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Preface to the June 2023 Issue

The June 2023 issue of Legal Insights Quarterly was prepared to provide an extensive look into the upcoming legal issues as well as the foremost contemporary legal agenda in Turkey.

The Corporate Law section of this issue includes an article related to updates on the regulation of the Turkish Commercial Code in relation to the attendance of Ministry of Trade representatives in general assembly meetings of joint-stock companies with certain agenda items.

The Competition Law section of the June 2023 issue includes brief analyses of the outcomes of the two most prominent, recently published inquiries by the Competition Authority on the FMCG and the digital advertisement sectors. Moreover, it includes a brief explanation on the study that exhibits the effects of digitalization on competition law. Other articles featured under this section address mergers and acquisitions decisions of the Competition Board, its evaluation of resale price maintenance activities, as well as on-site inspections.

Further on, the Data Protection Law section delves into the Turkish Constitutional Court's recent decisions on the protection of personal data by way of analysing three different judgments that were handed down by the Constitutional Court. Similarly, Internet Law section provides insight on a Constitutional Court judgment regarding an employee whose contract is terminated due to their use of defamatory wording and hate language on social media.

The White Collar Irregularities section introduces the Istanbul Anti-Corruption Action Plan which is an OECD initiative whose objective is to collect and publish empirically supported data on anti-corruption measures adopted by the OECD Member States.

Lastly, the Intellectual Property Law section covers the effects of the High Court of Appeals' ruling on prolonging the protection period of copyrights from 50 to 70 years. The section also makes a deep-dive analysis on the Constitutional Court's conclusive evaluation on whether re-starting the copyright protection for the works of artists after expiration of the initial protection period violates the Turkish Constitution.

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 2023

Corporate Law

Attendance of the Ministry Representative to General Assembly Meetings of Joint-Stock Companies

Turkish Commercial Code numbered 6102 ("***TCC***") stipulates that a representative from the Ministry of Trade ("***Ministry***") must attend general assembly meetings of certain joint-stock companies, as well as those meetings with particular agenda items and ensure that these meetings are conducted in line with the laws, regulations, and articles of association of the company.

Article 407/3 of the TCC states that, the general assemblies which shall require Ministry representative's attendance, the procedures and principles regarding the appointment of the Ministry representatives, their qualifications, duties and authorities as well as their fees, shall be regulated by a regulation to be issued by the Ministry. To that end, the Regulation on the Principles and Procedures of Joint-Stock Companies' General Assembly Meetings and Ministry Representatives Attending These Meetings ("***Regulation on Ministry Representatives***") provides the requisite details on such matters.

I. Circumstances Where the Attendance of the Ministry Representative is Mandatory

Pursuant to Article 32 of the Regulation on Ministry Representatives and Article 407/3 of the TCC, a Ministry representative must be present at the general assembly meetings of joint-stock companies that have the following matters in their agenda and at the second meetings to be held in case of adjournment:

i. All general assembly meetings of the companies whose establishment and amendment to the articles of association are subject to the Ministry's approval; in terms of other companies, those general assembly meetings where the agenda includes amendment to the articles of association regarding share capital increase or decreases, the adoption or disapplication of a registered capital system, increasing the registered capital cap, changing the company's field of activity, as well as merger, demerger and conversion of the company type,

ii. General assembly meetings of companies where shareholders participate via electronic methods,

iii. All general assembly meetings to be held abroad,

iv. Privileged shareholders' special assembly meetings to be held abroad.

Apart from the meetings indicated above, it is not mandatory to have Ministry representatives at privileged shareholders' special assembly meetings or general assembly meetings of companies with sole shareholder, except for companies whose establishment and amendment to articles of association are subject to the Ministry's approval. The latter exception was introduced with the Regulation Amending the Regulation on the Principles and Procedures of Joint-Stock Companies' General Assembly Meetings and Representatives of Ministry of Customs and Trade Attending These Meetings published in the Official Gazette of October 9, 2020.

Nevertheless, a Ministry representative might still be appointed if requested by those convening the general assembly, and this request is found appropriate by the relevant appointing authority of the

Ministry. The appointing authority does not take into consideration the requests made by persons other than the those convening the general assembly meeting. That said, if the shareholders constituting at least 1/10 of the share capital submit such a request of appointment by also indicating their rationale behind this request to the company, the persons who convene the meeting must submit this request to the appointing authority. In this regard, the company's board of directors as its management organ, would be deemed as the company.

According to Article 35 of the Regulation on Ministry Representatives, for appointment of the ministry representative to the general assembly meetings requested to be convened by the board of directors, any member of the board of directors or persons authorized to represent the company may, at least ten (10) days before the meeting date, apply either (i) physically, via a petition drafted in accordance with the template annexed to the Regulation on Ministry Representatives, or (ii) electronically, through the MERSIS (Online Trade Registry System), together with the board of directors resolution setting out the agenda of the meeting.

II. The Role of the Ministry Representative and the Legal Consequences of Non-attendance

The role of the Ministry representative is to ensure that the meetings are conducted in line with the TCC and relevant regulations and statutes, as well as articles of association of the company and to supervise that the meeting minutes are drafted accordingly. Therefore, the Ministry representatives should record in the meeting minutes any illegalities and irregularities they spot with regard to the conduct of the meeting and the decisions taken during the meetings and sign the minutes together with the other required persons/entities.

According to Article 422 of the TCC and Article 32/4 of the Regulation on Ministry Representatives, the Ministry representative signing the meeting minutes constitutes a pre-condition for validity in terms of the minutes and the decisions therein. General assembly decisions resolved in the absence of the Ministry representative are deemed invalid, which is also attested by the decisions of the High Court of Appeals.

In addition, pursuant to Article 553/1 of the TCC, members of the board of directors may be held personally liable with their personal assets towards (i) the company, (ii) shareholders and (iii) the company's creditors for the damages they incur as a result of breach of their obligations arising out of the law and articles of association by fault. Both fault and damage elements must occur in order to hold the members of the board of directors liable. Accordingly, legal liability of the board of directors may arise, as the case may be, due to their failure to invite the Ministry representative to the general assembly meeting and convening the meeting without attendance of the Ministry representative, where required.

III. Conclusion

The Regulation on Ministry Representatives specifically indicates the general assembly meetings where the attendance of the Ministry representative is required, and as non-compliance with this requirement has serious consequences such as invalidity of the minutes and the decisions taken during the general assembly meetings, it is important for such

companies to ensure the Ministry representative's attendance.

Banking and Finance Law

Borrowing and Utilizing Loans From Outside of Turkey without Bringing the Funds into Turkey

I. Introduction

Pursuant to the Circular on Capital Movements dated May 2, 2018 ("***Circular***") introduced by the Central Bank of the Republic of Turkey ("***Central Bank of Turkey***") and Decree No. 32 on the Protection of the Value of the Turkish Currency, Turkish residents are allowed to borrow cash loans in Turkish Lira and foreign currency from abroad under certain circumstances, provided that they utilize these loans through a bank that operates in Turkey. However, there are certain limited cases listed in the Circular where this condition is not sought. In this regard, our aim in this article is to explain those instances where loans can be used without bringing the funds into Turkey.

II. Borrowing and Utilizing Loans without Bringing the Funds into Turkey

As per Article 22 of the Circular, the condition of utilization of the loan obtained from outside of Turkey by bringing the funds into the country through a bank in Turkey, is not sought in the below cases where:

i. Turkish residents are borrowing such loans abroad with respect to their business and operations abroad and using the funds outside of Turkey,

ii. Turkish residents are borrowing these loans from the export credit institutions registered in the List of Export Credit and Export Credit Guarantee Agencies set out under Annex 3 of the Circular, or borrowing from abroad within the scope of the guarantee of export credit guarantee institutions and repaying these loan amounts directly to the exporter company abroad,

iii. Turkish residents are borrowing the loans from development banks abroad that provide purchase of goods and term financing support, instead of cash loans, and repaying these loans directly to the exporter company abroad,

iv. Loans are obtained within the scope of imports to be made by Turkish residents, for the purchase of ships abroad,

v. Turkish residents are borrowing from abroad, for the purpose of refinancing other loans they had previously obtained from abroad. It should be noted that the part of the loans that are not used directly in the refinancing must still be brought into the country through a bank in Turkey,

vi. Loans are obtained from outside of Turkey by the Ministry of Treasury and Finance, on behalf of the Republic of Turkey as borrower or guarantor.

All loans which fall under the foregoing scope are to be notified to the General Directorate of Statistics of the Central Bank of Turkey for monitoring purposes.

On a relevant note, pursuant to Article 22/3 of the Circular, in the event that the above loans are repaid through a bank in Turkey, the relevant company must submit to the intermediary bank a copy of the loan agreement, loan repayment schedule and documents showing that the loan was used

abroad. The amounts that have not yet been repaid are included in the company's loan balance. However, in case the company provides documents showing that part of the loan was repaid directly from its assets abroad, such amount will not be included in the outstanding loan balance.

III. Conclusion

Although the general rule for Turkish residents getting loans from outside of Turkey is for them to bring the funds into the country through a bank operating in Turkey, it is also possible to utilize the funds without bringing them to Turkey in certain exceptional circumstances introduced by the Central Bank of Turkey. In any case, it should be checked whether the envisaged loan conditions and its utilization procedure are in line with the applicable legislation, as there could be certain restrictions introduced by the Decree No. 32 on the Protection of the Value of the Turkish Currency, its secondary communiques, and the Circular.

