies)"), if they (i) operate in the Turkish geographical market or (ii) conduct research and development activities in the Turkish geographical market or (iii) provide services to the users in the Turkish geographical market.

It is also noteworthy that the Amendment Communiqué does not seek a Turkish nexus in terms of the activities which render the threshold exemption. In other words, it would be sufficient for the Target Company to be active in the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies anywhere in the world for the threshold exemption to become applicable, provided that the Target Company (a) generates

revenue from customers located in Turkey or (b) conducts R&D activities in Turkey or (c) provides services to the Turkish users in any fields other than abovementioned ones. Accordingly, the Amendment Communiqué does not require (a) generating revenue from customers located in Turkey OR (b) conducting R&D activities in Turkey OR (c) providing services to the Turkish users concerning the fields listed above for the exemption on the local turnover thresholds to become applicable.

III. The Sectors Exempted from the Use of Local Turnover Thresholds

To clarify the meaning and the scope of these sectors exempted from the use of local turnover thresholds, a non-exhaustive list of activities which correspond to the sectors referred to in the definition of the Amendment Communiqué is provided below. The below list reflects a mere effort to provide insight and guidance in identifying this scope, thus the list is not exhaustive:

a) Digital platforms: Digital platforms are systems and interfaces that form a commercial network or market facilitating business-to-business (B2B), business-to-customer (B2C) or even customer-to-customer (C2C) transactions. Digital platforms include but are not limited to social media platforms, knowledge sharing platforms, media sharing platforms, service-oriented platforms, online marketplaces and digital content aggregators.

b) Software and gaming software: Software relates to a set of instructions, data or programs used to operate computers and execute specific tasks, while gaming software concerns software customised for gaming. Software and gaming software include but are not limited to the activities below.

i. writing and publishing of software and gaming software (including publishing of computer games) (NACE Rev. 2: 58.2),

ii. wholesale, retail sale, distribution and marketing of software (both customised and non-customised) and gaming software (NACE Rev. 2: 46.51, 47.41),

iii. reproduction from master copies of software (NACE Rev. 2: 18.2),

iv. manufacture of electronic games with fixed (non-replaceable) software (NACE Rev. 2: 32.40),

v. translation or adaptation of software and gaming software (NACE Rev. 2: 58.29),

vi. computer programming activities (designing the structure and content of, and/or writing the computer code necessary to create and implement systems software (including updates and patches), software applications (including updates and patches), databases, web pages, customising of software (NACE Rev. 2: 62.01),

vii. software installation services

(NACE Rev. 2: 62.09).

c) Financial technologies: Financial technologies refer to technology-enabled innovation in financial services. Undertakings which sit at the crossroads of financial services and technology fall into the scope of this definition. In brief, the term "financial technologies" is used to define software and other technology aiming to modify, enhance or automate financial services for businesses or consumers. Financial technologies include but are not limited to technologies and software developed for the following fields:

i. financial services activities (monetary intermediation, financial leasing, other credit granting) (NACE Rev. 2: 64.1, 64.9),

ii. insurance, reinsurance, pension funding (NACE Rev. 2: 65),

iii. activities auxiliary to financial services, insurance and pension funding (administration of financial markets (futures commodity contracts exchanges, securities exchanges, stock exchanges, stock or commodity options exchanges), security and commodity contracts brokerage (dealing in financial markets on behalf of others (e.g. stock broking) and related activities, securities brokerage, commodity contracts brokerage, activities of bureaux de change etc.), risk and damage evaluation, activities of insurance agents and brokers, fund management activities, financial transaction processing and settlement, investment advisory activities, activities of mortgage advisers and brokers (NACE Rev. 2: 66),

iv. accounting, bookkeeping and auditing activities, tax consultancy (recording of commercial transactions from businesses or others, preparation or auditing of financial accounts, examination of accounts and certification of their accuracy, preparation of personal and business income tax returns, advisory activities and representation on behalf of clients before tax authorities) (NACE Rev. 2: 69.2),

v. digital lending, payments, block chain and digital wealth management.

d) Biotechnology: Biotechnology refers to the technology that utilizes biological systems, living organisms or parts of this to develop or create different products. The sector includes but is not limited to the activities below:

i. research and experimental development on biotechnology (NACE Rev. 2: 72.11),

- DNA/RNA (genomics, pharmacogenomics, gene probes, genetic engineering, DNA/RNA sequencing/synthesis/amplification, gene expression profiling, and use of antisense technology),
- proteins and other molecules (sequencing/synthesis/engineering of proteins and peptides (including large molecule

hormones); improved delivery methods for large molecule drugs; proteomics, protein isolation and purification, signalling, identification of cell receptors),

- cell and tissue culture and engineering (cell/tissue culture, tissue engineering (including tissue scaffolds and biomedical engineering), cellular fusion, vaccine/immune stimulants, embryo manipulation,
- process biotechnology techniques (fermentation using bioreactors, bioprocessing, bioleaching, biopulping, biobleaching, biodesulphurisation, bioremediation, biofiltration and phytoremediation,
- gene and RNA vectors: gene therapy, viral vectors),
- bioinformatics (construction of databases on genomes, protein sequences, modelling complex biological processes, including systems biology),
- nanobiotechnology (applies the tools and processes of nano/microfabrication to build devices for studying biosystems and applications in drug delivery, diagnostics etc.),

ii. manufacture of biotech pharmaceuticals such as plasma derivatives (NACE Rev. 2: 21.20).

e) Pharmacology: Pharmacology, a biomedical science, deals with the research, discovery, and characterization of chemicals which show biological effects and the elucidation of cellular and organismal function in relation to these chemicals. In other words, pharmacology refers to the science of how drugs act on biological systems and how the body responds to the drug. The study of pharmacology encompasses the sources, chemical properties, biological effects and therapeutic uses of drugs. Pharmacology includes but is not limited to the biomedical studies and R&D activities conducted in the areas below:

i. Pharmacodynamics (relationship of drug concentration and the biologic effect (physiological or biochemical),

ii. Pharmacokinetics (interrelationship of the absorption, distribution, binding, biotransformation, and excretion of a drug and its concentration at its locus of action),

iii. Clinical Pharmacology and Therapeutics (understanding what a drug is doing to the body, what happens to a drug in the body, and how drugs work in terms of treating a particular disease),

iv. Pharmacotherapy (treatment of a disorder or disease with medication),

v. Neuropharmacology (understanding how drugs affect cellular function in the nervous system),

vi. Pyscopharmacology (use of medications in treating mental disorders),

vii. Cardiovascular pharmacology (understanding how drugs influence the heart and vascular system),

viii. Molecular pharmacology (investigates the molecular mode of action of drugs, among others using genetic and molecular biology methods),

ix. Radiopharmacology (study and preparation of radioactive pharmaceuticals),

x. Manufacture and R&D of pharmaceuticals (antisera and other blood fractions, vaccines, diverse medicaments, including homeopathic preparations), pharmaceutical preparations and medicinal chemicals (manufacture of medicinal active substances to be used for their pharmacological properties in the manufacture of medicaments: antibiotics, basic vitamins, salicylic and O-acetylsalicylic acids etc.); wholesale, retail sale, distribution and marketing of pharmaceuticals, pharmaceutical preparations and medicinal chemicals; growing of drug and narcotic crops (NACE Rev. 2: 21.1 and 21.2).

f) Agricultural chemicals: Agricultural chemicals refer to chemicals used in agriculture to control pests and disease or control and promote growth; such as pesticides,herbicides, fungicides, insecticides, and fertilizers. The sector includes but is not limited to the activities below:

i. mining of chemical and fertiliser minerals (NACE Rev. 2: 08.91),

ii. support activities for other mining and quarrying (where it relates to agricultural chemicals and fertilizers) (NACE Rev. 2: 09.90),

iii. manufacture of fertilisers (straight or complex nitrogenous, phosphatic or potassic fertilisers; urea, crude natural phosphates and crude natural potassium salts), nitrogen compounds (nitric and sulphonitric acids, ammonia, ammonium chloride, ammonium carbonate, nitrites and nitrates of potassium) (NACE Rev. 2: 20.15),

iv. manufacture of organic and inorganic basic chemicals (where it relates to agricultural chemicals and fertilizers) (NACE Rev. 2: 20.13, 20.14),

v. manufacture of pesticides and other agrochemical products (manufacture of insecticides, rodenticides, fungicides, herbicides, acaricides, molluscicides, biocides, manufacture of anti-sprouting products, plant growth regulators, manufacture of disinfectants (for agricultural and other use) (NACE Rev. 2: 20.2),

vi. wholesale, retail sale, distribution and marketing of fertilisers and agrochemical products (NACE Rev. 2:

46.75).

g) Health technologies: Health technologies are the application of organized knowledge and skills in the form of medicines, medical devices, vaccines, procedures and systems developed to solve a health problem and improve quality of life. They refer to any technology, including medical devices, IT systems, algorithms, artificial intelligence (AI), cloud and block chain, designed to support healthcare organizations and patients. Health technologies include but are not limited to technologies and software developed or being developed for the following fields:

i. human health activities (hospital activities, medical (medical consultation and treatment) and dental practice activities (dentistry, endodontic and paediatric dentistry; oral pathology, orthodontic activities) (NACE Rev. 2: 86),

ii. residential healthcare activities (residential nursing care activities, residential care activities for mental retardation, mental health and substance abuse, residential care activities for the elderly and disabled) (NACE Rev. 2: 87),

iii. manufacture of medical and dental instruments (e.g. operating tables, examination tables, hospital beds with mechanical fittings, dentists' chairs, surgical appliances) (NACE Rev. 2: 32.5).

If the Target Company's activities fall into the above markets/sectors, the thresholds that would be applicable would be: "The aggregate Turkish turnover of the transaction parties exceeding TL 750 million (approx. EUR 71.9 million or USD 84.9 million)" or "the worldwide turnover of at least one of the other parties to the transaction exceeding TL 3 billion (approx. EUR 287.9 million or USD 339.7 million)". Accordingly, when an undertaking that falls within the definition and criteria above is being acquired, the transaction would be notifiable if the aggregate Turkish turnover of the Target Company and the acquirer exceeds TL 750 million or the worldwide turnover of the acquirer exceeds TL 3 billion.

IV. Conclusion

The increased turnover thresholds and the exemption on the local turnover threshold mechanism introduced by the Amendment Communiqué alter the scope of the transactions that are notifiable to the Authority. On that note, the concentrations related to the fields of digital platforms, software or gaming software, financial technologies, biotechnology, pharmacology, agricultural chemicals and health technologies, will be scrutinized by the Authority.

Evolution of the Turkish Competition Authority's Approach Towards MFN Clauses: E-Marketplace Sector Inquiry Report[17]

I. Introduction

On March 14, 2022, the Turkish Competition Authority ("***Authority***") published its much anticipated E-Commerce Platforms Sector Inquiry Final Report [18] ("***Report***"). The Report is extensive in scope and it aims to present a snapshot of the market and provide policy recommendations to address the market failures detected by the Authority. In this article, however, the section on the most favored nation ("***MFN***") clauses will be focused on and more particularly it will be discussed whether MFN clauses can be employed by digital platforms in the light of findings of the Report. Decisional practice of the Turkish Competition Board ("***Board***") will also be under the spotlight to provide further colour.

II. Decisional Practice of the Board

Under this section we review the decisional practice of the Board pertaining to MFN clauses. But first, we think that a noteworthy development must be mentioned from the outset. With the recent amendments to the Block Exemption Communiqué on Vertical Agreements No 2002/2 ("***Communiqué No 2002/2***"), the safe harbor envisaged by the Communiqué is decreased to 30% from 40%. Thus, for MFN agreements to benefit from the amended Communiqué, the market share of the undertaking that benefits from the MFN clause must not exceed 30%.

When the Board's case law is examined, we see that wide and narrow MFN clauses are safe to employ when the market share of the undertaking benefiting from such clause falls below 30% (then 40%). For example in the Board's *Kitap Yurdu*[19] and *Pankobirlik*[20] decisions, the Board granted the safe harbor of the Communiqué without making a distinction between wide and narrow MFN clauses.