Capital Markets Law

Financial Rights Granted to Board Members of Publicly Traded Companies

Article 394 of the Turkish Commercial Code ("***TCC***") provides that members of the board of directors may be granted with certain financial rights, such as (i) attendance fees, (ii) salaries, (iii) bonuses, (iv) premiums and (v) dividends, provided that the payment amounts for these are determined by the company`s articles of association or through a general assembly resolution. According to the reasoning in the explanatory notes of the said article, these financial rights are limited to those listed in the provision (*numerus clausus).*

Similarly, Article 516 of the TCC regulating the scope of the annual activity report of the board of directors, implies that financial benefits such as salaries, premiums, bonuses, allowances, travel, accommodation and representation expenses, in-kind and cash benefits, insurances and similar guarantees might be provided to the board members and the company's top executives. Relevant legislation requires that the total figure for such benefits granted to executives and directors are set out within the annual activity report of the board of directors.

In terms of publicly traded companies, the Capital Markets Law ("***CML***") and the Communiqué on Corporate Governance ("***Communiqué***") introduce certain rules as to the financial rights granted to the board members for transparency purposes. According to Article 4.6.5 of the Corporate Governance Principles annexed to the Corporate Governance Communiqué, remuneration and all other benefits provided to board members and executives with administrative liability should be disclosed to the public through the annual report of the publicly traded companies. This disclosure should be made separately on an individual basis.

As these financial rights have a wide scope, they are regulated in more detail under Article 4.6.5 of the Corporate Governance Principles. Accordingly, payments made to the board members may include cash payments such as salaries, bonuses, other regular and incidental payments, non-cash payments such as shares, share-based derivative products, share purchase options granted to employees within the scope of share acquisition plans, accommodation, automobile whose ownership is transferred and/or allocated for the director's use, and all other benefits provided.

It should be also noted that pursuant to Article 4.6.1 of the Corporate Governance Principles, the board of directors is responsible for the company to achieve its operational and financial performance targets which were determined and disclosed to the public. The assessment of whether the company has achieved such targets and the reasons for any shortfall should be disclosed in the annual report. Board members and managers with executive duties may be rewarded or dismissed based on these evaluations. Therefore, the financial rights of the board members might differ according to their performance and this is at the discretion of the general assembly, *i.e.*, the company's shareholders.

That said, as per Article 4.6.3 of the Corporate Governance Principles, dividends, share options or payment plans based on the company's performance cannot be used in the remuneration of the independent board members. The remuneration of the independent board members should be at a level to protect their independence.

In fact, according to Article 4.6.2 of the Corporate Governance Principles, the principles of remuneration for the board members and managers with executive duties should be documented in writing and submitted to the shareholders as a separate item on the agenda of the general assembly meeting, thus giving them the opportunity to comment. The remuneration policy prepared for this purpose should be available on the company's website.

According to Article 4.5.13 of the Corporate Governance Principles, the remuneration committee, if any, submits its recommendations to the board of directors regarding the remuneration of board members and managers with executive duties, by taking into account their performance on the criteria used in remuneration. Therefore, in publicly traded companies, the board of directors will be authorized to submit proposals regarding the financial rights of the board members or the amount to be paid, for the general assembly to discuss and resolve on this matter.

On a final note, implementation of each provision of the Corporate Governance Principles are not mandatory and accordingly, it may be decided by board of directors not to implement certain provisions related to remuneration and financial rights of the board members and other relevant executives. Remuneration and financial rights may vary depending on the qualifications or field of activity of the company in question. In this regard, such matter and applicable criteria should be handled within each publicly traded company separately.

Competition / Antitrust Law

The Competition Board's Mikro Yazılım/Emükellef Teknoloji Decision: An Insight on the Market Definition and Competitive Assessment in the Software Industry

I. Introduction

On January 17, 2023, the Turkish Competition Authority ("***Authority***") published the Turkish Competition Board's ("***Board***") reasoned decision[1] ("***Emükellef Decision***") regarding the acquisition of sole control over Emükellef Teknoloji A.Ş. ("***Emükellef***") by Mikro Yazılımevi

[1] The Board's Emükellef decision dated 13.10.2022 and numbered 22-47/676-287.

Yazılım Hizmetleri Bilgisayar San. ve Tic. A.Ş. ("***Mikro***"), which is indirectly controlled by Turkish Private Equity Fund III ("***TPEF III***"). The decision provides insight into the factors that the Board considers in defining the relevant product market and conducting the competitive assessment in the software sector which has become increasingly important in today's economy.

II. The Board's Approach to Determining the Relevant Product Market

With respect to the parties' activities, the Board first noted that the *e-Mükellef* software, which is the main product/service of the target, is a program that enables public accountants to exchange certain information, documents, and data to meet some needs of the accounting offices and their clients. However, the *e-Mükellef* software, which facilitates small-scale work for public accountants, does not have the characteristics of a software that meets all basic requirements of public accountants. In other words, the *e-Mükellef* software is not a general-purpose accounting software service and does not perform comprehensive operations such as accounting and tax calculation. Accordingly, the Board stated that the said software can be described as the personal web-based agenda of the public accountant. In addition, the Board noted that the only targeted users of the software are independent certified public accountants ("***CPAs***") who run their own accounting offices, in other words, the software is not intended for the use of sworn certified public accountants ("***SCPAs***") and affiliated CPAs.

Regarding the acquirer's activities, the Board noted that the ultimate acquirer of the target, TPEF III, is a fund that invests in companies operating in different sectors across Turkey. Mikro is active as a portfolio company of TPEF III and operates in the accounting and enterprise application software markets. In this context, it carries out production, sales, marketing and after-sales service activities for enterprise application software, cloud-based pre-accounting software, e-transformation software and services for commercial enterprises and public accountants. Mikro offers these services that can be used by public accountants only to companies or independent CPAs and SCPAs who run accounting offices.

The Board indicated that, in the broadest sense, both companies operate in the software industry. At this point, while making an evaluation in the software sector, the Board, in line withits previous decisions,[2] evaluated that (i) software can be divided into two categories, as the software "for individual users" and the software "for enterprise users", (ii) enterprise software can further be separated into infrastructure software and application software, and (iii) application software can be separated into "personal productivity applications" and "enterprise application software". In this context, the Board emphasized that software for enterprise users differs from software for individual users due to many parameters, such as the scope of the needs that they meet, prices and additional support provided before and after sale.

The Board then made a summary of some of its relevant decisions. Accordingly, the Board first referred to the IT Sector

[2] The Board's Logo decision dated April 28, 2011 and numbered 11-26/497-154 and The Board's IT decision May 26, 2005 and numbered 05-36/481-112.

preliminary investigation decision[3] ("***IT decision***") where it concluded that (i) the markets on which the undertakings individually focused and had expertise are different, (ii) the undertakings are not active in the same market and are not competitors to each other since the software of the parties concerns applications specific to a certain sector or customer, and (iii) the relevant product markets are different since the production of the relevant software requires sectoral expertise and the customers in the related sector purchase the said software. The Board also explained its *Logo* decision[4] where the Board found that Logo Yazılım Sanayi ve Ticaret A.Ş. ("***Logo***") creates enterprise application solutions and, in particular, basic enterprise resource planning solutions that can be used by small and medium-sized companies that are active in all sectors. Accordingly, in the *Logo* decision, the Board considered the markets of "SME enterprise resource utilization software" and "support services for Logo Software enterprise resource software" as the relevant markets. The Board also referred to two other decisions where the relevant market is defined as the "enterprise resource software" market.[5]

In line with the information provided above, the Board decided that there is a horizontal overlap in Turkey between the activities of Mikro and Emükellef, which provide enterprise software services for accounting professionals, in (i) broadly defined "enterprise application software" and (ii) narrowly defined "enterprise resource software". The Board also emphasized the parties' statements that the targeted users of *e-Mükellef* software would continue to be only independent CPAs and that the post-transaction strategy of the acquirer would be to sell the *e-Mükellef* software to its existing public accountant customers and other public accountants. The Board stated that considering these statements and the fact that the *e-Mükellef* software's only targeted users are independent CPAs, it would also analyze the transaction considering the "enterprise resource software for independent CPAs" market which is a sub-segment of the "enterprise resource software" market.

III. The Board's Approach to the Competitive Assessment of the Transaction

The Board decided that the transaction would not lead to any competitive concern in any of the affected markets.

For the "enterprise application software" market, the Board noted that (i) the parties' combined market share would be low and (ii) there are major players in the market.

Regarding the "enterprise resource software" market and its sub-segment "enterprise resource software for independent CPAs" market, the Board found that the post-transaction market shares of the parties would be relatively high when calculated based on the target users and the number of customers. However, the Board evaluated that such an examination that is solely based on target users, and the number of customers would not reflect the market power of the relevant undertaking accurately because of the dynamics of the relevant market.

[3] The Board's IT decision dated May 26, 2005 and numbered 05-36/481-112

[4] The Board's Logo decision dated April 28, 2011 and numbered 11-26/497-154.

[5] The Board's Mikro, Zirve and Parasüt decision dated June 20, 2019 and numbered 19-22/329-147 and the Board's Mikro and Zirve decision dated January 18, 2018 and numbered 18-03/25-13.

Accordingly, the Board underlined the widespread use of multiple software by customers, easy market entry and strong competitors in the market and decided that the transaction would not lead to significant impediment to effective competition. As for the use of multiple software by customers, the Board considered that (i) the software provided by undertakings active in the market (such as Mikro and Emükellef) typically does not overlap and is not substitutable, (ii) in the relevant market, customers tend to simultaneously use different software supplied by competitors because of the different features of the software, (iii) a number of Emükellef's customers are already the customers of Mikro. The Board noted that, for instance, the customers of Mikro commonly use software developed by Mikro while providing services to customers in their own office; however, when they offer services in their customers' offices, they may use software by other developers. On the market entry, the Board found that (i) it is easy to develop software to compete in the market, (ii) even some of the CPAs themselves develop such software and (iii) thus, the undertakings supplying services in the sub-breakdown of the market can compete with Emükellef's software without incurring high additional costs or facing obstacles. Finally, the Board underlined that the data transfer among competitor products is not complicated and can be completed in a couple of hours. Therefore, although the Board found that the market shares of the parties are relatively high in the mentioned sub-segment of the market, it evaluated that the market share in the said market is not reflective of the market power given the characteristics of the market.

IV. Conclusion

The Emükellef decision is important in terms of showing the Board's approach to market definition and competitive assessment in the software sector. It is understood from the decision that the Board may adopt a narrow market definition considering the needs addressed by the software, services associated with the software and especially the target users. The decision also illustrates the Board's approach to the assessment of market power in these narrowly defined software markets. In this respect, the Board considers customers' multiple access to competitors' software, the complementary relationship between the software offered by undertakings, lack of barriers to entry and high data portability as the factors that stimulates competition in the market and thus analyzes that even high market shares may not reflect the market power of the undertakings in the software markets.

Turkish Competition Authority Publishes Its Preliminary Report on the Online Advertising Sector Inquiry

I. Introduction

Back in January 2021, the Competition Authority ("***Authority***") initiated an inquiry into the online advertising sector. On April 7, 2023, the Authority officially announced its preliminary report on the online advertising sector inquiry ("***Preliminary Report***"). The Preliminary Report outlines the Authority's key findings from its online advertising sector inquiry as well as opening an avenue to receive feedback from stakeholders until July 7, 2023.

The reason emphasized by the Authority for launching the sector inquiry is that the online advertising sector encompasses

various services and actors in the advertising supply chain with a complicated structure. Considering the characteristics of and the rapid global growth in the sector, combined with the climbing internet and social media usage in Turkey, the Authority initiated the sector inquiry to gain a better understanding of the online advertising sector. The Preliminary Report also cites various studies and sector inquiries into the online advertising sector carried out in the United Kingdom,[6] Australia,[7] Germany,[8] France,[9] Spain[10] and Japan,[11] alleging that the competition authorities in these jurisdictions all point to similar competition concerns.

The Preliminary Report provides a general examination of the various types of online advertising, namely search-based advertising, display advertising, video-based display advertising, and product listing advertising, as well as an analysis of the substitutability of these sub-categories of online advertising. The Preliminary Report highlights (i) the importance of some players' online ads ecosystems, and (ii) data as an allegedly critical component of competition in online advertising.

II. Analysis of Online Ads Ecosystems

The Preliminary Report makes analysis on different players operating in the online ads ecosystems. By way of an example, building up on the previous Competition Board decisions on Google[12] and Meta[13], the Preliminary Report finds that Meta is concentrated in display advertising, whereas Google is concentrated in search-based advertising.

The Preliminary Report notes that the display advertising market has a convoluted structure and concludes that various stakeholders such as advertisers, publishers, and ultimately, users are sensitive to actual or potential disruption to competition in online advertising services.

III. The Role of Data as an Allegedly Critical Component of Competition in Online Advertising

The Preliminary Report suggests that the allegedly strong position of incumbents in online ads and online ad tech is fuelled by their access to large-scale data within their ecosystems. Therefore, the Preliminary

[6] CMA (2020), "Online Platforms and Digital Advertising Market Study Final Report" https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf (Last accessed on April 11, 2023)

[7] ACCC (2021) Digital Platforms Inquiry, Final Report, https://www.accc.gov.au/system/files/Digital%20advertising%20services%20inquiry%20-%20final%20report.pdf (Last accessed on April 11, 2023)

[8] Online Advertising, Series of papers on "Competition and Consumer Protection in the Digital Economy", https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Schriftenreihe_Digitales_III.pdf?__blob=publicationFile&v=5 (Last accessed on April 11, 2023)

[9] Opinion no. 18-A-03 of 6 March 2018 on Data Processing in the Online Advertising Sector https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2019-10/avis18a03_en_.pdf, (Last accessed on April 11, 2023)

[10] For a summary of the report, see. https://www.cnmc.es/sites/default/files/3626361_10.pdf (Last accessed on April 11, 2023)

[11] JFTC (2021), "Final Report Regarding Digital Advertising", https://www.jftc.go.jp/en/pressreleases/yearly-2021/February/210217.html (Last accessed on April 11, 2023)

[12] The Board's Adwords decision dated November 12, 2020 and numbered 20-49/675-295.

[13] The Board's Meta decision dated October 20, 2022 and numbered 22-48/706-299.

Report delves into the types of data collected and processed from the ads ecosystems, as well as methods of collecting data and the competitive advantages gained due to data variety and size. The Preliminary Report also examines the types of targeted advertising, their benefits, and the concerns that this method of advertising raises in consumers.

The Preliminary Report states that, while personalized ads create more relevant and effective advertisements, the application also raises privacy concerns among consumers since it is based on the collection, use and sharing of their personal data.

IV. Certain Potential Concerns Pointed Out by the Preliminary Report

The Preliminary Report points out the alleged conflict of interests arising from the vertical integration in the ad tech supply chain. The Preliminary Report suggests that a conflict-of-interest issue may arise due to vertical integration.

The Preliminary Report also refers to potential transparency concerns in the ad tech supply chain. The Preliminary Report suggests that advertisers and publishers should have the ability to make informed choices as to which services and providers they will use.

The Preliminary Report also mentions access to large-scale data collected from the various complimentary services, allegedly rendering incumbents in a powerful position in the market.

V. Conclusion

Overall, the Preliminary Report covers the development, dynamics and competitive environment relating to the online ads sector. The Preliminary Report analyzes issues such as the allegedly complex structure of the ad tech supply chain, data collected by major actors and the potential tying, self-preferencing, and data-merging practices.

The Preliminary Report gives an indication of the Authority's understanding of the online advertising sector, advertising technologies and the competition law concerns that are on the Authority's agenda. When released, the final report will provide the full framework of the Authority's approach to the online advertising sector and an indication of the role played by stakeholders in shaping the Authority's understanding and policies during the public consultation period that will last until July 7, 2023.

Turkish Competition Board's In-Depth Analysis on the Essence of Information Exchange in Light of the Sunny Decision

I. Introduction

The Turkish Competition Board ("***Board***") decided not to initiate a full-fledged investigation ("***Decision***"),[14] in a recent preliminary investigation concerning the allegations that Sunny Elektronik Sanayi ve Ticaret A.Ş. ("***Sunny***") prohibited its resellers' online sales and engaged in resale price maintenance and facilitated indirect information exchange between its resellers, namely CarrefourSA Carrefour Sabancı Ticaret Merkezi A.Ş. ("***CarrefourSA***"), Migros Ticaret A.Ş. ("***Migros***") and Yeni Mağazacılık A.Ş. ("***A101***"). The case handlers of the Authority had suggested initiation of a full-fledged investigation.

[14] The Board's Sunny decision dated 18.05.2022 and numbered 22-23/371-156.

This article will (i) provide a very brief analysis on the Decision and (ii) explain the Board's assessment on its findings with respect to the allegations related to hub & spoke cartel as well as the information exchange among the undertakings.

II. The Decision

As noted in the Decision, within their written report, the case handlers noted that they suspected that Sunny had violated Article 4 of Law No. 4054 on Protection of Competition ("***Law No. 4054***"), by (i) resale price maintenance of the dealers that conduct internet sales and other resellers, and (ii) prohibiting their online sales. The case handlers also reported that besides CarrefourSA and Migros, some other entities, except A101, were suspected to have been involved in indirect information exchange through Sunny. Hence, the case handlers called for the initiation of a full fledged investigation for these undertakings, except for A101.

Having said that, within scope of the Decision, the Board rendered conclusion of the preliminary investigation based on the lack of evidence indicating the violation of the Law No. 4054. In the Decision, the Board solely analyzed indirect information exchange related allegations and the decision contained no assessment of restriction of online sales.

The Decision only featured two findings, which are heavily redacted. Based on the two findings, the Board evaluated whether an Article 4 violation occurred based on the suspicion that CarrefourSA, Migros and A101 were involved in indirect information exchange regarding the products supplied by Sunny.