The Board found in its *Kitap Yurdu* decision that Kitap Yurdu was demanding to be provided with the same or better discounts from which its competitors benefitted, and stated that Kitap Yurdu's market shares were within the safe harbor provided by the Communiqué No 2002/2 and concluded its analysis there. Similiarly, in *Pankobirlik*, the supply contracts of Pankobirlik stipulated that the suppliers cannot offer a lower price than the price offered to Pankobirlik. The Board granted the safe harbor of the Communiqué due to Pankobirlik's market shares falling under the 40% threshold, subject to removal of the provisions which stipulated that the price lists applied to distributors and dealers shall be sent to Pankobirlik.

The Board's *Hepsiburada* [21] decision is another important decision but the assessment of the Board is interesting to say to least. The Board started its assessment by first considering whether Hepsiburada is dominant. Upon its assessment, the Board stated that Hepsiburada is not dominant, even under the most narrow market definition[22]. The

[17] This article first appeared in Mondaq (https://www.mondaq.com/turkey/antitrust-eu-competition-/1193734/evolution-of-the-turkish-competition-authority39s-approach-towards-mfn-clauses-e-marketplace-sector-inquiry-report)
[18] Available only in Turkish: https://www.rekabet.gov.tr/Dosya/geneldosya/e-pazaryeri-si-raporu-pdf (accessed on 21.04.2022).

[19] *Kitap Yurdu* (05.11.2020,20-48/658-289).
[20] *Pankobirlik* (28.07.2020, 20-36/489-215).
[21] *Hepsiburada* decision (15.04.2021,21-22/266-116).
[22] Ibid para 26-31.

Board then proceeded to analyze Hepsiburada's agreements and stated that the agreement envisaged a wide MFN clause[23]. The Board stated that this clause was not enforced in light of the answers submitted by several undertakings and that the clause did not create any effect[24]. However, the Board then stated that since the MFN clause may foreclose the market to other online platforms that operate with lower commission, it may create barriers to entry to market and price stringency, thus the clause created effects that are restrictive of competition[25]. Therefore, interestingly, the Board considered the wide MFN clause restrictive of competition after accepting that it did not create any effects. More interestingly, a few paragraphs before, the Board also stated that MFN clauses are not "*per se*" violations[26]. Consequently, the Board concluded its assessment by stating that the MFN clause benefitted from the Communiqué No 2002/2.

The Board's *Yemeksepeti*[27] decision is another noteworthy decision, in which the Board fined the dominant Turkish online food delivery platform for its use of wide MFN clauses but did not consider narrow MFN clause as a violation. The Board determined that wide MFN clauses resulted in termination of promotions provided on competing platforms[28]. The Board then stated that when a significant portion of the sellers/providers' sales are subject to MFN clauses, potential sellers lose the motivation to decrease their prices. This in turn, hinders new entries, innovative products and business methods[29]. Consequently, the Board has stated that since no platform is able to differentiate its products/services and the determination that a significant portion of these platforms either exit the market or exist as marginal players, means that MFN clause created exclusionary effects in the market[30].

A similar analysis is made in the Board's *Booking.com*[31] decision, in light of the dynamics of the digital markets. According to Booking.com's agreements at the time, accommodation facilities were unable to offer better prices for hotel rooms on the internet than on Booking.com. The Board stated that the wide MFN condition lessened competition in terms of commission because competing platforms were unable to get better prices from the accommodation facilities in exchange for better commissions[32]. The Board also stated that the relevant clause hindered competing platforms entry to the market. In a market where indirect network externalities also exit, accommodation facilities were unable to offer better prices in exchange of lower commissions. This in turn hinders the ability of new platforms to offer competitive offerings and reach the necessary scale[33]. In other words, the Board stated that wide MFN clauses hindered the ability of new platforms to differentiate themselves and ignite their platform. On this basis, the Board rendered a violation decision.

The Board also analyzed the narrow MFN clause in its *Booking.com* decision and stated that, within the framework of commitments offered, amended contracts benefitted from an individual exemption

[23] Ibid para 55.
[24] Ibid para 59-61.
[25] Ibid para 62.
[26] Ibid para 57. See also to that effect *Booking* decision (05.01.2017, 17-01/12-4).
[27] *Yemeksepeti* decision (09.06.2016, 16-20/347-156).
[28] Ibid para 40.
[29] Ibid para 139.
[30] Ibid para 161.
[31] *Booking.com* decision (05.01.2017, 17-01/12-4).
[32] Ibid para 281-283.
[33] Ibid para 284.

for 5 years[34]. The Board's reasoning in restricting the individual exemption with 5 years was that the sales made through the accommodation facilities own website may be more important in the future[35].

Lastly, in its *Yemeksepeti Commitment*[36] decision the Board stated that chain restaurants, individual restaurants and restaurants with branches have the motivation to offer better prices at their own websites. Furthermore, it is stated that Yemeksepeti asked for broachers and equated the conditions offered on Yemeksepeti with conditions on broachers. As a result of the fact that the broachers offered by some restaurants and the in-restaurant menus are the same, the narrow MFN clause also effected prices at the restaurant[37]. In continuation, the Board stated that restaurants were in an effort to develop their own channels in order to avoid Yemeksepeti's high commissions. As a result of the narrow MFN condition, this effort may go to waste[38]. The Board also stated that Yemeksepeti being a "gate-keeper" due to the number of restaurants on its platform and user network and the facts that there is no effective competitor of Yemeksepeti and majority of the deliveries are made on Yemeksepeti, made platforms dependent to Yemeksepeti[39]. Lastly the Board stated that narrow MFN clause may hinder the entrance of competitors because, new competitors may not have market power to dictate restaurant to offer the same discount on their platform[40].

[34] Ibid para 346.
[35] Ibid para 330.
[36] *Yemeksepeti Commitment* Decision (28.01.2021, 21-05/64-28).
[37] Ibid paras 7-8.
[38] Ibid para 9.
[39] Ibid para 10
[40] Ibid para 11.

III. Assessments of the Report

Before delving into the assessments of the Report, we note that even though the term "gate-keeper" is used numerous times, the meaning of this term is quite vague at the time of writing. The definition will carry importance since it will directly impact an undertakings ability to employ MFN clauses (particularly wide MFN clauses) if designated as a "gate-keeper". The decisions of the Board also do not provide a meaningful definition to shed light on the term. Indeed, the Board used the term "gate-keeper" in a recent decision, albeit without a concrete definition and merely stated that Yemeksepeti is a gate-keeper due to its user network and the number of restaurants on its platform[41].

The Report states that the Authority is currently working on a legislation pertaining digital markets and "gate-keepers" are considered to be defined as undertakings with "significant market power". However, the term "with significant market power" is also vague and it does not allow us to discern exactly which undertakings will be considered to have "significant market power". As far as we are concerned there is no degree of dominance under the Law No 4054 on the Protection of Competition ("***Law No 4054***"). In other words, there is no meaningful distinction between an undertaking which is dominant with 60% market share or 90% market share.

[41] Ibid, para 10.

3. Reports assessment on wide MFN clauses:

According to the Report, wide MFN clauses entail three competitive concerns.

a. Lessening the competition based on commission in the market and increase of retail prices as a result of the latter:

The Report states that since the force behind the growth of e-commerce platforms are provided by the user base, it is vital for platforms that want to get a foothold in the market to provide the products and services to consumers under the most favorable conditions[42]. In the absence of MFN clauses, the main determinant of sales prices and conditions at e-commerce platforms in a competitive market are commissions. The lower the commission, the lower the price will be. This fact drives platforms to compete on commission rates[43].

In continuation, the Report states that wide MFN clauses eliminates the motive to provide better prices because, when the seller provides a better price to the platform that offers it a lower commission, the seller must also provide the same price to the platform which benefits from the MFN clause. This then creates a significant cost the seller must bear on its own. However, the platform which benefits from the MFN clause will benefit from better prices without incurring any costs[44]. It is further stated that this holds true when the platform increases the commission rates. Since the seller will be bound by the MFN clause, if it increases the prices on the platform, it must also raise its prices on other platforms, effectively rendering it unable to price more favorably on platforms that offers it better conditions[45].

b. Price stringency and facilitation of anti-competitive coordination

The Report states that even if a new comer offers very low commissions, even a zero commission, the seller will have a very low motivation to offer low prices for consumers. On this front the Report states that the new platform will have a lower demand and prices offered for this low demand must also be provided to the beneficiary of the MFN clause. In other words, the seller will not have the motivation to provide low prices for the new comer, knowing that it must also provide these benefits to the MFN beneficiary[46]. Furthermore, the Report states that, a platform which knows that its competitors employ MFN clauses, may refrain from providing better conditions because the MFN beneficiary will also benefit from these conditions[47]. In this sense, the Report states that wide MFN clauses will eliminate platforms drive to compete with each other and that it may create price stringency.

c. Decrease in market entry, facilitation of exit from the market and/or hindrance of growth in the market

The Report states that in the absence of MFN clauses, a new competitor which seeks to enter the market can do so by offering better and more attractive offerings than the incumbent undertakings and facilitate its growth. On this front, the Report references its consumer survey and state that "convenient prices" comes at the forefront of the reasons for consumers to

[42] The Report, para 397.
[43] Ibid, para 398.
[44] Ibid para 400.
[45] Ibid para 401.
[46] Ibid para 421.
[47] Ibid para 422.

shop online[48]. According to the Report, the presence of wide MFN clauses will prohibit the platform with a lower commission to gain market share and on the contrary, will make incumbent platforms more attractive[49]. This in turn may result in tipping[50].

4. Reports assessment on narrow MFN clauses:

As per the Report, wide MFN and narrow MFN clauses may create the same effects when the marketplace is indispensable for the seller and when the seller's direct sales channel (e.g., its website) is substitutable with the platforms website in the eyes of the consumers. Under this scenario, if a competing platform cannot offer a commission equal or less than the costs incurred via the seller's own website and if sales volume the seller may acquire from this platform is not sufficient enough to leave the "indispensable platform", it would not be logical for the seller to offer lower prices on that competing platform than its own website. When looked from another angle, if the indispensable platform increases commissions, the seller will also increase its sales prices due to increase in costs and will be forced to increase the prices on its direct sales channel. The seller, knowing that consumers are indifferent to its sales channel and the platform will have the motivation to increase its prices on other platforms to preserve its direct sales channels' appeal[51].

Based on the foregoing, the Report is concerned with narrow MFN clauses when the conditions are met, the platform which benefits from the MFN clause must be indispensable and that consumers must view the direct sales channel of the seller, as a substitute to the platform. On this basis, the Report then proceeds to analyze whether the direct sales channels of the sellers are direct substitutes of platforms. According to the consumer surveys, 76.6% of the consumers that shop online do so through market places and 14.6% shops through the seller's website. Therefore, the Report states that consumer's preferences concentrate on market places [52] . In continuation, the Report states that a significant number of sellers do not have their own websites and concludes that seller's websites are not substitutes of market places. Since narrow MFN clauses do not involve other platforms, the Report states that sellers would still maintain the motivation to sell with lower prices on platforms that offer low commissions. Consequently, according to the Report, even if narrow MFN clauses are employed by gate-keepers, it would not be possible to concretely foresee the competitive effects and a case-by-case analysis must be conducted[53].

IV. Conclusion

It is almost safe to say that, wide MFN clauses cannot be employed by "gate-keeper" undertakings. Indeed, according to the Report, when wide MFN clauses are employed by "gate-keepers", the efficiencies will not be big enough to counteract the negative effects[54]. Although a comparison can be made with the definition provided by the Digital Markets Act of the European Commission, the term "gate-keeper" is not yet defined and the Board decisions do not provide a meaningful guidance. Until such time the

[48] Ibid para 425.
[49] Ibid para 426.
[50] Ibid para 427.
[51] Ibid para 430.
[52] Ibid para 431.
[53] Ibid para 433-434.
[54] Ibid para 717. Under its proposed "Gate-keeper Regulation", the Report also states that gate-keepers shall not employ wide MFN clauses, para 773.

term is defined, it would be prudent for dominant undertakings to refrain from employing wide MFN clauses. The recent *Yemeksepeti* and *Booking.com* decisions show that, wide MFN clauses are considered to hinder the abilities of new competitors to differentiate themselves. That said, safe harbor provided (*i.e.*, 30% market share threshold) by the Communiqué No 2002/2 still applies and undertakings that satisfy the threshold can safely employ wide MFN clauses. However, the Report calls for strengthening of the secondary legislation due to the fact that MFN clauses, exclusivity clauses and exploitative practices carry the risk of lessening and disrupting competition on the merits[55] and thus, this may be subject to change in the future. For non-dominant undertakings (whose market shares fall outside the safe harbor), employing wide MFN clauses may not be perilous. Even though the findings in the Report do not paint a grim picture and it is obvious that the market did not yet tip in favor of any market player, the Authority signals that it may jealously guard the structure of the market. Indeed, the recent *Hepsiburada* decision may be giving signals in this direction. Thus, the Authority may block the application of wide MFN clauses even when employed by non-dominant players.