In its past decisions, the Board noted that as a general rule, it is not prohibited for undertakings to prudently adapt themselves to the position of their competitors and it is accepted that the undertakings can gather market intelligence from the market. For example, in its *Furniture* decision,[15] the Board stated that it is not a violation for undertakings to track their competitors via using their "commercial intelligence." Similarly in its *PVC* decision,[16] the Board evaluated an instance where the undertakings in the market gathered up-to-date list prices from their customers. The Board stated that, the undertakings gathering up-to-date list prices from their customers allowed them to monitor the price competition in the market and devise competitive strategies vis-à-vis their competitors' pricing campaigns. In its *Tires* decision,[17] the Board considered that sharing of current prices was not in itself sufficient to establish the existence of an anti-competitive agreement.

While this is the case, within the Decision, the Board noted that information such as price and production amount are information that leads to transparency in the main competition parameters in a market when shared with competitors, hence it is evaluated that information on price, cost, sales data, capacity usage ratio, proposals, agreement clauses, stock levels are competitively sensitive information. The Board then delved into hub & spoke information exchange and stated that in hub & spoke type of violations, there is a third party that is in a vertical relationship with the said competitor undertakings and the competitors that are in a horizontal relationship conduct indirect information

[15] The Board's Furniture decision dated 01.11.2018 and numbered 18-41/651-317, para 56.
[16] The Board's PVC decision dated 23.09.2021 and numbered 21-44/646-323, para 75.
[17] The Board's Tires decision dated 16.12.2015 and numbered 15-44/731-266, para 24.

exchange through the common supplier. Hence, the Decision analysed the findings through the lens of a hub & spoke infringement. In this vein, the Board detailed the criteria laid down by the Competition Appeal Tribunal ("***CAT***") in its Tesco judgement[18-19] and stated that for a hub & spoke violation to exist, retailers (that are competitors on the horizontal level) should have exchanged future prices via a common supplier within the scope a certain "foresight" and "agreement" (*i.e.*, a concurrence of wills).[20]

In light of the above, the Board concluded that the findings in the particular case did not show any violation of such and hence deemed that there was no information and/or document indicating that Sunny, and the resellers of products supplied by Sunny, A101, CarrefourSA and Migros were involved in a restrictive agreement and violated Article 4 of the Law No. 4054 and as a result, the Board decided not to initiate a full-fledged investigation.

[18] CAT's Tesco judgement dated 20.12.2012 and numbered 1188/1/1/11. The Board cited the following criteria under para 20: (i) Retailer A discloses to supplier B its future pricing, (ii) it must be shown that the retailer A's intention was that the information supplied to B would be shared with C, in order to influence market conditions, (iii) B should indeed pass this information to C, (iv) C should be in a position know under which circumstances A shared this information with B and (v) C should use this information in determining its own future price.
[19] The Board further states that in its earlier decisions, it also followed the criteria laid down by CAT. On this basis, the Turkish Competition Board's *Tires* decision dated 16.12.2015 and numbered 15-44/731-266 and Consumer Electronics dated 07.11.2016 and numbered 16-37/628-279 are given as examples.
[20] The Decision para 23.

Turkish Competition Board Cements its Approach regarding Family Ties and Economic Unity

I. Introduction

The Turkish Competition Board (the "***Board***") unconditionally approved the transaction concerning the acquisition of sole control over Sançim Bilecik Çimento Madencilik Beton Sanayi ve Ticaret A.Ş. ("***Sançim***") by Mustafa Hakan Safi, Said Safi and Faruk Safi ("***Sançim Decision***").[21] The Board's reasoned decision involves a thorough analysis of economic links and family ties when determining the existence of a single economic unit, as well as a competitive assessment of the envisaged transaction in Turkey in conjunction with multiple vertical relationships between the parties' activities.

II. Evaluation of Economic Links and Family Ties within the context of Single Economic Unit Approach under Turkish Merger Control Regime

Before delving into its substantive assessment regarding the transaction, the Board underlined the necessity to evaluate the family ties among Mustafa Hakan Safi, Said Safi and Faruk Safi; the relevant ownership structures of the legal entities within Safi Holding; and the actual relationship among these legal entities when conducting their business activities. Given that Mustafa Hakan Safi, Said Safi and Faruk Safi, who would be the shareholders and directors of Sançim post-transaction, are also shareholders and directors of the entities within Safi

[21] The Board's Sançim decision dated 10.10.2022 and numbered 22-46/675-286.

Holding, the Board analyzed whether Mustafa Hakan Safi, Said Safi and Faruk Safi; Sançim and the entities within Safi Holding constitute a single undertaking (*i.e.*, a single economic unit).

The circumstances under which real persons would be considered to constitute a single economic unit have been elaborately discussed and evaluated by the Board in several cases previously. There are various decisions of the Board where (i) the persons which have the same last name were considered as a single economic group;[22] (ii) a company that is controlled by five individuals of a family with equal ownership and the companies that are controlled by one of these individuals were considered to constitute an economic unit;[23] (iii) companies controlled by siblings were considered within the same economic unit;[24] and (iv) even the individuals that do not have the same last name were considered as an economic group based on the economic links and/or family ties among them.[25]

That being said, the Board acknowledges that there could be cases where existing family ties would not be sufficient to conclude that the relevant persons/entities in question constitute a single economic unit. In this respect, the Board has identified the relevant criteria for determining whether there is a single economic unit in such cases as follows: (i) whether there are economic links and family ties between the relevant persons and/or groups; (ii) the foundations, characteristics and scales of such economic links and their comparison with independent activities (if any); and (iii) whether there is a unity of interest between these persons.[26]

III. Analysis of Economic Links and Family Ties in the Sançim Decision

First, the Board assessed the family relations between the shareholders of companies within Safi Holding and the shareholders of Sançim post-transaction, which belong to the same family group. In this respect, the Board determined that Sançim's post-transaction owners/directors will be Mustafa Hakan Safi, Said Safi and Faruk Safi who are members of the same family. Furthermore, the Board also determined that there are also economic links, in addition to family ties, between the parties, on the grounds that these three individuals have close family ties and economic links with the individuals that control the companies within Safi Holding in the relevant sector; these individuals own the shares in these entities; and there are not any conflicts of interest among them.

Accordingly, the Board concluded that the ultimate acquirer within the scope of this transaction should be identified as the Safi Family (*i.e.*, the economic unit that

[22] The Board's Çimentaş decision dated 7.8.2001 and numbered 01-39/391-100; Parıltı-Sofra decision dated 4.10.2002 and numbered 02-61/759-307.
[23] The Board's Misbis decision dated 08.11.2007 and numbered 07-85/1039-401.
[24] The Board's Altıparmak decision dated 31.03.2010 and numbered 10-27/393-146.
[25] The Board's Bilkom decision dated 9.01.2001 and numbered 01-03/10-3.
[26] The Board's MGS/Gıdasa decision dated 07.02.2008 and numbered 08-12/130-46; Ajans Press-PR Net decision dated 21.10.2010 and numbered 10-66/1402-523; Paraffin decision dated 28.10.2009 and numbered 09-49/1220-308; Yıldızlar/Yıldız Sunta decision dated 13.08.2020 and numbered 20-37/525-233; Copa/Yapıloji decision dated 01.10.2020 and numbered 20-44/609-269; Indorama/Sasa decision dated 08.01.2015 and numbered 15-02/24-10; Mavi/Akarlılar decision dated 08.03.2018 and numbered 18-07/121-65.

consists not only of Mustafa Hakan Safi, Said Safi and Faruk Safi, but also the entities within Safi Holding where these three individuals and other family members are present) on the basis that (i) Mustafa Hakan Safi, Said Safi and Faruk Safi have ownership of entities within Safi Holding and therefore there is a unity of interest between them, and (ii) all entities within Safi Holding would be in a unity of interest with Sançim and they would belong to a single economic unit since Mustafa Hakan Safi, Said Safi and Faruk Safi has close family ties with other shareholders in the entities within Safi Holding.

IV. Competitive Assessment of the Transaction

After identifying the ultimate acquirer within the scope of the envisaged transaction, the Board continued with its substantive assessment regarding the competitive impact of the transaction in Turkey. Based on the Turkey-related activities of the transaction parties, the Board identified three separate vertical relationships: (i) Sançim's activities concerning grey cement (upstream) and Safi Family's activities concerning residential construction (downstream), (ii) Sançim's activities concerning ready-mixed concrete (upstream) and Safi Family's activities concerning residential construction (downstream), and (iii) Sançim's activities concerning cement (downstream) and Safi Family's activities concerning wholesale of import coal (upstream). In line with these vertical relationships, the Board defined the relevant product markets as "ready-mixed concrete", "grey cement", "wholesale of import coal" and "residential construction".

The Board defined the relevant geographic market for wholesale of import coal and residential construction as "Turkey". As for the market for ready-mixed cement, in line with its decisional practice where it defined the geographic scope by drawing a circle with a radius of 50 kilometres around where manufacturing facilities are located and taking into account the area that is included in this circle,[27] the Board considered that "Bursa" and "Bilecik" provinces could be the relevant geographic market since Sançim's ready-mixed concrete facilities are located there. In terms of the geographic scope of cement markets, the Board either typically draws a circle with a radius of 250-300 kilometres around where the facilities are located and takes into account the area that is included in this circle,[28] or alternatively applies the "10% criteria method" according to which the Board includes the relevant provinces where sales made by a cement facility constitutes at least 10% of the cement consumption in the province, within the geographic scope of the market.[29] In the present case, the Board applied the "10% criteria method" and defined the geographic scope of the grey cement market as the area consisting of "Bursa, Bilecik, Kocaeli, Sakarya and Yalova" provinces.

[27] *e.g.*, the Board's decision dated 31.10.2019 and numbered 19-37/556-228, decision dated 02.05.2019 and numbered 19-17/243-110, decision dated 05.07.2018 and numbered 18-22/383-188, decision dated 21.12.2017 and numbered 17-42/667-295, decision dated 09.08.2017 and numbered 17-26/412-184.
[28] *e.g.*, the Board's decision dated 06.11.2012 and numbered 12-54/1527-545, decision dated 05.08.2010 and numbered 10-52/986-353.
[29] *e.g.*, the Board's decision dated 08.07.2021 and numbered 21-34/477-239, decision dated 24.4.2007 and numbered 07-34/352-132, decision dated 26.08.2009 and numbered 09-39/926-227.

In terms of the vertical relationships between (i) upstream market for grey cement and downstream market for residential construction and (ii) upstream market for ready-mixed cement and downstream market for residential construction, the Board remarked that there are only potential vertical links between Sançim and Safi Family; Safi Family did not have any activities in the construction industry in the last three years; Sançim's market shares in the relevant markets are relatively low; and there are strong competitors that would be able to exert competitive pressure. As for the vertical relationship between the downstream market for grey cement and upstream market for wholesale of import coal, the Board took into account the market shares of Safi Family in a broader market for the supply of coal, as well as the narrower markets/segments for the supply of coal to cement manufacturers and the wholesale of import coal to cement manufacturers. In addition, the Board also considered that there are significant number of competitors in the market; import coal is only one of the fuels that are used by cement manufacturers alongside alternative fuels (waste), petroleum coke and domestic coal; there are alternative sources of supply for cement manufacturers for their fuel requirements; the market is fragmented; and there is no existing commercial relationship between the parties prior to the transaction, as the Safi Family did not supply coal to Sançim in the last three years.

In this respect, the Board assessed that none of these vertical relationships would result in competition law concerns, and customer or input foreclosure risks. Accordingly, the Board unconditionally approved the transaction within Phase I review.

V. Conclusion

Sançim Decision further reinforces the Board's approach towards determining the unity of interest between parties and under which circumstances economic links and family ties would suffice to identify a single economic unit. Sançim Decision also sheds light on the Board's substantive assessment regarding cement, concrete and coal industries, which are seen as essential/critical sources and input in the Turkish economy.

Monetary Fine Imposed for Hindrance of On-Site Inspection: A Brief Analysis of the Competition Board's Naos Decision

I. Introduction

On October 6, 2022, the Turkish Competition Authority ("***Authority***") published the Turkish Competition Board's ("***Board***") reasoned decision ("***Decision***"),[30] in which the Board decided to impose an administrative monetary fine on Naos İstanbul Kozmetik San. ve Tic. Ltd. Şti. ("***NAOS***") due to hindering and complicating the on-site inspection, as per Article 16 of Law No. 4054 on the Protection of Competition ("***Law No. 4054***").

The Decision provides further insight into the Board's approach towards hindering and/or complicating on-site inspections.

II. Background of the Decision

On September 13, 2022, the Authority's case handlers conducted an on-site inspection at NAOS's premises in Istanbul ("***First On-site Inspection***") within the

[30] The Board's Naos decision dated 06.11.2022 and numbered 22-45/659-283.

scope of an ongoing preliminary investigation[31] concerning the allegations that undertakings operating in the cosmetics and personal care products sector have violated Article 4 of Law No. 4054 by maintaining resale prices and restricting online sales of resellers. During the on-site inspection, the case handlers detected that one mobile device, claimed to be used for both personal and business purposes by the relevant NAOS employee, did not have WhatsApp installed or contain any contact, call log or written correspondence. This raised suspicions, and the case handlers deemed this contradicted with normal course of life. Accordingly, the case handlers conducted a second on-site inspection at NAOS's premises in Istanbul on September 28, 2022 ("***Second On-site Inspection***").

During the Second On-site Inspection, the case handlers sought to question the mobile device of the same NAOS employee. In scope of the Second On-site Inspection The relevant employee indicated that he uses only the mobile device inspected during the First On-Site Inspection and that he has not used WhatsApp for a long time. Afterwards, the case handlers accessed the employee's email account and discovered that another mobile device was synchronized with his email account. The employee claimed that the mobile device shown in the email account belonged to his daughter.

In order to determine whether the mobile device inspected during the First On-site Inspection and the Second On-site Inspection is used actively by the employee in question, the Authority conveyed an information request to the Information and Communication Technologies Authority ("***ICTA***") on the day of the Second On-site Inspection to identify whether the employee's registered phone number matched with two different International Mobile Equipment Identity ("***IMEI***") numbers on the day of the First On-site Inspection and the day before. The Authority also requested information as to which IMEI number was used with the phone number in question and the time of use for each IMEI number.

The ICTA's findings demonstrated that the relevant phone number was used by the relevant NAOS employee for two different mobile devices with two separate IMEI numbers. The ICTA found that one of the IMEI numbers was used on September 11, 2022 and September 12, 2022, and the other IMEI number was used on September 13, 2022, *i.e.*, the day of the First On-site Inspection. In light of the information obtained during the on-site inspections as well as from the ICTA, the Board held that the NAOS employee in question removed the SIM card from the mobile device after the First On-site Inspection began and inserted it into the empty mobile device and handed it over to the case team for their inspection. The ICTA also found WhatsApp correspondences conducted by the NAOS employee in question with another NAOS employee on September 21, 2022 and September 13, 2022 although he claimed during the First On-site Inspection and Second On-site Inspection that he has not used the WhatsApp app for a long time.

Considering all these findings, the Board held that the actions of the NAOS employee hindered and complicated the on-site inspections conducted at NAOS's premises, and imposed an administrative monetary fine of 0.05% of NAOS's gross income for the 2021 financial year.

[31] The preliminary investigation was initiated pursuant to the Board's decision dated June 23, 2022 and numbered 22-28/467-M.

III. Conclusion

This Decision showed that the Authority does not only rely on the inspected employees' statements during the on-site inspection and uses its power given by the Law No. 4054 (*e.g.*, requesting information from other authorities and conducting a second on-site inspection in this case) to find whether the employees' statements reflect the truth. Thus, the Decision has reiterated the Board's approach towards the circumstances which constitute hindering and complicating on-site inspections. The Decision has emphasized once again that concealing information hinders and complicates the Authority's on-site inspections and lead to an administrative monetary fine as per Article 16(1)(d) of the Law No. 4054.

Navigating the Digital Frontier: Study on the Reflections of Digital Transformation on Competition Law

I. Introduction

On April 18, 2023, the Turkish Competition Authority ("***Authority***" or "***TCA***") published the Study on the Reflections of Digital Transformation on Competition Law ("***Digital Transformation Study"*** or ***"Study***") on its website,[32] which provides an overview of the competition law framework for digital markets and highlights the challenges surrounding, among others, digital ecosystems, data practices, algorithmic collusion, interoperability, and platform neutrality.

Although it appears that the Digital Transformation Study suggests solutions to certain challenges, it is understood that its main purpose is to provide a very detailed snapshot of the digital ecosystems and potential competition law matters surrounding such ecosystems. As such, it does not particularly focus on suggesting detailed solutions to the identified concerns.

This article summarizes the Digital Transformation Study and highlights its important findings.

II. Competition Law Concerns and the Board's Inquiries and Decisions on Digital Markets

Digital platforms and ecosystems have been considered non-traditional business models with distinct economic characteristics since they first appeared in the past few decades. In accordance with the Study, with digitalization, competition in markets has been increasing and traditional businesses must develop digitalization strategies to compete with digital businesses. Digitalization has also given rise to platform economies. Platforms are dynamic markets and they bring suppliers and consumers together.

The Digital Transformation Study discusses the challenges of competition in digital markets and the impact of digitalization on traditional business models. The importance of the emergence of digital platforms and ecosystems, which have disrupted traditional market structures and introduced new competition dynamics have also been highlighted. It further examines the role of data in digital markets and the implications for competition. The Study inspects how digital platforms collect and use data to enhance their services and develop new products, as well as how data can be a source of market power for dominant players. In addition, the Study analyzes the competitive

[32] https://www.rekabet.gov.tr/Dosya/dijital-piyasalar-calisma-metni.pdf

dynamics of digital advertising markets and the impact on traditional media outlets by considering how digital advertising has changed the way that consumers access and consume news and information, and how this has affected the revenue models of traditional media outlets.

The Study addresses the unique features of digital markets, such as network effects and data-driven economies of scale as well. The need for greater collaboration among competition authorities and policymakers to develop effective regulatory approaches for digital markets has also been underlined in the Study.

Steps taken by the competition authorities all around the world are also addressed by the Study and it is indicated that the regulatory steps for digital markets come from countries around the world. Accordingly, the Study notes that many competition authorities, including the European Commission ("***Commission***"), have prioritized adapting existing rules to digital markets and maintaining the traditional legal framework and perspective.