As for narrow MFN clauses, the Report adopts a more hospitable stance. Indeed, even though it states that narrow MFN clauses' harmful effects would be higher when employed by gate-keepers, it calls for a case-by-case analysis[56]. Accordingly, it seems so that even the "gate-keepers" can employ narrow MFN clauses if they can establish with concrete data that the direct sales channel of sellers is not substitutable with its platform in the eyes of the consumers. Indeed, the Report takes into account the fact that 76.6% of the shoppers prefer platforms as opposed to the sellers own website, in reaching its conclusion. That being said, the recent *Yemeksepeti Commitment* decision, still signals caution. The discerning factor, however, may be the fact that Yemeksepeti had no effective competitor[57]. On the contrary, the Report states that the competition is among e-market places[58]. Consequently, where there is sufficient competition between platforms, even a "gate-keeper" may argue that narrow MFN clauses do not restrict competition.

A Decision on the Welding Sector: How the Turkish Competition Board Uses Economic Analysis in the Presence and Absence of the Evidence of Communication Among Competitor Undertakings?[59]

The Turkish Competition Board's (the "***Board***") decision on whether undertakings that are active in the welding sector violated Article 4 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***") by way of determining their prices together has been published[60].

The Board found that the investigated undertakings (*i.e.* (i) Gedik Kaynak Sanayi ve Tic. A.Ş. ("***Gedik***"), (ii) Kaynak Tekniği San. ve Tic. A.Ş. ("***Askaynak***") under the control of Lincoln Electric

[55] Ibid para 766.
[56] Ibid para 717.
[57] Yemeksepeti Commitment Decision (28.01.2021, 21-05/64-28), para 10.
[58] The Report 433.
[59] This Article first appeared in Mondaq (https://www.mondaq.com/turkey/cartels-monopolies/1182530/a-decision-on-the-welding-sector-how-the-turkish-competition-board-uses-economic-analysis-in-the-presence-and-absence-of-the-evidence-of-communication-among-competitor-undertakings)
[60] The Board's decision dated 08.04.2021 and numbered 21-20/247-104.

Holdings, Inc., and (iii) Oerlikon Kaynak Elektrodları ve Sanayi A.Ş. ("***Oerlikon***")/ Magmaweld Uluslararası Tic. A.Ş. ("***Magmaweld***") under the control of Zaimoğlu Holding A.Ş.) have violated Article 4 of the Law No. 4054 through price fixing in 2011 but did not impose an administrative fine on the investigated undertakings for their violation in 2011 due to the expiration of the 8-year statute of limitation. For the following periods from 2011 to 2019, the Board reached the conclusion that there is no sufficient finding to prove that the undertakings violated Article 4 of the Law No. 4054 and therefore did not impose any administrative fine on the investigated undertakings.

By way of background information, the Board explained in the decision that welding is a manufacturing method used to join metal or thermoplastic materials together, and that the welding sector in Turkey has an oligopolistic structure with three major players among many domestic and foreign companies operating in the market. These major players are the investigated undertakings, *i.e.* (i) Gedik (ii) Askaynak and (iii) Oerlikon/Magmaweld.

The decision of the Board sheds light on how the Board uses economic analysis for its assessment under Article 4 of the Law No. 4054 in an oligopolistic market under different scenarios. In the decision, the Board used economic analysis (i) to determine the duration of a cartel infringement that it found based on communication evidence and (ii) to decide on whether to apply the presumption of concerted practice where there is no evidence of communication among undertakings. The Board also explained how to determine the starting point for the statute of limitation for the infringements by-object.

I. Theoretical Background Set out by the Board

The Board stated that (i) the documents related to the year of 2011 will be analyzed within the framework of whether there is any anti-competitive "agreement" between the undertakings since these documents include some evidence proving an agreement while (ii) the parallel pricing behavior of the undertakings during the period between 2017 and 2019 will be analyzed within the framework of "presumption of concerted practice" under Article 4/3 of the Law No. 4054 since there is no evidence of communication for this period.

Accordingly, the Board first provided its interpretation on the presumption of concerted practice provided under Article 4/3 of the Law No. 4054 which is as follows: "*In cases where the existence of an agreement cannot be proved, a similarity of price changes in the market, or the balance of demand and supply, or the operational regions of undertakings to those markets where competition is prevented, distorted or restricted, constitutes a presumption that the undertakings are engaged in concerted practice.*" According to the Board, the said article provides that, even if there is no evidence of communication, the Board may decide that there is concerted practice among undertakings provided that (i) the economic evidence shows a parallel behavior and (ii) the undertakings could not disprove the Board's claim.

II. The Board's Analysis on the Findings for 2011

Based on the evaluation of the documents collected from the undertakings, the Board found that (i) the general managers of Gedik, Askaynak and

Oerlikon/Magmaweld took joint decisions on product prices and sales methods, (ii) they showed an effort to ensure implementation of these decisions by each undertaking and (iii) they warned those who do not comply with such decisions. Based on these findings, the Board decided that there was (i) a clear meeting of minds of the general managers of the competitor undertakings and (ii) an effort to implement monitoring and sanctioning mechanism (*i.e.* warning) in case of a "cheat" and "self-seeking". Accordingly, the Board decided that the attempts and actions of the undertakings fulfil the necessary conditions for finding of a cartel infringement.

The Board then noted that although the documents show the existence of a cartel and the intention of maintaining the cartel, the documents concern only a period of 4 months, hence it is necessary to conduct an economic analysis on the price-cost data of undertakings in the relevant periods (*i.e.* 2011-2016) to determine the duration of the cartel agreement. In this regard, the Board found that although the economic analysis demonstrated a parallelism between the prices of the competitor undertakings, there was also parallelism between the relevant costs. Thus, the Board decided that the economic findings were insufficient to reach the conclusion that (i) the parallelism in the prices was independent from the parallelism in the costs and (ii) there existed an anti-competitive agreement especially considering that the sector consists of homogenous products and small number of players. For completeness, the Board requested further economic analysis from the Turkish Competition Authority's Economic Analysis and Research Department which takes into account all variables that may affect the prices other than the cost variable, but the additional analysis did not provide any evidence for the existence of an anti-competitive agreement. Therefore, the Board only relied on the documents collected from the undertakings when determining the duration of the cartel.

Following that, the Board conducted an analysis on the punishability of the violation and examined whether the statute of limitation was expired with respect to the violation detected based on the relevant documents. The Board referred to Article 20 of the Law No. 5326 on Misdemeanour providing the statute of limitation as 8 years and explained how the starting point of the statute of limitation for competition law infringements can be determined. The Board noted that since the documents concern a restriction of competition by-object, it is sufficient to make the relevant correspondence for breaching the law. Hence, the infringement occurred when the correspondences are made. Indeed, the date of the last document to prove the existence of violation was 25 April 2011, and there was no other communication, document or economic analysis to prove the existence of violation for the following periods. Therefore, the Board stated that the infringement ceased on 25 April 2011 and given that Board rendered its decision to initiate the relevant investigation against the undertakings on 20 February 2020, the statute of limitation had run out, and there were no grounds to impose an administrative fine for the violation occurred in 2011.

III. The Board's Analysis on the Findings for the Period of 2017-2019

In its analysis for the period of 2017-2019, the Board first highlighted a document dated 2011 indicating that the relevant

undertakings showed effort to keep their coordination in secret and carried out measures not to leave any evidence behind (*e.g.* communicating via personal e-mails). Therefore, the Board noted the possibility that the reason why no communication documents were obtained after 2011 may be because the cartel agreement was well-hidden after that date and stated that the search for economic evidence has gained importance due to this possibility.

In light of the theoretical background set out above, the Board argued that the presumption of concerted practice provided under Article 4/3 of the Law No. 4054 is a tool which enables the Board to reach the conclusion that there was a violation based on purely economic evidence in the absence of concrete communication evidence. The Board noted that the existence of anti-competitive "agreement" and "concerted practice" needs to be proved based on an "evidence of communication" demonstrating the presence of coordination. Nevertheless, for the assessment under Article 4/3 of the Law No. 4054, the Board argued that:

"*In order to find that the high prices that are independent from the costs are applied as a result of coordination, the pricing behaviors must provide a presumption for the existence of a communication within the framework of the 'presumption of concerted practice'. In other words, the pricing behavior must create an environment where the need for communication between undertakings is replaced by that behavior*."

Accordingly, if the pricing behavior of the undertakings provides such an environment, this may enable the Board to presume that there was a violation even in the absence of communication.

After providing the results of the economic analysis, the Board explained that even though there was a period within the overall period from 2011 to 2019 where there was a parallel price increase which is independent from the increases in the costs, the following question needs to be answered before finding a violation: "*Taking into account the tendency for oligopolistic dependency in the welding sector, are the price increases the result of an anti-competitive agreement or oligopolistic dependency*?" On this note, the Board stated that while the parallel price increases as a result of oligopolistic dependency are considered as one-sided actions and do not amount to a competition violation; price increases as a result of a concerted practice or agreement, are considered to be a violation of Article 4 of the Law No. 4054.

In light of this, the Board stated that it analyzed the case based on an economic analysis on whether the pricing behavior in the market was in line with a situation where there is communication for coordination.

The relevant economic analysis revealed that the pricing behavior was parallel during the investigation period and the profitability of the undertakings was increased in the last periods. Nevertheless, it was found that the cost and currency exchange rate had a significant impact on the price changes, and when the data are adjusted for the impact of these variables, the price changes did not show the effect of an infringement.

More specifically, it was found that;

i) The prices in the welding sector are affected by the exchange rate increases before the increase is actually reflected on the costs because

the prices are increased based on the expectation of cost increases and in parallel with the increases in producer price index. Indeed, the prices in the sector were mostly correlated with the exchange rate and producer price index.

ii) The increase in the prices before the increases in the costs - in addition to the increased export opportunities due to the exchange rate - has led to an increase in the profitability of the undertakings.

iii) Even though the raw materials in the welding sector are supplied mostly from domestic producers, the first parameter to affect the prices is fluctuations in the exchange rate since the price of raw materials is indexed to the prices determined in the worldwide metal exchange markets.

iv) There are fluctuations and delays in the price transitions of undertakings - which is not expected in cases where the prices are increased based on an agreement.

Based on the above findings, the Board decided that even though the possibility of an anti-competitive conduct cannot be entirely excluded given the increased profitability observed in this period and the fact that the increases in the exchange rate reflected on the prices before its effect on the costs, there is no statistically meaningful correlation among the undertakings' prices when the data are adjusted for the exchange rates and costs. The Board then concluded that the presumption of the concerted practice cannot be applied for the period of 2017-2019 since there are no indications of "market behavior that provides a presumption of communication". Accordingly, the Board decided that the undertakings did not violate Article 4 of the Law No. 4054 during the relevant period.

IV. Conclusion

The decision is noteworthy since, first, the Board underlined that, within the framework of the presumption of concerted practice, it may base its allegation under Article 4 of the Law No. 4054 based on purely economic evidence if the "market behavior provides a presumption of communication". Second, the Board seems to consider itself liable to include the period between 2011 and 2016 into the duration of the "cartel" infringement if there existed a parallelism in prices (i) that cannot be explained by the costs within that period and (ii) "indicating an anti-competitive agreement" even if the last evidence of communication was dated 2011.

Third Time Unlucky: The Board Rejected Paşabahçe's Latest Individual Exemption Request

I. Background

The Turkish Competition Board ("***Board***") recently published its reasoned decision[61] on an individual exemption request by Paşabahçe Cam Sanayi ve Ticaret A.Ş. ("***Paşabahçe***"), an undertaking mainly active in design, production and sale of household glassware. Paşabahçe requested an individual exemption for its authorised dealership agreement with the wholesalers in their household goods channel for the distribution of glass and porcelain houseware ("***Agreement***").

[61]The Board's decision dated 10.10.2021 and numbered 21-30/385-193.

After a detailed review on Paşabahçe's request, the Board rendered that the Agreement already benefited from group exemption under the Block Exemption Communiqué on Vertical Agreements ("***Communiqué No: 2002/2***") for the porcelain houseware market, however, the Agreement cannot be granted an individual exemption for the glass houseware market as it failed to meet the requirements stipulated under the Article 5 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***").

In terms of the Board's review record, the official number of individual exemption applications for the year 2021 was 22, and only 3 of them were rejected[62]. Yet, what especially makes this decision noteworthy is that Paşabahçe actually had secured two prior individual exemptions for its authorised dealership agreement with the wholesalers in the household channel for the distribution of glass and porcelain houseware. One was in 2010[63] and the other was in 2015[64]. Therefore, what made a quite similar agreement fall short of individual exemption criteria is worth focusing on.

II. The Board's Block Exemption Analysis for the Agreement

Before delving into the exemption analysis itself, the Board firstly evaluated the Agreement in light of the Article 4 of the Law No. 4054 titled "*Agreements, Concerted Practices and Decisions Limiting Competition.*" This is because when an agreement does not have a dimension that could restrict competition under the Article 4 of the Law No. 4054, the Board renders a negative clearance decision in response to the individual exemption requests.

Following its evaluations, the Board concluded that the Agreement did include certain provisions that could restrict competition within scope of Article 4 of the Law No. 4054. These were provisions that (i) restricted active sales of authorized dealers to certain costumers/areas, (ii) required the authorised dealers to purchase glass houseware products only from Paşabahçe or from places Paşabahçe will refer them to, and (iii) prevented the authorised dealers to directly or indirectly produce, sell, or market any competitor product.

The Board, then, went on to evaluate the Agreement pursuant to the Communique No. 2002/2 to see if the Agreement benefited from a block exemption. For this, the Board made a distinction between two product markets: (i) porcelain houseware market and (ii) glass houseware market. The Board stated that Paşabahçe's market share in the latter, way exceeded the thresholds in the Communiqué No: 2002/2, so it decided that Paşabahçe could not benefit from a block exemption in the glass houseware market. Finding that the market share thresholds are met for the porcelain houseware market, the Board's block exemption review continued only for the porcelain houseware market.

Following its review, the Board concluded that the Agreement did not include any provisions or did not have any *de facto* vertical restraints that would make it fall outside the scope of block exemption provided in the Communique No. 2002/2. This conclusion was limited to the *porcelain* houseware market. For the *glass* houseware market, where the Board

[62]The Turkish Competition Authority's Decision Statistics for the year 2021 available at the Turkish Competition Authority's official website.
[63]The Board's decision dated 12.05.2010 and numbered 10-36/572-202.
[64]The Board's decision dated 09.07.2015 and numbered 15-29/431-126.

attributed a high market share to Paşabahçe, the Board moved on to analyse if the Agreement could be granted an individual exemption.

III. The Board's individual exemption analysis for the Agreement

The Board evaluated the Agreement to see if it could be granted an individual exemption as per the Article 5 of Law No. 4054. In doing so, the Board followed its usual case law to analyse each individual exemption criterion separately.

In terms of the first condition of individual exemption (*i.e.,* new developments or improvements or economic or technical improvement in the production or distribution of goods and in the provision of services), the Board acknowledged Paşabahçe's efficiency arguments claiming (i) increased service quality and efficiency in marketing activities, (ii) better evaluation of consumer demands and ensuring optimization in the planning of production, (iii) controlled production costs and (iv) decreased stocking and logistics costs as a result of enhanced rationalization in distribution.

In terms of the second condition of individual exemption (*i.e.,* consumer benefit), Paşabahçe stated that the consumer benefits in the Board's previous two exemption decisions were still applicable. According to Paşabahçe, the most important benefit of the Agreement to the authorised dealers was the investments Paşabahçe provided to them. As a result, they argued, economically stronger authorised dealers would be able to benefit consumers.

At this point, the Board noted that Paşabahçe was granted individual exemption to its distribution system for some 10 years, so the Board actually expected Paşabahçe to be able to put forward solid examples and data on how cost savings are passed on to the consumers, yet Paşabahçe had failed to do so.

Still, the Board accepted the consumer benefit arguments of Paşabahçe and concluded that the Agreement fulfilled the second condition of the Article 5 of the Law No. 4054, as well. This was due to the fact that Agreement promoted service quality of the authorised dealers, ensured continuous supply and product variety, and provided increasing product availability.

The Board then evaluated the third condition of Article 5 of Law No. 4054 that the Agreement should not eliminate the competition in a significant part of the relevant market. Board stated that the agreement contains a non-compete clause for the dealers and such brand restriction has 4 main negative effects for competition: (i) market foreclosure effect, (ii) coordination effect, (iii) preventing inter brand competition and (iv) price increase effect.

Besides, the Board made a specific reference to the paragraph 157 of the Guidelines on Vertical Agreements which states that the combination of exclusive distribution with exclusive buying may reduce intra-brand competition and increase the risk of market partitioning which may facilitate price discrimination in particular.

With these concerns in mind, the Board separately evaluated the respective market positions of the provider (Paşabahçe), competitors and buyers. The Board concluded that, (i) Paşabahçe held a significantly strong position in the glass houseware market, (ii) competition within

the glass houseware market is considerably low due to Paşabahçe's dominance, (iii) buyers do not have power to balance Paşabahçe's position in the market.

Moreover, the Board closely examined the barriers of entry and underlined that, there are obstacles that make it harder for competitors to enter and grow within the glass houseware market. Besides, the Board found out that, although competitors brought new products into the market, their sales numbers did not grow. In this respect, the Board considered that the glass houseware market is far from having a competitive and dynamic structure.

The Board conducted its own review on how market reacted to Paşabahçe's vertical restraints that were in practice for some time. As a result, Board concluded that the Agreement's non-compete provisions, exclusive distribution clauses and exclusive buying requirements would have significant competition restrictive impacts on the market and the agreement would remove the competition on a significant part of the market. For this reason, the Board arrived at the conclusion that the Agreement did not satisfy the third requirement in the individual exemption criteria.

Lastly, the Board examined the final condition of Article 5 of Law No. 4054 that the Agreement should not restrict competition more than necessary to achieve the goals set out in the first two criteria under the sub-paragraphs (a) and (b) of the Article 5(1). The Board found that a non-compete clause alone could be sufficient to achieve the procompetitive goals set out in the first two criteria. Therefore, the Board decided that the Agreement does not satisfy the requirement in the last condition of the individual exemption criteria, as it included further vertical restrictions including exclusive distribution and exclusive buying requirements.

IV. Conclusion

In light of the foregoing, even though Paşabahçe actually did secure two prior individual exemptions in 2010 and 2015 for its authorised dealership agreement with the wholesalers in the household channel for the distribution of glass and porcelain houseware, the latest version of the agreement was not granted individual exemption.

The Board seemingly expected to observe solid procompetitive impacts of the previous agreements, whereas, the data that the Board had was not quite supportive of that. Instead, the Agreement was not found very promising considering the market dynamics and Paşabahçe's strong position in the market. Most remarkably, the Board found the combination of vertical restrictions in the Agreement -consisting of a non-compete clause along with exclusive distribution and exclusive buying requirements- as excessive and concluded that a non-compete clause alone could be sufficient to achieve the procompetitive goals addressed with the Agreement.

Turkish Competition Board Grants Unconditional Approval to the Acquisition of Sole Control of Atotech Limited by MKS Instruments, Inc.

The Turkish Competition Board (the ***"Board"***) has published its reasoned decision[65] regarding the acquisition of sole control of Atotech Limited ("***Atotech***") by MKS Instruments, Inc ("***MKS***").

As per the notified transaction, MKS will hold all shares of Atotech, retain its management powers and responsibilities, and thus, it will acquire sole control of Atotech.

Before delving into its substantive analysis, the Board provided insights on the activities of the parties. The Board first analysed whether there is horizontal or vertical overlap between the activities of the parties in Turkey. The Board stated that Atotech is a global supplier of specialty chemicals, equipment, services and solutions for coating and surface treatment. Atotech supplies coating chemicals ("***EL Chemicals***") and equipment ("***EL Equipment***") to manufacturers of printed circuit boards ("***PCB***"), semiconductor ("***SC***") and other electronic components. In terms of the acquirer, MKS is a provider of instruments, systems, subsystems and process control solutions that measure, monitor, analyze, report, reinforce and control the critical parameters of its customers' production processes. The Board stated that MKS supplied equipment, parts and subsystems for industrial use while Atotech supplied surface coating chemicals, which are considered as consumables.

Based on the explanations and statements provided by the parties, the Board evaluated that there was no horizontal or vertical overlap between the activities of the parties. On the other hand, the Board assessed that there might have been complementarity and weak substitution relations between the activities of the parties.

As per Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions, the Board stated that conglomerate mergers are those (i) implemented between undertakings with no horizontal or vertical relationships and (ii) where the relationship between the merging undertakings is neither purely horizontal (being in the same relevant market) nor vertical (supplier-buyer relationship). The Board continued that the main concern in such conglomerate mergers is that the merged undertaking may leverage its power in one market to foreclose competitors in another market via bundling or tying practices that use the different products sold by the undertaking.

In this sense, the Board firstly evaluated the market shares of the parties in the relevant product markets in Turkey and the competition conditions in the relevant markets. The Board found that Atotech has a very high market share in Turkey in the EL Chemicals market. On the other hand, MKS is not active in the EL Chemicals market in Turkey or globally.

Further, the Board acknowledged that there were many stages in the PCB manufacturing process that did not require the presence or involvement of Atotech and MKS, yet there were other companies supplying equipment and consumables for usage in these machining steps where the parties were not currently active. Accordingly, the Board concluded

[65]The Board's *Atotech/MKS* decision dated 07.10.2021 and numbered 21-48/690-342.

that as a result of the notified transaction, it was not possible for the merged undertaking to dominate the whole (or even a significant part) of the PCB production line and the possibility of significantly lessening competition is low.

The Board also concluded that the current global players would not face any significant barriers to entry in the Turkish market. As per the efficiency gains, the Board stated that the notified transaction could lower the transaction costs. Consequently, the Board unconditionally approved the notified transaction although the Board found that there is a complementary relationship between the products offered by the parties to the notified transaction. When the efficiency gains are also taken into account, the Board decided that the proposed transaction would not create a dominant position or the strengthen an existing dominant position, and would not result in a significant lessening in effective competition.

All in all, the Board ultimately granted an unconditional approval to the transaction stating that the proposed transaction fell within the scope of Article 7 of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board and the transaction would not significantly impede effective competition.

The Turkish Competition Board Approved the Establishment of a Joint Venture Between Azertelecom Int. LLC and Socar Turkey Enerji Anonim Şirketi

The Turkish Competition Board ("***Board***") has published its reasoned decision regarding the establishment of a joint venture, Transanatolian Fiber Taf Telekomünikasyon Hizmetleri A.Ş. ("***Transanatolian***"), in which the parent undertakings namely, Azertelecom Int. LLC ("***Azertelecom***") and Socar Turkey Enerji Anonim Şirketi ("***Steaş***"), a subsidiary of the State Oil Company of the Republic of Azerbaijan ("***Socar***") (together referred to as the "***Parties***" or "***Parent Undertakings***") will have equal capital shares ("***Transaction***").[66]

In its review of the 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 the transaction concerns the formation of a joint venture that will permanently perform all the functions of an independent economic entity. According to Article 5(3) of the Communiqué No. 2010/4, to qualify as a concentration subject to merger control, a joint venture must satisfy two criteria: (i) the existence of joint control of the parents in the joint venture and (ii) the economic independency of the joint venture. Moreover, the Board held that the turnover figures of the Parties exceed the turnover thresholds stipulated in Article 7 of Communiqué No. 2010/4. All factors considered, the Board decided that the

[66] The Board's decision dated August 19, 2021 and numbered 21-39/556-269.

notified transaction is subject to the approval of the Board.