III. Possible Competition Law Violations in Digital Markets

The Study discusses possible competition law violations in digital markets and suggests that digital markets are different from traditional markets due to their unique characteristics, such as network effects, economies of scale, and data-driven business models. The Study discusses how and if these characteristics may create entry barriers for new competitors. For instance, the Authority discusses in its Study the potential collusion between competitors via algorithms. They note that algorithms can potentially be used to monitor competitors' prices and adjust prices in response, potentially leading to collusion.

The Study also pointed out that privacy and data protection issues may also potentially pose competition law concerns. The Study argues that undertakings that collect excessive data may be able to use such excessive data to gain a competitive advantage. On that front, the Study indicates that in identifying any potential competition law concerns regarding collecting excessive data, the key challenge would be to determine where the borders of reasonable and legitimate collection of data ends and where the borders of excessive collection of data starts.

The Study suggests some potential solutions to address competition law concerns in digital markets:

i. **Promotion of the interoperability:** Promoting interoperability between different platforms may increase competition and reduce entry barriers.

ii. **Data portability and data sharing:** Data portability and data sharing may also increase competition by reducing the advantage held by undertakings with large amounts of data.

iii. **Algorithmic transparency:** Greater transparency around algorithms may help to prevent algorithmic collusion and ensure that algorithms are not used in anticompetitive ways.

iv. **Enhanced merger control:** The merger control may need to be enhanced to address the unique challenges posed by digital markets.

IV. Conclusion

The Study concludes by pointing out that based on the regulation requirements, global practices, and academic studies

concerning digital markets, it has been concluded that a draft including the basic principles and procedures for regulating digital markets should be prepared, along with more detailed explanations and regulations for relevant basic regulations to be implemented through secondary legislation.

Turkish Competition Authority Publishes its Final Report on the Fast-Moving Consumer Goods Retail Sector Inquiry[33]

I. Introduction

The Turkish Competition Authority ("***Authority***") has published its Final Report ("***Final Report***") on fast moving consumer goods ("***FMCG***") retailing sector inquiry ("***Sector Inquiry***")[34] on March 30, 2021, two years after the release of its Preliminary Report.[35] This is the second sector inquiry report on FMCG retailing since the release of the 2012 Final Report on FMCG Retailing ("***2012 Report***").[36] The Sector Inquiry has been initiated with the Turkish Competition Board's ("***Board***") decision dated February 16, 2017 and numbered 17-07/73-M rendered upon an internal note prepared by the Authority within the scope of *Tesco Kipa/Migros* Decision,[37] reporting that there had been significant changes in terms of the market dynamics included in the 2012 Report.

The Final Report maintains the conclusion that was drawn within the Preliminary Report, that (i) FMCG retail chains hold significant buyer power; (ii) such buyer power allows FMCG retail chains to perform certain unfair commercial practices, such as charging fees to suppliers, long maturity terms for the payment of retailers and making unilateral amendments to the supply contracts. That being said, the Final Report builds upon the Preliminary Report in terms of the competitive concerns and identifies specific practices that might give rise to further concern in the market. The Final Report also puts forward concrete proposals for preventing the identified competitive concerns.

The Final Report explores the market structure and development, effects of digitalization process as well as COVID-19 pandemic on FMCG retailing, relevant product and geographical market definitions that are deemed significant in terms of the Board's decisional practice, the buyer power that organised retailers hold vis-à-vis the suppliers, regulations to counter unfair commercial practices that are performed based on buyer power and agreements covering specific product weight.

This article provides the key takeaways from the Final Report.

[33] First appeared in Mondaq on April 3, 2023 (https://www.mondaq.com/turkey/antitrust-eu-competition-/1300624/turkish-competition-authority-publishes-the-final-report-on-fast-moving-consumer-goods-retailing-sector-inquiry)

[34] https://www.rekabet.gov.tr/Dosya/htm-sektor-nihai-raporu.pdf, last date of Access March 31, 2023.

[35] Preliminary Report on the Sector Inquiry has been published on the website of the Turkish Competition Authority on February 5, 2021; https://www.rekabet.gov.tr/Dosya/geneldosya/htmperakendeciligisektorincelemesionraporu-pdf, last date of Access March 31, 2023

[36] https://www.rekabet.gov.tr/Dosya/sektor-raporlari/6-hizli-tuketim-mallari, last date of Access March 31, 2023.

[37] Decision of the Board conditionally approving acquisition of majority shareholding of Tesco Kipa Kitle Pazarlama Ticaret Lojistik ve Gida San. A.Ş. by Migros Ticaret A.Ş., dated February 9, 2017 and numbered 17-06/56-22.

II. Concentration Levels in the Market and Assessment from a Merger Control Standpoint

The Final Report notes that the concentration level in FMCG organized retailing sector has shown a rapid increase within the reference period of 2010-2021. In that context, the Final Report notes that the concentration level (CR4) based on the top four retailers has increased from 26% to 77% within 2010-2021. As per the Authority's observations regarding the trend of market shares, market shares of the top four retailers has increased, while local and regional retailers has suffered market share losses.

The Final Report discusses whether high concentration level in the sector is a result of the consecutive, slow-paced and unnoticed mergers and acquisitions. In that context, the Final Report delves into the merger control legislation and notes that there are certain mechanisms that enable tackling market concentration by way of these transactions. Firstly, the Final Report notes that the amendments introduced to the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***") in 2017[38] has enabled the Authority to consider multiple transactions that have been realized by the same persons or undertakings or within the same relevant market by the same undertaking within a three years period as a single transaction in terms of turnover calculation. The Final Report deems such mechanism beneficial in terms of catching the transactions realized in the retailing sector that are under turnover thresholds.

Secondly, the Final Report remarks that the changes introduced to Article 7 of Law No. 4054 on the Protection of Competition[39] ("***Law No. 4054***") has also contributed in tackling concentration in the retailing market. In that context, it is noted that introduction of the significant impediment of effective competition ("***SIEC***") test instead of dominance test has enabled the Authority to prohibit transactions that give rise to minimal level of concentrations. Lastly, the Final Reports notes that recent decisional practice of the Board adopts a narrower market definition, which enables a thorough review of the mergers and acquisitions in the sector.[40]

Against the foregoing, as initially set forth by the Preliminary Report, the Final Report remarks that the concentration levels (CR4 and CR10) in FMCG retail sector are high. Adding on that the Final Report concludes that the increasing concentration levels (CR4 and CR10) in FMCG retail sector have not originated from consecutive, slow-paced and unnoticed mergers and acquisitions. The Final Report adds that expansion within the sector by acquisitions is not alarming. In addition, the Final Report includes quantitative analysis on the number of new stores opened by the retailers and indicates that the underlying reason for the concentration in the market is the new

[38] This amendment was introduced by the Communiqué No. 2017/2 on the Amendment of Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board, promulgated on the Official Gazette of February 24, 2017.

[39] In 2020, the Competition Law was subject to essential amendments which passed through the Grand National Assembly of Turkey on 16 June 2020, and entered into force on 24 June 2020 ("***Amendment Law***") on the day of its publication in Official Gazette No. 31165.

[40] *Migros/Carrefoursa* decision of the Board dated 04.05.2021 and numbered 21-25/307-140; Migros/Adese decision of the Board dated 01.07.2021 and numbered 21-33/430-215.

store openings. Additionally, the Final Report remarks that decreasing the thresholds for merger control filings in the FMCG retailing sector is not necessary, given that such an action would decrease efficiency of the future mergers and acquisitions between small retailers and prevent such undertakings' growth.

III. Assessment on Buyer Power and Unfair Commercial Practices

The Final Report remarks that the increasing concentration levels in the sector contribute to the buyer power of the retailers. The Final Report notes that buyer power of the FMCG retailers is influential over small scale and regional suppliers. On the other hand, buyer power of FMCG retailers vis-à-vis global suppliers or suppliers that enjoy market power is rather limited. Additionally, the Final Report indicates that the buyer power is more prominent in cases where the manufacturer supplies private branded products to the retailer.

The Final Report finds that increasing buyer power may give rise to unfair commercial practices, such as charging fees to suppliers, long maturity terms for the payment of retailers and making unilateral amendments to the supply contracts. The Final Report notes that such practices may obstruct the activities of small and medium scale suppliers and weaken their competitive strength. The Final Report stresses that such practices should be prevented given that these may reduce the incentives of small and medium scale suppliers to invest, enter into and introduce new products to the markets, emphasizing that small and medium scaled suppliers are the bedrock of the national economy.

The Final Report remarks that the European Commission's Unfair Commercial Practices Directive[41] may be of guidance in the way to achieving a healthy market environment in terms of the entire agriculture - food supply chain in Turkey by way of protecting the farmers, farmers' associations, agricultural product suppliers, suppliers that sell processed agricultural products against the high buyer power. Following that, the Final Report suggests that a set of rules similar to the Unfair Commercial Practices Directive must be adopted. In that context, the Final Report proposes the following rules to be introduced within Draft Bill on Amendment of the Law on Regulation of Retail Commerce ("***Draft Bill***").

Prohibition of the following:

- Maturity terms that exceed 30 days for perishable agricultural products and food products,
- Maturity terms that exceed 60 days for other agricultural products and food products,
- Short notices of cancellation for perishable foods,
- Unilateral contract amendments of the buyer,
- Payment requests that are not related to the transaction,
- Transfer of the risk of lost and damaged goods to the supplier,
- Buyer's failure to provide written approval to the supply agreement despite the request of the supplier,

[41] Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain.

- Abuse of trade secrets by the buyer,
- Trade retaliation by the buyer,
- Transfer of the costs for investigating consumer complaints to the supplier.

The Final Report further evaluates that the following subjects should be prohibited or a regulation must be enacted that states retailer's request for cost would be only valid when it is included in the agreement signed between the parties with a clear clause:

- Return of the products that are not sold,
- The supplier' payment of the costs of listing, shelf, and stock,
- The supplier's payment for promotion,
- The supplier's payment for marketing,
- The supplier's payment for advertisement,
- The buyer's request for a staff fee from the supplier in order to place staff that is used for selling supplier's products.

Furthermore, the Authority presents its provisions that are as follows to ensure that these regulations are applied properly:

- Establishment of an administrative independent unit in order to conduct the follow-up and audit of these regulations,
- Structuring the said administrative unit in a as task-specific manner and granting it with the authority to conduct investigations upon complaint or ex officio,
- Granting the said unit with the authority to conduct a dawn raid considering the possibility of the secret conduct of unfair trade practices,
- Granting the unit with the authorities such as imposing monetary fines, termination of the violation.

Lastly, the Final Report's suggestions in terms of the administrative monetary fines are as following:

- The monetary fines that are aimed to prevent the unfair trade practices must be of a deterrent nature,
- Fines should accrue until the violation is terminated,
- The turnover of the undertaking (*i.e.*, the entire single economic unit) should be taken into account in terms of calculation of the fine,
- Recidivism should be regarded as an aggravating factor.

The Authority then states its further opinions on the regulation as follows:

- The principle of economic unity should be introduced in a way that would include affiliated companies, to prevent circumvention of the said rules,
- The availability of using alternative dispute resolution procedures, such as settlement, mediation, and arbitration, for the resolution of potential disputes should not be established as a precondition of litigation, and the use of such procedures should not affect the right to file a complaint with the relevant unit.

Lastly, the Final Report suggests prohibition or regulation of the "price difference invoice" practices, along with other unfair commercial practices.

IV. Assessment on Information Exchange and Chinese Wall

Furthermore, the Final Report includes its assessment pertaining to the possible

information exchange between the manufacturers of private label products and the retailers. The Final Report suggests adopting the practice that is referred to as the "Chinese Wall" in literature. "Chinese Wall" practice refers to the separation of communication channels of purchasing units of the undertakings. The Final Report evaluates that the necessity for such separation must be conducted on a case-by-case basis, rather than regulating the obligation to do the separation initially.

The Final Report defines the Chinese Wall as the practice of "*building a wall"* between undertakings' purchasing units or sectors in order to limit or all together prevent the exchange of competitively sensitive information between private labelled product manufacturers and retailers. In the end, the Final Report states that evaluations must be made case-specific and the determination on which procedure to use for separation must be individually decided since each undertaking works with different business models and organizational structures in the FMCG retail sector in Turkey.

V. Other Policy Suggestions

i. **Practices related to Product Weight:** The Final Report identifies the agreements, where retail chains require their suppliers to manufacture products that fit into a specific product weight and ensure that these products under specific weight category are exclusively sold by their retail chain as a competitive concern. The Final Report notes that such agreements are increasingly common in the sector and could give rise to exclusive supply of a particular type of product (*i.e.*, products that have a certain weight or package type). The Final Report suggests that such arrangements should be prevented by way of legislation/regulation.

ii. **Store Opening Permission:** The Final Report notes that taking the population criteria into account in terms of new store opening permissions might have anti-competitive effects. That said, the Final Report suggests introduction of a legislation/regulation that prohibit opening a second store within a certain diameter or acquisition of additional stores within a certain diameter would have pro-competitive effects in the market.

iii. **Availability of the Product During the Announced Discount Periods:** The Final Report notes that one of the main complaints of the consumers are availability of the products that are announced as discounted during the promoted discount periods. To that end, the Final Report proposes a legislation/regulation to ensure the availability of products at the price that is promoted by way of the announcement/commercial, during the period indicated in such announcement/commercial.

iv. **Change of Market Share Threshold Criteria in the Vertical Block Exemption Communiqué:** The Final Report proposes a dual market share threshold criteria for retail FMCG sector, where both the suppliers' and the retailers' market shares are taken into account in terms of Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("***Communiqué No. 2002/2***") due to the increasing buyer power of the retailers.

v. **Emphasis on Digitalization:** Lastly, the Final Report remarks that FMCG retailing market has digitalized due to COVID-19's impact. Accordingly, the

Final Report suggests that the impact of digitalization must be taken into account in terms of competitive assessments as well as market definitions.

VI. Conclusion

Overall, the Final Report covers the development, dynamics and competitive environment relating to the FMCG retailing sector for the period after the 2012 Report. The Final Report analyses the issues identified in the Preliminary Report and further proposes more concrete suggestions for solving the respective concerns. In this vein, the Final Report conducts detailed analysis on the issues that are deemed as most prominent and proposes policies to tackle such issues such as (i) concentration level in the FMCG retail sector and its repercussions, (ii) buyer power and unfair commercial practices arising from it, (iii) potential of anti-competitive information exchange between the suppliers of private label products and retailers, (iv) digitalization of the FMCG retail market.

Employment Law

Early Retirement: Amendment to the Social Security and General Health Insurance Law No. 5510 and Decree No. 375

I. Introduction

On March 3, 2023, the Law on the Amendment of the Social Security and General Health Insurance Law No. 5510 and Decree No. 375 ("***Amendment Law***"), also known as the Law on Early Retirement ("***EYT***"), was published in the Official Gazette. This Amendment Law modifies the eligibility conditions for retirement for those individuals who were deemed to be subject to social security and registered with the Social Security Institution ("***SSI***") before September 9, 1999. In this article, we will explain the conditions set out under the Amendment Law with regard to eligibility for early retirement.

II. Conditions of Early Retirement

According to the EYT, those individuals who were deemed registered with the SSI before September 9, 1999, will be able to retire in accordance with provisions under the EYT. In order for these individuals to be able to qualify for early retirement within the scope of EYT, the individuals who were employed under the "Article 4/1(a)" status of the Social Security and General Health Insurance Law No. 5510 ("***Law No. 5510***") must (i) complete a 20-year social security period for women, or a 25-year social security period for men, and (ii) fulfil the conditions of having worked the requisite number of days (and paid the corresponding social security contributions) for this statutory social security insurance, which varies from 5000 to 5975 days depending on the individual's initial date of registration with the SSI system.

In accordance with the Amendment Law, the following individuals will be entitled to an early retirement without any age requirement: (i) individuals who started working before September 8, 1999 (inclusive) within the scope of long-term social security categories (such as disability, old age, and death insurance) and (ii) individuals who started working after September 9, 1999 (inclusive) within the scope of long-term social security categories, but whose SSI start date has been brought back to a date before September 8, 1999 (inclusive) due to their

"service debt", *i.e.*, voluntary payments of social security contributions for the particular periods they were unable to work, as per the provisions of the relevant legislation. These individuals will be able to retire within the scope of EYT regardless of whether they are subject to Article 4/1(a), 4/1(b), or 4/1(c) status[42] under the social security legislation.

In order to exercise their right for early retirement within the scope of EYT, the employee must apply to the SSI and then must submit their resignation to the employer, together with a letter obtained from the SSI regarding their eligibility for severance pay due to retirement. The employer must notify the SSI within at most 10 days following the termination of the employment agreement. As a result of early retirement, the employer will be obliged to pay the following to the retiring employees: (a) severance payment, (b) any accrued and unpaid salary, (c) accrued contractual benefits, (d) payment in lieu of any accrued and unused annual leave days, (e) accrued and unpaid overtime/excess time pay and (f) accrued and unpaid pay for working on national and public holidays and weekly holidays (if any).

In addition to the foregoing, the retired employees can be re-hired by the same employer if mutually agreed. Those employees who retire within the scope of EYT will also be required to pay social security support premium if they continue working post-retirement, be it the same employer or a different one. According to the relevant legislation, if an employee retires within the scope of EYT but starts working for the same employer within 30 days following the date the employee terminated the employment, the amount corresponding to 5 points of the employer's share of the social security support premium will be covered by the Turkish treasury. However, the employer will not be able to benefit from the 5 points incentive if those employees who retire early start working in a different workplace after terminating their employment within the scope of the EYT.

III. Conclusion

The Amendment Law published in Official Gazette numbered 32121 and dated March 3, 2023 amended the conditions and requirements for eligibility of retirement for those individuals who were deemed to have registered with the SSI before September 9, 1999.

Litigation

High Court of Appeals Ruled That Time Limits Regarding Appeal Requests Shall Not Be Applicable in Case There is an Error Regarding the Term of Appeal in the Decision Subject to the Appeal Request

I. Introduction

The time limits for making an appeal request are explicitly determined under the Turkish Code of Civil Procedure ("***TCCP***") along with the outcome of an appeal request which has not been submitted within the term of appeal. Accordingly, the court authorised to hear the appeal request must dismiss the application if it is not filed within the time required.