The Transaction relates to the electronic communication sector. Therefore, the Board requested the opinion of the Information Technologies and Communications Authority ("***ITCA***") as per Article 7 of the Act No. 5809 on Electronic Communications which stipulates that *"The Board primarily takes into account the opinion of the ITCA and the regulatory actions taken by the ITCA in all its decisions regarding the electronic communications sector, including the decisions to be taken regarding mergers and acquisitions (...) to be made regarding the electronic communications sector"*. In its opinion letter, the ITCA assessed that the proposed joint venture will not harm the current conditions of competition, market indicators and market structure in terms of the effects that may take place in (i) the relevant market where service is to be provided, and (ii) other markets where the Parties are authorised to operate.

In its review, the Board examined whether the transaction satisfies the two criteria that a joint venture must meet. Consequently, it explained when joint control is deemed to exist and what "effective control" means in light of the Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control ("***Control Guidelines***"). Accordingly, effective control refers to the authority to block the decisions directing the strategic business actions of an enterprise. In paragraphs, 50 *et seq*. of the Control Guidelines, joint control occurs when the parties have (i) equal voting rights, (ii) veto rights in strategic decision-making, or (ii) joint use of voting rights. To that end, the Board stated that when the Parent Undertakings are required to compromise on important decisions concerning the joint venture (such as the appointment of executive management teams, decisions regarding budget, decisions on business plans and significant investments in the joint venture) joint control within the meaning of Control Guidelines exists. The Board later evaluated (i) the shareholder structure of the joint venture upon the consummation transaction and (ii) the articles of the agreement that brings about the concentration namely Shareholders Agreement on Transanatolian Fiber Taf Telekomünikasyon Hizmetleri A.Ş. in light of the Control Guidelines. Consequently, the Board decided that Transanatolian will be jointly controlled by Steaş and Azertelecom thereby satisfying the above-mentioned first criterion to be classified as a joint venture within the meaning of Article 5 of the Communiqué 2010/4.

Secondly, the Board evaluated whether the joint venture is an independent economic entity, in other words, whether it has full-functionality. Within the framework of its assessment of full- functionality, the Board assessed whether the joint venture to be established is a separate undertaking that can continue its activities in the relevant market independent from the parent undertakings. The Board found that the joint venture will exercise activities beyond one specific function of the parent undertakings. Furthermore, the Board decided that the joint venture; (i) will have its own management, (ii) will have financial resources and personnel, (iii) will engage in and offer sales to the third parties other than the parent undertakings within the scope of company activities, (iv) will continue its activities with the income from the services, and (iv) the joint venture will operate within the scope of sales made to third parties independently from its parent undertakings in the telecommunication services sector. The

Board also examined that to carry out its activities, the joint venture will be subject to the licences to be issued on its own name and account by the ITCA, and therefore, it will operate independently, on a lasting basis, for an indefinite period of time and in full-functionality, with sustainable resources.

In its assessment, the Board reminded that according to the Communiqué No. 2010/4, affected markets consist of relevant product markets and where, (i) two or more of the parties have commercial activities in the same product market (*i.e.*, horizontal relationship) (ii) at least one of the parties is engaged in commercial activities in markets which are upstream or downstream from the product market any of the other parties (*i.e.*, vertical relationship).

In the evaluation made within this framework, the Board held that Transanatolian will be active in (i) the organisation of cross-border data traffic, (ii) the organisation of local data traffic, and (iii) capacity sales. In this context, Transanatolian was aimed to develop a new data transmission route from Europe to Asia by bringing together the local assets and international experiences of the Parties. The Board envisaged that the main and only activity of the joint venture will be the sale of digital capacity and data transmission which, Socar Turkey Fiber Optik Anonim Şirketi ("***Socar Fiber***") that is controlled by Steaş has the right to use. In other words, the joint venture will be active in the (i) establishment and operation of transmission infrastructure via cable, (ii) connection between the points of presence of other operators, (iii) establishment and operation of terrestrial and/or submarine transmission infrastructure between various points of presence, establishment and (iv) operation of towers, poles, huts, containers and similar facilities. Consequently, the Board considered the main activities of Transanatolian in the area of infrastructure management services to be data transfer services to be carried out in the territory of Turkey and sales of the capacity in the existing infrastructure in Turkey.

I. Information on the Parent Undertakings

(i) Azertelecom

Azertelecom is a subsidiary of Azertelecom LLC, which was established within the Neqsol Holding group of companies under the control of Nasib Hasanov and operates in the telecommunications sector in Azerbaijan. Azertelecom is active in the areas of mobile backhaul, wholesale internet, leased line services, laying of fiber optic cables, international transit, data center services and VPN services. In addition, Azertelecom has telecommunications activities in Bulgaria, Georgia, Azerbaijan and Ukraine. However, Azertelecom does not have any activities in Turkey.

(ii) Steaş

The other Parent Undertaking of the joint venture, Steaş, engages in a wide variety of activities which, among others, include production, processing, sales, distribution, investment, research and development, export, import, port management, sales and distribution of fuel in the energy sector, especially natural gas and oil, per the energy legislation of Turkey, and the establishment of commercial and industrial facilities related to these activities; providing all kinds of electronic communication services, and the establishment and operation of infrastructure.

Moreover, Steaş has two subsidiaries that it directly and indirectly controls, namely Millenicom Telekomünikasyon Hizmetleri Anonim Şirketi ("***Millenicom***") and Socar Fiber. The ITCA stated that Socar Fiber is authorised in the areas of infrastructure management and multi-use radio services and Millenicom, is authorised to provide fixed phone service, infrastructure management service, internet service provider service and virtual mobile network service.

II. Assessment of the Affected Markets

Considering the fields of activity of the Parent Undertakings, the Board determined the activities of the joint venture and Socar Fiber in Turkey to horizontally overlap in the infrastructure management service market. This was because (i) the fiber line of Socar Fiber may be used in the future by the joint venture, (ii) there are ongoing negotiations with regards to the signing of a contract between the joint venture and Socar Fiber regarding the establishment of a usufruct right on the fiber optic cables in favour of the joint venture observing the principle of compliance with commercial precedents, and (iii) the mentioned fiber optic cable route will not only be used by Transanatolian, as Socar Fiber`s activities will be carried out on the same line under competitive trade principles. The Board also held that there could be a vertical overlap between the activities of the joint venture and Millenicom considering, Transanatolian may be able to operate in the internet service provider market through the use of the fiber optic line operated by Millenicom although it is not among the activities planned as a priority.

After its relevant product market definition, the Board moved on to assess the effects of the Transaction on the relevant product markets. In its assessment, the Board considered the total market share of the Parties and their position in comparison with their competitors, and the opinion letter of the ITCA. The ITCA stated that considering the market shares of Socar Fiber and Millenicom in the last quarter of 2020 regarding their jurisdictions, Socar Fiber is not among the top 10 operators in the infrastructure management service market according to the number of subscribers and revenues. The ITCA also mentioned that Millenicom is also not among the top 10 operators in the infrastructure management service market, according to its net sales revenues. Moreover, according to its market share ratios per number of subscribers and revenue, Millenicom is respectively the 8th and 5th operator with the highest market share in the fixed phone service market. Furthermore, the ITCA stated that Millenicom ranks 6th in the internet service provider market according to the number of subscribers and income.

Consequently, the Board concluded that the market shares of the Parties in the overlapping markets were at a negligible level, that the joint venture will increase the competition in the market. Therefore, the joint venture will not have a restrictive effect on the competition in the market in Turkey.

On a global scale, the Board held that there is a horizontal and/or vertical overlap between the activities of the Parties and the joint venture since the Parties have affiliates in the telecommunications sector. However, the Board evaluated that the Transaction will not have a restrictive effect on competition since the provision of telecommunication services is subject to national licence requirements and the market shares of the parties in the affected markets in Turkey, are limited.

In light of the foregoing, the Board ultimately concluded that the transaction will not cause a significant impediment of effective competition in the markets. Thus, the Board granted unconditional approval to establishment of a joint venture between Azertelecom and Socar. The decision of the Board provides valuable insights in terms of the transactions that concern the electronic communication sector.

Employment Law

Right to Paid Annual Leave in Light of a Recent Decision of the Court of Cassation

I. Introduction

Under the Turkish Labor Law numbered 4857 ("Law no. 4857"), employees who have completed at least one (1) year of service since their commencement of employment, including the trial period, must be granted paid annual leave. The employee shall be granted the minimum annual leave periods as determined by the applicable law, however the employer can provide for longer periods of paid annual leave under the employment contract.

According to Article 59 of the Law no. 4857, any paid annual leave that the employee was entitled to, but had not yet used at the time the employment contract was terminated, will be paid in lieu to the employee or other persons entitled on their behalf, upon the termination of their employment agreement for any reason, at the wage rate as of the date of termination. It is important to highlight that, as the relevant provision also expressly states, the mandatory condition of entitlement to the annual leave payment is the termination of the employment agreement. The method of terminating the employment agreement, or whether the termination was based on just cause does not matter; the employee would still be entitled to the payment in lieu for the unused days of annual leave.

Moreover, according to Article 54 of Law no. 4857, in the calculation of the required period of time for entitlement of the right of paid annual leave, the total period during which the employee has been employed in one or more establishments belonging to the same employer shall be taken into consideration. Furthermore, any period of time spent by the employee in a workplace within the scope of Law no. 4857 and any period of time previously spent by the same employee in a workplace belonging to the same employer but not covered by Law no. 4857 shall also be considered while calculating such period of time.

The Court of Cassation recently rendered a decision[67] regarding the eligibility for paid annual leave, indicating that, in case of intermittent work, the period of time for which the employee had been employed before – *even if such period is less than 1 (one) year* – will be merged with the subsequent period of time during which the employee was employed by the same employer, while calculating the required period of time for annual leave.

II. Requirements of being entitled to annual leave payment

First of all, according to Article 53 of Law no. 4857, in order to be eligible for pid annual leave, employees who work at workplaces falling under the scope of Law no. 4857, need to have been working for at

[67] 9th Chamber of the Court of Cassation, E. 2021/10345 K. 2021/14531, dated October 20, 2021.

least one (1) year, including their trial period, starting from the date on which the employee actually started to work at that workplace. In other words, as per Article 54 of Law no. 4857, the one (1) year period is calculated from the date the previous right of the paid leave has begun, until the following employment year. The employees are required to use their paid annual leave arising from each of their employment years, within the following employment year. On the other hand, it is important to state that there are cases (such as sick days) stipulated under Article 55 of the Law no. 4857 which an employee will be deemed to have worked in terms of the paid annual leave. Therefore, when calculating the required period of time for paid annual leave, Article 55 of the Law no. 4857 should also be taken into consideration.

Secondly, the workplace which the employee has been working in, has to fall under the scope of Law no. 4857 in order for such employee to be entitled to paid annual leave. It is mandatory that the works performed by the employee should be continuous, *i.e.*, these should not be a seasonal jobs or promotional campaign works which are not deemed to be continuous due to their nature.

As a result, the employees shall use their annual leaves, with payments calculated for each year of service according to Article 54 and Article 55 of Law no. 4857, within the following year of employment. In case they do not use all of their leaves, the employees will be entitled to payment in lieu for the unused annual leaves upon termination of their employment agreement.

III. Outcomes of the decision of Court of Cassation

In the case that was subject to the decision of the Court of Cassation, the employee had intermittently worked for the same employer for a total of two (2) years, five (5) months and eighteen (18) days. The court of first instance calculated the period of time in relation to the annual leave based on fourteen (14) days of annual leave period by separating the periods of intermittent work, not by merging them. However, contrary to the decision of the court of first instance, Article 54 of Law no. 4857 explicitly states that the durations in intermittent work shall be merged in calculating annual leave.

As it is clearly indicated in the decision of the Court of Cassation, in the calculation of the required duration of employment for being entitled to paid annual leave, the employee's intermittent working periods in which the employee has worked for the same employer shall be merged and the total number of days shall be taken into consideration. In the case of public authority employers, it is also mandatory to merge the various service periods served in the public institutions and organization. In addition, in case the employee works intermittently for the same employer, periods of such intermittent work shall be merged and considered in total, even if statutory severance had been paid for the work period that ended with the first termination. In the said decision of the Court of Cassation, it is also determined that, in case of intermittent employment, working periods less than one (1) year shall also be taken into consideration while calculating the total employment period for entitlement to paid annual leave. In other words, the annual leave period should be determined by merging the previous periods of work for which the employee

had not been entitled to annual leave due to falling short of the one (1) year period, in the case the employee has worked intermittently for the same employer.

In this regard, as it is explained in the said decision, the total time the employee spent working for the same employer should have been taken into consideration when calculating the accrued number of paid annual leave days and payment in lieu of unused days. Therefore, the remuneration should have been calculated based on a twenty-eight (28) day period, instead of 14 (fourteen) days in this particular case.

IV. Conclusion

The decision of the Court of Cassation poses great importance since it points out significant terms and conditions when calculating the accrued period of paid annual leave. Such calculation is also very essential for calculating the payment in lieu for the unused days of leave, upon the termination of the employment contract. As per the applicable legislation and the relevant decision of the Court of Cassation, the employee's intermittent working periods in which the employee has worked for the same employer shall be taken into consideration together. While calculating such period, a working period that is less than one (1) year will also need to be taken into consideration even if the employee had not been entitled to paid annual leave upon termination of the working period at the end of that initial period.

Litigation

The Constitutional Court Rules that Dismissing Unquantified Receivable Claims due to Lack of Legal Benefit Violates Right to Access to Court

I. Introduction

Under Turkish Law, as per Article 107 the Turkish Code of Civil Procedure numbered 6100 ("TPC"), if a creditor cannot be expected to accurately and precisely determine the amount or value of their claim on the date the lawsuit is filed or it is impossible to do so, the creditor may file an action for an unquantified receivable claim by specifying the legal relationship and a minimum amount or value (to be used as basis for court fees). As per the referred article, an unquantified receivable claim is subject to certain criteria, and cannot be filed for all claims. Nevertheless, the law stayed silent on the consequences of filing an unquantified receivable claim even though the required criteria for filing such claim were not met in a concrete case.

One of the criteria for filing an unquantified receivable claim is that the amount of the receivable must be, objectively, impossible for the creditor to precisely calculate, or the circumstances must be such that the creditor cannot be expected to calculate the exact receivable amount when the lawsuit is being filed ("Indeterminacy Criterion"). In this heading, the High Court of Appeals has numerous precedents where cases which do not meet the Indeterminacy Criterion and thus cannot be registered as "unquantified" receivable claim but are filed so nonetheless, must be dismissed on procedural grounds due to lack of legal benefit.

The Constitutional Court, however, in its decision rendered on February 22, 2022 within the scope of the individual application numbered 2019/12190 ("Decision"), concluded that this approach of the courts to dismiss unspecified receivable claims due to the absence of a procedural prerequisite for filing a lawsuit (*i.e.*, lack of legal benefit), in fact violated the applicant's right to access to justice (including access to courts), which is protected under Article 36 of the Constitution.

II. The Practice of the High Court of Appeals regarding the Indeterminacy Criterion

The introduction of "unquantified receivable claim" to the Turkish legal system is grounded on the right to a remedy. Indeed, before this option was introduced under the regulation, none of the available legal remedies offered a sufficient solution to a claimant where the amount or value of their receivable was unknown at the time.

In this regard, although the TPC openly introduces the Indeterminacy Criterion, it does not explicitly regulate the aftermath of filing an unquantified receivable claim in cases where the Indeterminacy Criterion is not satisfied. That said, the Preamble of the TPC ("Preamble") reads that "*In order for the creditor to bring such a lawsuit, it must not be possible for the creditor or it must be objectively impossible to truly determine the exact amount or value to be claimed. If the amount of the lawsuit to be filed is known or can be determined, such a lawsuit cannot be brought. Because, as in every case, legal benefit shall be sought here as well and in such a case, it cannot be said that there is a legal benefit.*" In this scope, in consideration of the fact that having legal standing, *i.e.*, the existence of legal benefit is a procedural prerequisite, the quoted section of the Preamble was interpreted to suggest that lawsuits filed as an `unquantified receivable` even though the Indeterminacy Criterion was not satisfied, should be dismissed.

Indeed, in parallel with the Preamble, the established jurisprudence of the High Court of Appeals set forth that a lawsuit that was filed as an unquantified receivable claim despite not meeting the Indeterminacy Criterion must be dismissed on procedural grounds due to lack of legal benefit, existence of which is a procedural prerequisite. For instance, the High Court of Appeals addressed this matter in its decision numbered E. 2014/21954 K. 2014/28204 and dated October 20, 2014. In the respective decision, the High Court of Appeals examined and referred to the explanations included in the Preamble and consequently adjudicated that "*At this point, it should also be clarified that in case a lawsuit is indicated to be an unquantified receivable claim in the lawsuit petition, despite the conditions for filing an unquantified receivable claim were not met; the lawsuit should be dismissed due to lack of legal benefit without granting any time to the plaintiff. Because, the Law did not allow such a lawsuit to be filed in cases where it is possible to determine the receivable. In such a case, the lawsuit should be dismissed due to the lack of legal benefit in filing an unquantified receivable claim, and no additional time should be granted (...) As it is understood that the receivables that are made subject to the lawsuit are actually determinable and cannot be made subject to an unquantified receivable claim, it was erroneous to render a decision as written by examining the merits, while the case should have been*

dismissed on procedural grounds due to the lack of legal benefit."[68]

III. The Constitutional Court's Decision regarding the Indeterminacy Criterion

In the case examined in the Decision, the applicant ("Applicant"), who is an employee retired from the Municipality, filed an unquantified receivable claim against the Municipality, requesting the payment of his receivables arising from the collective bargaining agreement. The Applicant indicated the amount of requested compensation as TRY 6,539.68, by reserving his rights for the surplus. Subsequently, in consideration of the expert report, the Applicant increased his compensation claim to TRY 11,745.23 by amending his initial pleading. The first instance court ("Court") partially accepted the Applicant's lawsuit and ruled for payment of compensation to the Applicant in the amount of TRY 8,827.97. The 22nd Civil Chamber of the High Court of Appeals ("Chamber") considered that the subject matter receivable was not unquantified and stated that there was no legal benefit for the Applicant to file an unquantified receivable claim without satisfying the required criteria, instead of filing a full/partial receivable lawsuit (general action for performance), and reversed the Court's decision on the grounds that the lawsuit should have been dismissed on procedural grounds. The first instance Court complied with the Chamber's reversal decision and, by adopting the Chamber's reasoning therein, dismissed the lawsuit on procedural grounds due to lack of legal benefit. Upon appeal, this decision was upheld by the Chamber. In his individual application to the Constitutional Court, the Applicant argued that his right of access to a court was violated because the lawsuit he filed on account of non-payment of his employment receivables was dismissed due to the absence of a procedural prerequisite.

In evaluating the Applicant's individual application, the Constitutional Court examined the purpose and conditions of filing an unquantified receivable claim and acknowledged that unquantified receivable claim provides certain additional advantages, unlike the general action for performance, in terms of the creditor's right to access to a court. In this scope, the Constitutional Court emphasized that "*As it can be understood from the preamble of Article 107 of the Law No. 6100, the purpose of regulating the unquantified receivable claim is to ensure enjoyment of the right and to facilitate the individuals` access to a court. The legislator introduced the opportunity to file an unquantified receivable claim in cases where it is not possible for the creditor to precisely calculate its receivable, in order to prevent loss of rights due to procedural requirements. In this respect, it is understood that the unquantified receivable claim is a legal remedy that is provided to prevent sacrificing merits to procedure.*"[69]

After addressing the purpose and benefits of the option to file an unquantified receivable claim, while evaluating the consequences of erroneously filing an unquantified receivable claim (despite legally not being able to do so) instead of filing a full/partial receivable lawsuit

[68] The 22nd Civil Chamber of the High Court of Appeals' decision numbered E. 2014/21954 K. 2014/28204 and dated October 20, 2014. See also the 22nd Civil Chamber of the High Court of Appeals' decision numbered E. 2015/12704 K. 2016/17336 and dated June 9, 2016; the 22nd Civil Chamber of the High Court of Appeals' decision numbered E. 2016/5620 K. 2016/8576 and dated March 17, 2016.

[69] Constitutional Court, *Ismail Avci*, numbered 2019/12190 and dated February 22, 2022 ("Avci"), §62.

(general action for performance), the Constitutional Court noted that in order to consider such interference with the right of access to a court to be proportionate, the dismissal of the lawsuit due to lack of legal benefit must be the last resort. [70] The Constitutional Court further noted that various provisions existed under the TPC that granted substantial powers to the judges in order to make those lawsuit petitions that were not duly prepared, comply with the procedural requirements: (i) as per Article 119/2 of the TPC, in case the relief sought is missing from the petition, the judge shall grant one (1) week of peremptory term to the plaintiff to make up the deficiency, (ii) as per Article 115/2 of the TPC, if it is possible to remedy an absence of a procedural prerequisite, the judge shall grant the relevant party a peremptory period of time to satisfy this procedural prerequisite and dismiss the lawsuit on procedural grounds due to the absence of a procedural prerequisite only if the absence of the procedural prerequisite was not remedied, and (iii) as per Article 31 of the TPC, the judge has the authority to have the parties explain the issues that the judge deems to be ambiguous or contradictory [71] . Accordingly, the Constitutional Court pointed out that there is actually a tool to avoid a harsh intervention to the right to access to a court by dismissing a case on procedural grounds.

In light of the foregoing, the Constitutional Court stated that the possibility of filing an unquantified receivable claim, which was introduced with a view to facilitate the plaintiffs' right to access to a court, led to negative consequences for the Applicant due to the strict interpretation adopted by the Chamber in the case at hand; because, "*The applicant was deprived of the right to bring a dispute regarding his civil right before the court, simply because he had indicated in his lawsuit petition that his lawsuit was an unquantified receivable claim. The fact that the applicant erroneously filed an unquantified receivable claim not only resulted in him not benefitting from the advantages brought by the unquantified receivable claim, but also led him to the lose his rights that he could have obtained through a general action for performance.*" [72] In this scope, the Constitutional Court evaluated that non-satisfaction of the requirements for filing a lawsuit providing additional advantages in terms of access to a court may only have an effect limited with the removal of those additional advantages and set forth that "*interventions that would result in the individual facing deprivations beyond not being able to benefit from the advantages provided by the unquantified receivable claim, cannot be accepted as a last resort.*"[73]

Consequently, the Constitutional Court considered that the dismissal of the unquantified receivable claim filed by the Applicant even though the required criteria for filing such a claim was not satisfied, due to the absence of a procedural prerequisite, cannot be deemed as the last resort, taking into account the alternatives available under the procedural law[74]. The Constitutional Court therefore adjudicated that the interference with the right to access to a court (which was conducted through the dismissal of the lawsuit on procedural grounds due to lack of legal benefit) was not in compliance with the proportionality principle (in terms of the "necessity" limb of the proportionality principle) and thus constituted a violation

[70] *Avci*, §§68, 74.
[71] *Avci*, §§69, 70.
[72] *Avci*, §71.
[73] *Avci*, §72.
[74] *Avci*, §74.

of the Applicant's right to access to a court that is protected under Article 36 of the Constitution.

IV. Conclusion

The Decision is of great importance as it dissents from the established jurisprudence of the High Court of Appeals. The ruling in question established that dismissal of a lawsuit that is filed as an unquantified receivable claim while the exact amount of the receivable could have been precisely determined by the plaintiff (*i.e.*, even though the Indeterminacy Criterion is not satisfied) because of procedural grounds due to lack of legal benefit violates the Applicant's right to access to a court. So the Constitutional Court gives way to a substantial shift in practice as to unquantified receivable claims. How the jurisprudence will evolve after the Decision is yet to be seen.

Data Protection Law

Recent Decisions of the Turkish Data Protection Board

The Turkish Data Protection Board ("Board") has published three of its decisions from January to April, which are summarized below in chronological order:

Decision numbered 2021/1210 and dated December 2, 2021 on processing mobile phone number data, by calling users for information and sending text messages about Digiturk promotions.[75]

The data subject filed a complaint regarding three phone numbers that had called to advertise Digiturk (a paid-TV network in Turkey) services and promotions. During the investigation the Board gathered information from the provider of Digiturk service, the Digiturk service distributor and the owner of the phone numbers. Digiturk service provider indicated that the distributors are the data controllers acting independently. The distributor indicated that they have a subcontractor relationship with M.D. (owner of one of the phone numbers) and they have no information how they obtain the phone numbers and make the calls. M.D. indicated that the data was obtained using number derivation method before the Law on Electronic Commerce was in force. M.A. stated that these individuals came across the advertisements on social media that ran during certain periods via their social media accounts, and they willingly filled-out the forms, upon which the promotions were broadcast/made to them. However, the Board has not found the forms sufficient as the form sample provided to the Board was written by M.A.'s handwriting using M.A.'s number and signature. The Board decided that the Digiturk service provider and its distributor do not act as data controllers and therefore, there is no action to be taken against them, however the Board directed the Digiturk service provider to instruct and direct its distributors for maximum effort and diligence in getting new customers and provide clear clauses on who the data controller and the processors are. The Board decided to impose administrative fines upon M.D. and M.A. since their data processing activities are not in accordance with Article 5 of the DP Law.

[75] https://kvkk.gov.tr/Icerik/7152/2021-1210 (Last accessed on April 25, 2022).

Decision numbered 2022/13 and dated Junary 6, 2022 on sharing exam result documents by a local news site without the consent of the data subject[76]

This decision concerned a case wherein the Higher Education Institutions Exam (HEIE) exam result document, which contains the personal data of the data subject, was shared by a local news website without the data subject's consent, and furthermore, the data subject's application to the data controller regarding the data processing activity was left unanswered. The Board stated that while there is freedom of press for the data controller who published the news, there is also the right to demand the protection of personal data for the data subject, and therefore the right to demand the protection of personal data conflicts with the freedom of the press. The Board concluded that the news merely providing the result as an example of a HEIE exam winner and not related to a high academic achievement, such a news item did not cause the public to contemplate on the issue and therefore lacked public interest. Accordingly the Board decided that the personal data processing activity carried out in the news in question, was against the law, and imposed an administrative fine on the data controller who had processed personal data unlawfully as per Article 12 of Turkish Data Protection Law ("DP Law").

Decision numbered 2022/137 and dated February 17, 2022 on unlawful processing of personal data by the data controller, which is a shopping mall, by obtaining an e-Devlet password from the data subjects for purchases on credit and their T.R. identity number for creating a membership on the website [77]

This decision is regarding a case in which the data subject is asked for their password to the E-Devlet platform *(which is the Turkish Republic's electronic gateway /platform for individuals to access certain public services and records pertaining to them)* when they apply to purchase a mobile phone on credit (secured via promissory notes) through the website of a shopping mall, and the data controller`s system is designed in a way that the purchase cannot be completed without the E-devlet password of the data subject. Although the data controller stated in its defense that the image requesting the relevant password was on the website without their knowledge, and that they immediately removed the relevant image when they became aware of the situation, the Board did not find this justification sufficient. The Board stated that obtaining e-Devlet password is not necessary for the activity and if obtained, it could result in dangerous consequences for the individuals. Moreover, the TR identity number requested during registration is not necessary either and combining the two could allow access by irrelevant parties to the individuals' e-Devlet accounts. The Board also stated that the data controller did not take the necessary technical and administrative measures in the data processing activities on the website since malicious people can easily access the address information of data subjects on the website by entering the information of the data subjects they know to be members of the website. The Board decided that the data processing activity carried out by requesting TR identity number information and the e-Devlet password is in violation

[76] https://kvkk.gov.tr/Icerik/7179/2022-13 (Last accessed on April 25, 2022).

[77] https://kvkk.gov.tr/Icerik/7192/2022-137 (Last accessed on April 25, 2022).

of Article 5 of the Law and there is a data security gap due to the fact that the data can be viewed by third parties, and this constitutes a violation of Article 12 of the Law; and imposed an administrative fine on the data controller who did not fulfill the obligation to take the necessary technical and administrative measures to ensure data security in the processing of personal data.

Internet Law

Amendments to Consumer Protection Law Introduce New Obligations to Intermediary Service Providers

I. Introduction

Law No. 7392 Amending Consumer Protection Law and Property Ownership Law ("Amendment Law") has been published on the Official Gazette on April 1, 2022 [78] . The Amendment Law is significant since it introduces new obligations on intermediary service providers ("ISPs").

II. General Obligations of the Intermediary Service Providers

ISPs are defined in electronic commerce laws as "the natural or legal person who provides the medium for others to carry out their economic and commercial activities." According to existing electronic commerce laws, ISPs do not have an pre-emptive obligation to check whether the content, product or service violates the law.

Primarily, the obligations of ISPs are (i) providing necessary information pertaining to themselves such as contact and business information, affiliated trade association, commercial name, MERSIS number, (ii) providing technical means to the service providers for them to display and update the required information on their designated area granted by the ISP, (iii) ensure that the service providers display their required information on their designated area granted by the ISP, (iv) maintaining a "transaction guide" including up-to-date information as required under the Regulation on Service Providers and Intermediary Service Providers in E-Commerce, (v) enabling the second-hand goods to be put on sale through separate categories; the customer to see the total price and other contractual conditions before confirming the purchace and payment, as well as information on the additional costs if the total price and costs cannot be determined beforehand; a summary of the purchase order and feasible technical means so that the customers can correct certain errors on the order; sending the customers the terms of contract and general contractual conditions (vi) sending purchase confirmation to the customer without delay, (vii) ensuring data safety, (viii) data retention obligations, (ix) providing information requested by provincial directorates within fifteen days, (x) registration on the Electronic Commerce Information System ("ETBİS").

III. New Obligations of the ISPs

Considering the developments in the e-trade sector, the Amendment Law introduces the following obligations for ISPs regarding distance sales contracts:

(i) ISPs are responsible for establishing an uninterrupted system in which consumers

[78] *See:* https://www.resmigazete.gov.tr/eskiler/2022/04/20220401-17.htm (Last accessed on April 13, 2022)

will be able to submit and follow the progression of their requests and any notices regarding the matters determined by the regulations,

(ii) ISPs are jointly and severally liable with the seller or supplier for providing preliminary information, and confirming and evidencing the preliminary information they provide to the consumers in the name and account of the seller or supplier,

(iii) ISPs are responsible for the deficiencies in the mandatory elements of the preliminary information to be determined by regulations, except for cases where data entries are made by the seller or supplier,

(iv) ISPs are responsible for keeping the records of consumers' transactions with the sellers or suppliers and providing this information to the relevant parties upon request,

(v) ISPs are responsible for each transaction in which the sellers or suppliers act in violation of the provisions of this article due to the fact that they violate their agreement with the sellers or suppliers on the provision of intermediary services,

(vi) If ISPs collect payment on behalf of sellers or suppliers, they will be jointly and severally responsible with the seller or supplier for the delivery and performance of the goods and services and obligations relating to the right to withdrawal. However, the cases where the payment is transferred to the seller or the suppliers upon the delivery or performance of the goods and services; and where consumers use their rights regulated under Article 11 and Article 15 (consumers' optional rights regarding defective goods or services) of the Consumer Protection Law, will be deemed exempt,

(vii) ISPs are responsible for the failure to perform the distance sales contracts at all, or as required in sales made under marketing campaigns, promotions or discounts that they organize without the approval of sellers or suppliers,

(viii) ISPs are responsible for the compatibility and evidencing of the matters included in the preliminary information, and the information in their advertisements.

Furthermore, the obligation to deliver the goods or perform the services within the 30-day period will not be applicable for those distance sales contracts on goods prepared specifically upon the request and individual needs of the consumers (*e.g.* furniture).

IV. Administrative Fine

The Amendment Law generally increases the amount of the administrative monetary fines and amends Article 77 of the Consumer Protection Law by including newly introduced paragraphs or articles to the relevant administrative fine provisions. Within this scope, for the ISPs who violate their obligations under the newly introduced paragraph 6 of Article 48 of the Consumer Protection Law, an administrative fine in the amount of 615 Turkish Liras (as of 2022) for each violation will be imposed as per amended paragraph 1 of the Article 77 of the Consumer Protection Law. Moreover, the Amendment Law further sets out administrative monetary fines in the amount of 1 (one) million Turkish Liras for those who violate the obligations determined under paragraph 5 of Article 48 of the Consumer Protection Law, which stipulates the obligation of establishing an uninterrupted system in which consumers

will be able to submit and follow up on their requests, and any notices.

More importantly, the Amendment Law sets forth that if the violation is made by way of Internet, the Advertisement Board may decide to block access to the violating content of a broadcast, or a section or part thereof (as an URL address, etc.). However, if the violation cannot be prevented by technically blocking access to the violating content or preventing access to the related content, the Advertisement Board may block access to the whole website. The decision will be communicated by the Advertisement Board to the Access Providers Union as per Article 6/A of the Law on the Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Broadcasts. It might be possible to apply to a criminal justice of the peace regarding this decision, and if necessary, appeal the decision rendered by the criminal justice of peace in accordance with the provisions of the Code of Criminal Procedure numbered 5271 dated 12/4/2004.

The Amendment Law also amends the authority to impose the administrative fines for the purposes of reducing bureaucracy and shortening the process. In this context, the authority to impose administrative fines as per paragraph 12 and 13 of Article 77 (commercial advertisements and unfair commercial practices) of the Consumer Protection Law is transferred from the Ministry to the Advertisement Board. While the authority to impose administrative fines as per other provisions of the Law remains with the Ministry, the Ministry might transfer its authority to the provincial directorates of trade.

V. Effective Date and Enforcement

The provisions of the Amendment Law regarding intermediary service providers will enter into force six months after the publication date (*i.e.*, October 1, 2022).

With the amendment on paragraph 6 of Article 48 of the Consumer Protection Law, the principles and procedures on the obligation of the intermediary service providers might be regulated by additional regulations, therefore it might be expected that an additional and detailed regulation which set out the rules, principles and procedures on the obligations of the intermediary service providers in distance sales contracts might be issued in the future.

Telecommunications Law

Number Portability Regulation is Amended

The Information Technologies and Communication Authority ("***ICTA***") approved the Regulation Amending the Regulation on Number Portability ("***Amending Regulation***") and the Procedures and Principles Amending the Procedures and Principles on Number Portability Implementation Process ("***Amending Procedures and Principles***"), with its decision of December 22, 2021 numbered 2021/DK-YED/402 [79] . The Amending Regulation[80] was subsequently published in the Official Gazette on

[79] *See:* https://www.btk.gov.tr/uploads/boarddecisions/numara-tasinabilirligi-mevzuatina-iliskin-duzenlemeler/402-2021-web.pdf (Last accessed on April 13, 2022).
[80] *See:* *https://www.resmigazete.gov.tr/eskiler/2022/02/20220212-3.htm* (Last accessed on April 13, 2022).

February 12, 2022 and entered into force on the same date.

The Regulation on Number Portability outlines the number porting process and states that number portability is initiated with the application of the subscriber to the recipient operator in writing, by calling their customer services, via Internet or through other means determined by the ICTA. Moreover, the number porting process cannot be initiated without the request of the subscriber and the subscriber should notify the number to be transferred, identity information, sender operator information, contact information and the preffered porting time to the recipient operator through an application form. The recipient operator and the subscriber will enter into a subscription agreement at the time the number porting process is completed, and the subscriber will be deemed to have approved the provision of information required by the number porting process and the execution of this transaction by the recipient operator on their behalf.

The Amending Regulation newly introduces "*notification of the receipt of the number porting request*" to this process. Accordingly, with regards to mobile number portability, the information on the receipt of the number porting request should be notified to the number which is requested to be transferred by the recipient operator, via SMS. As per the Provisional Article 2 of the Amending Regulation, this provision was to come into force after one (1) month as of the effective date of the Regulation, meaning that the practice is being implemented as of March 12, 2022. The details of this notification are also provided under the Amending Principles and Procedures.

The Amending Regulation also sets forth the definition of "transaction document," which refers to the transaction document defined under the Regulation on the Process of Applicant's Authentication in Electronic Communications Sector published in the Official Gazette of June 26, 2021. In this respect, transaction document means the document created in the electronic environment for subscription agreement, number porting, change of operator, qualified electronic certificate, registered e-mail application and application for SIM change processes.

As a part of the number porting process, the recipient operator should convey the copies of the signed request form regarding the porting of the subscriber's number and other information and documentation pertaining to identity information to the number portability system in the electronic environment to be sent to the sender operator. However, with the amendments brought by the Amending Regulation, in cases where authentication is made electronically per the Regulation on the Process of Applicant's Authentication in Electronic Communications Sector, only the transaction document will be conveyed to the sender operator through the number portability system. The Amending Procedures and Principles explain what will be included in the transaction document in such cases according to subscriber's type. In this regard, the transaction document includes the application form, the identity information stipulated under the Article 4/1 (a) of the Procedures and Principles on Number Portability Implementation Process and authentication information as obtained in the scope of the Regulation on the Process of Applicant's Authentication in Electronic Communications Sector for individual subscribers. As for corporate subscribers,

the identity information stipulated under the Article 4/1 (a) of the Procedures and Principles on Number Portability Implementation Process is not a requirement.

The Amending Regulation and Procedures and Principles elaborate on the electronic authentication in number porting processes and the notification of the receipt of the number porting request, which has started to be implemented as of March 12, 2022. Accordingly, operators might find it necessary to review their operations and take the required measures and steps in line with these amendments.

White Collar Irregularities

An Overview of Whistleblower Protection Laws in the United States and the European Union

A whistleblower can be defined as "an employee who alleges wrongdoing by his or her employer, of the sort that violates public law or tends to injure a considerable number of people." [81] Whistleblowers, whether public or private, must be acting in good faith and have reasonable belief that there "exists a violation of law, rule or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[82]

Currently there are no laws or regulations in Turkey that incentivize individuals to report the unethical, non-compliant or otherwise corrupt behaviors, nor provisions to protect these individuals against retaliation. This naturally leads such incidents to be resolved in civil courts, if resolved at all. In contrast to Turkey, the concept of "whistleblowing" has increasingly gained significance in the United States and the European Union and there are various regulations put in place to incentivize and build a "whistleblower culture."

Whistleblower's Rights in the U.S.

In the United States, there is no uniform law for whistleblower protection as there are over fifty laws on the federal level, hundreds of state statutes and common law protections. Circumstances of whistleblower protection vary depending on which law the "whistle blower" falls under. However, there are some overarching federal laws that protect against retaliatory acts and provide financial incentives.

False Claims Act

False Claims Act allows private citizens to file suits on behalf of the government ("*qui tam*" actions) against those who have defrauded the government. Private citizens who successfully bring qui tam actions may receive a portion of the government's recovery (from 15% up to 30%). Cases are filed "under seal" and remain confidential during the first phase of the proceeding.

Securities Exchange Act and Commodity Exchange Act

The Securities Exchange Act grants awards to whistleblowers that provide information to the Securities and Exchange Commission in relation to violations of the Securities Exchange Act, if the information leads to the recovery of monetary sanctions that exceed USD 1 Million. Whistleblowers are entitled to a percentage recovery ranging from 10-30% of the

[81] Cornell Law School, Legal Information Institute See: https://www.law.cornell.edu/wex/whistleblower
[82] 5 USC § 2302, See: https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5-section2302&num=0&edition=prelim; Last accessed on April 17, 2022)

amount collected by the government. The Securities Exchange Act only applies to publicly traded companies. Similarly, the Commodity Exchange Act awards whistleblowers that provide information to the Commodity Futures Trading Commission relating to violations of the Commodity Exchange Act, if the information leads to the recovery of monetary sanctions exceeding USD 1 Million. Whistleblowers are entitled to a percentage recovery ranging from 10-30% of collected sanctions. The Securities Exchange Act only applies to publicly traded companies.

Foreign Corrupt Practices Act and Other Federal Laws

The Act has extra-territorial scope and prohibits American citizens or publicly traded companies from paying bribes to foreign officials to obtain a business advantage. Other federal laws that protect whistleblower disclosures against retaliation are (i) Motor Vehicle Safety Act, (ii) Act to Prevent Pollution from Ships, (iii) Lacey Act, (iv) Endangered Species Act, (v) Fish and Wildlife Improvement Act, and (vi) Financial Institutions Reform, Recovery and Enforcement Act (FIRREA).

European Council's Directive on Protection of Persons who Report Breaches of the Union Law

In contrast to the U.S., European Council has more advanced regulations for whistleblower protections, comprehensive in both ex-ante and ex-post standards of protection for whistleblowers reporting on breaches of European Union law.

Directive on Protection of Persons who Report Breaches of the Union Law ("*Directive*") covers breaches that occur in the following areas: (i) public procurement, (ii) financial services, products and markets, and prevention of money laundering and terrorist financing, (iii) product safety and compliance, (iv) transport safety, (v) protection of the environment, (vi) radiation protection and nuclear safety, (vii) food and feed safety, animal health and welfare, (viii) public health, (ix) consumer protection, and (x) protection of privacy and personal data, and security of network and information systems.

The Directive requires all enterprises that have 50 or more workers to establish internal reporting and follow-up channels. The Directive lays out prescriptive requirements for these channels, based on confidentiality and diligent follow-up. The Directive leaves room for Member States to decide on the formalities of these channels.

Furthermore, the Directive requires Member States to ensure that any authority which has received a report but does not have the competence to address the breach reported transmits it to "the competent authority", within a reasonable time, in a secure manner, and that the reporting person is informed, without delay, of such a transmission. The Directive defines the term "competent authority" as "any national authority designated to receive reports and give feedback to the reporting person, and/or designated to carry out the duties provided for in this Directive, in particular as regards follow-up."

The Directive grants protection to individuals irrespective of whether they are Union citizens or third-country nationals, who by virtue of their work-related activities, irrespective of the nature of those activities and of whether they are paid or not, have privileged access to information on breaches which would be in

public interest and who may suffer retaliation if reported.

The Directive further establishes a follow-up requirement. The follow-up requirement requires the reporting person to be informed within a reasonable timeframe about the action envisaged or taken as follow-up to the report and the grounds for such action. The follow-up is illustrated in the Directive with reference to other channels or procedures, closure of the procedure based on lack of sufficient evidence or other grounds, launch of an internal enquiry, and possibly, its findings and any measures taken to address the issues raised.

The Directive sets forth that the reasonable timeframe for informing a reporting person should not exceed three months. The reporting person should be able to make an informed decision on whether, how, and when to report. Legal entities in the private and public sector that have internal reporting procedures in place should be required to provide information on those procedures as well as on external reporting procedures to relevant competent authorities.

Comparison of the U.S. Laws and the Directive

Burden of Proof

For a whistleblower complaint to be protected under U.S. laws, the complaint must be reasonable and made in good faith. Whistleblowers are protected from retaliation even if the issue they disclosed turns out to be harmless or incorrect. Similarly, under the Directive, reporting persons should have reasonable grounds to believe, in light of the circumstances and available information at the time of reporting, that the matters reported by them are true. The Directive allows reporting of inaccurate information by honest mistake of facts or mistake of the law (falsely believing that reporting falls in the scope of the Directive).

Internal Reporting

Certain U.S. statutes do not deem internal reporting sufficient to trigger non-retaliatory provisions of whistleblower protection statutes. Under the Directive, employees can choose whether to internally report first or to directly report to competent authorities depending on the circumstances of the case; both of which are protected under the Directive. However, the Directive instructs Member States to encourage reporting through the internal channels before going through external reporting channels.

Rewards

The Directive does not set forth any rewards for whistleblowers. This is in significant contrast to U.S. whistleblower laws and regulations, most of which award 10% to 30% of the proceeds from sanctions to whistleblowers. That being said, there are exceptions to when whistleblowers are awarded in the U.S. Whistleblowers can obtain compensation if their allegations prove to be correct and support a government prosecution resulting in collection of a sanction from the wrongdoer.

Intellectual Property Law

New Trend Alert: NFT Trademark Applications and Crypto Trademark Law. The Recent Rise of Trademark Applications and Enforcements of Global Giants in Relation to NFTs

I. Introduction

The Non-Fungible Token ("NFT") concept is seen as the latest technological trend with immense financial aspects, since the cryptocurrency outbreak. NFTs can be briefly defined as digital assets with an indisputable proof of ownership through records forever registered in blockchain. The digital security that NFTs offer, which takes its root from the blockchain system, with their easy and profitable tradability on top of it, made the NFTs more desirable and financially attractive for everyone, including the global giants of almost every sector, from the payments industry to the food sector.

These snowballing reactions to the NFT technology also had effect in intellectual property law, demonstrated by recent (and very interesting) trademark applications and enforcements. Nevertheless, it seems inevitable that several issues regarding the legal understanding of NFTs and implementation of traditional intellectual property law concepts, such as infringement or counterfeits, will arise over this new concept in the following days.

II. An Overlook of the Recent NFT Trademark Applications of Global Giants

Very recently, foremost companies from different sectors started to file trademark applications which have NFT-related goods and/or services in their scope. Indeed, American Express has very recently filed trademark applications for phrases "American Express", "Amex", "Centurion", "Membership Rewards" and "Shop Small" seeking registration for class 09, *i.e.* "*digital media, namely, non-fungible tokens (NFTs) featuring textual and graphic content*", and class 35, *i.e.* "*provision of an online marketplace for buyers and sellers of digital media, namely, non-fungible tokens (NFTs) featuring textual and graphic content"* before the United States Patent and Trademark Office on March 9, 2022.

Similarly, the fast-food restaurant chain McDonalds also appears to be planning radical moves in NFT world. Indeed, McDonalds has also filed trademark applications having "both virtual and real-world concerts and events" before USPTO. The actions taken by McDonalds towards these trademark applications are interpreted as early signs of future activities expanding McDonalds into the virtual food and beverage sector.

III. Potential Legal Issues regarding NFT Trademarks

Although the trademark applications with NFT related scope is a promising development in crypto trademark law, it is still an unknown zone for intellectual property law in terms of how the enforcement of IPRs will proceed. Indeed, even though some foresee that NFTs are capable of serving as a strong tools to prevent counterfeiting, due to them being a metadata confirming the physical product ID and providing process security, it is still not possible to foresee the enforcement of IPRs when it comes to uses in NFT form, especially keeping in mind the different regulations and different implementations

of intellectual property law in different jurisdictions.

There are pioneer cases filed already, claiming the infringement of trademarks through their use as or on NFTs. The infringement of the famous Birkin bag of the well-known fashion designer Hermes, through creating the NFT version of the bag, *i.e.*, "MetaBirkin", is one of them. Mason Rothschild, a digital artist, created the NFT version of the eminent Hermes Birkin bag and put them up to sale on a digital market place under the name of "MetaBirkin". The fashion designer recently filed a lawsuit against Rothschild and claimed that using Hermès' federally registered trademarks (including its globally recognized "Birkin" word mark and trade dress) without its permission, is a violation of its trademark rights.

Another pending lawsuit which involves the claim of trademark infringement through use of a trademark on NFTs, is between Nike and StockX, a sneaker reseller. In the lawsuit filed very recently, on February 3, 2022, Nike argues that StockX infringes its trademark right through the sale of virtual products that bear Nike's trademarks, without the consent of Nike. In the lawsuit, Nike alleges that the crypto assets which bear Nike's trademarks constitute trademark infringement, false designation of origin, and trademark dilution violations, among others.

The interpretation of the Federal Court before whom both of the above-mentioned claims are raised will have a crucial effect on the global understanding of trademark infringement through the use of the trademark on or as NFTs. In addition, it is beyond doubt that the judgement of the Court will have its effects on the commercial future of the concept of NFT. Indeed, in the event that the Court would come to the conclusion that the use of a registered trademark on or as NFT is an extension of digital infringement of trademarks, then it might have an adverse effect on the rising trend of NFT globally.

IV. Conclusion

NFTs have reached an undeniable popularity not only among the public but also among global giants. Accordingly, while these giants enforce their well-known trademarks against their being used on or as NFTs, the trademark applications regarding goods and services in relation with NFTs have emerged without delay. It is evident that the global economic actors take the intellectual property aspect of NFT and crypto trademark law very seriously and they also take rapid action in proprietorship aspects and enforcement aspects.

Under the Turkish intellectual property law, there is yet no trademark application having goods and/or services in relation with NFTs nor a lawsuit enforcing trademark rights against their uses as or on NFTs. However, considering the jurisdiction-limited protection that trademark registration provides, it is not very far down the road that trademark applications having NFT related goods and services might be filed before Turkish Patent and Trademark Office or lawsuit claiming trademark infringement through NFTs might be filed in the future.

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ELİG
GÜRKAYNAK
Attorneys at Law

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