[42] Meaning, regardless of whether they work for a private entity or an individual Article 4/1(a), they work independently 4/1(b) or they work as a government official 4/1(c).

The Decision of the 9th Civil Chamber of the High Court of Appeals[43] ("***Decision***") sets an innovative principle regarding the foregoing articles of TCCP on the term of appeal, with respect to a fair trial. In accordance with the Decision, if a court decision (i) fails to indicate that parties are entitled to appeal (in those cases where the decision is not final and the right to appeal is available to the parties) or (ii) states an incorrect term of appeal, then the procedural terms for appeal as regulated under TCCP shall not be applicable and such faulty court decisions can be appealed with no time limit. This includes the scenarios when a court decides its decision is final and cannot be appealed, despite appeal being available in accordance with the TCCP. In this ruling, the High Court of Appeals relies on Article 36 of the Turkish Constitution on the principle of fair trial and the Constitutional Court's decisions regarding the same.

II. Decision

According to Article 346 of TCCP a request for appeal must be dismissed, if it was not made within 2 weeks following the service of the reasoned judgment being challenged. Pursuant to Article 345 of TCCP, the appeal request also must be dismissed if it is made against a final judgment.

In this particular, the Decision, the court of first instance had mistakenly ruled that its decision was final and binding. However, in accordance with the TCCP, that decision could actually be appealed, therefore it was not final. The reasoned decision of the court of first instance was served to the parties, and the defendant appealed the decision long after the date of service and past the statutory deadline. Accordingly, the Regional Court of Appeal refused the appeal request of the defendant and dismissed the case. However, the High Court of Appeals decided that appeal request of the defendant shall be accepted even if it was not made within the relevant period set out under TCCP. The Decision points to the Turkish Constitutional Court precedents and refers to a decision[44] which states that courts are under the obligation to point out the remedies, if any, against the decision they are rendering and the applicable time periods to pursue such remedy.

Accordingly, when a court erroneously misleads parties by pointing out that there is no remedy against its decision or by indicating an incorrect time period for appeal, the time limits of appeal requests under the TCCP shall not be applicable, and parties may appeal the decision with no term of appeal to comply with. The Decision provides that deciding that parties would be bound with the appeal periods set out under the TCCP anyway would be an excessively normative approach on the issue. Also, it was stated that the parties to a dispute should not have to bear the consequences where they were not duly informed about their right to appeal.

III. Conclusion

With the Decision, the High Court of Appeals established an approach that prioritizes the individuals' right to a fair trial. Accordingly, in case a court fails to provide the correct information regarding the remedies available and the right to

[43] Decision of 9th Civil Chamber of the Court of Cassation dated 31.03.2022, numbered 2022/3453 E. and 2022/4246 K.

[44] Turkish Constitutional Court, application number: 2014/819 dated: June 9, 2016 published in the Official Gazette dated June 29, 2016 and numbered 29757

appeal in its judgment, the imperative provisions of TCCP regarding the term of appeal shall not be applicable. Therefore, parties will be entitled to appeal a decision which had failed to set out the remedies or had described these remedies incorrectly, without being bound by the appeal periods regulated under the TCCP. Without a doubt the Decision established a new and liberal approach to the appeal periods, however, it is uncertain whether this approach will also be adopted by the other chambers of the High Court of Appeals.

Data Protection Law

Turkish Constitutional Court's Recent Decisions on Protection of Personal Data

The Turkish Constitutional Court ("***Court***") recently handed down certain decisions related to the right to respect for private life and the right to demand the protection of personal data.[45]

I. Decision numbered 2019/25604[46]

The decision is regarding termination of the applicant's employment contract, as a result of the employer's investigation on the correspondences between the applicant and his colleague.

The applicant filed a lawsuit before the Istanbul Anadolu 7th Labor Court for reinstatement, stating in his petition that his employment contract was terminated unjustly, a copy of the message content on which the termination was based was not included in the termination notice, the correspondence was fictitious, the mobile phones provided by the company were also used by the employees in their private life and that these correspondences should be protected as personal data. The company stated in its response that the mobile phone allocated to the company employee was examined in order to reach the contact information of the company's customers, that the messages between the applicant and the former employee were discovered during this examination, and that there were offensive statements about the company employees as well as defamatory statements regarding their failure in fulfilling their duties and responsibilities. The court decided to dismiss the case, emphasizing that these conversations could constitute a rightful termination, and that since the mobile phone was provided by the company, it would be acceptable that the aforementioned correspondence was obtained in accordance with the law. The applicant appealed against the relevant decision and the Regional Court of Justice examined the case and did not find the applicant's claims acceptable, emphasizing that the words used in the contents of the messages are of a nature that may disrupt the working relations between the employer and the employees, and adversely affect the business relationship, that the company's "Communication Tools Policy" provides that the mobile phone allocated to employees belongs to the company and that these communication devices should only be used for business purposes and not for private correspondence, so that the company's examination of the mobile phone does not violate the privacy of personal life.

The applicant then made an individual application before the Court. The Court

[45] Decision numbered 2019/25604 published on the Official Gazette of November 15, 2022, decision numbered 2018/16857 published on the Official Gazette of December 1, 2022 and decision numbered 2018/6161 published on the Official Gazette on December 20, 2022.

[46] https://www.resmigazete.gov.tr/eskiler/2022/11/20221115-5.pdf (Last accessed on April 10, 2023).

evaluated the employer's authority to control the employee's communication in the context of respect for private life and freedom of communication. The Court stated that although the Regional Court of Justice relied on the "Communication Tools Policy" document, this policy did not discuss the issues related to the authority to inspect and supervise the use of communication devices, the limits of such use and whether the penalties for breaching these limits was clearly regulated and whether the document was notified to the workers within the scope of the notification requirement. Furthermore, the Court emphasized that the grounds of the Regional Court of Justice were not based on the documents and communication devices specific to the employee, but over the device made available to the employee in the context of the employment and in this case, the notice requirement of the employees, including the usage limits of the communication devices delivered by the employer, the employer's authority to inspect/supervise the said tools, and the sanction related to the use against the purpose, has not been fulfilled and the Regional Court of Justice have not conducted any research on whether such information was conveyed specifically for the employee. In addition, the Court underlined that the employer was not able to demonstrate that its examination on the phone used by the employee had been appropriate for and limited to the stated purpose, and that the contents of the messages obtained from the phone, which constituted the basis for termination, did not confirm their arguments, despite the fact that the employer had claimed during the trial process that the examination on the phone had been made in order to reach customers' contact information.

Ultimately, the court stated that, considering that messaging applications can also be used for personal reasons, it is clear that monitoring someone else's mobile phone and intercepting the employee's messages is contrary to the worker's reasonable expectation of protecting the privacy of his personal life and communication, and that the Regional Court of Justice did not evaluate how the correspondence on someone else's mobile phone was inspected, whether the contents of the message had been necessary to establish the grounds of termination, and its effect on the employee's private life and communication.

Consequently, the Court decided that the Regional Court of Justice had failed to satisfy its positive obligations, and that the applicant's right to respect for private life guaranteed in Article 20 of the Constitution and freedom of communication guaranteed in Article 22 of the Constitution, was violated.

II. Decision numbered 2018/16857[47]

This decision concerns the applicant's claim on violation of the right to request the protection of personal data as a result of an investigation made against him regarding the illegal recording of a private conversation.

The applicant filed a criminal complaint before Istanbul Chief Public Prosecutor's Office for the offence of listening and recording conversations between individuals, stating that his statements about a debt relationship made in a non-public environment were recorded, in a planned manner and with criminal intent,

[47] https://www.resmigazete.gov.tr/eskiler/2022/12/20221201-3.pdf (Last accessed on April 10, 2023).

and that this recording was submitted to a criminal investigation file in which he was one of the defendants, and requested a criminal case to be filed against the relevant offender. Although the Public Prosecutor's Office initiated an investigation for the offense of violating the privacy of personal life and recording the conversations between individuals, it later handed down a decision to not prosecute, stating that the interview in question was recorded and presented as evidence to an investigation, that the person acted with the motive of presenting evidence, that there was no element of intent, and that there were also High Court of Appeals decisions of in this regard. The applicant appealed against this decision before Istanbul 3rd Criminal Judgeship of Peace, claiming that the requested evidence had not been collected in the initial investigation, that it was not determined whether there were any deletions to or alterations in the recording made, that the statements of the relevant suspects were not taken, and that the audio recording was made in a planned manner with criminal intent and it was a breach of their right to respect for private life guaranteed under the Turkish Constitution. His objections were dismissed and the decision of the Prosecutor's Office became final.

The applicant then made an individual application before the Court. Upon finding the case admissible, the Court evaluated that the state has a positive obligation to take judicial measures against any interference that may arise from the actions of other individuals, as well as public authorities, on the rights of all individuals within its jurisdiction within the scope of respect for private life guaranteed in Article 20 of the Constitution and that the relevant public prosecutor office had failed to put forward a convincing approach that the procedure for making the audio recording (obtained and used without the applicant's consent) was not contrary to the applicant's rightful expectation of the protection of his fundamental rights. Besides, although it was stated that the people who obtained the audio recording had a legitimate aim and did not have a criminal intent, no evaluation or investigation was made about how the relevant actions affected the personal data and private life of the applicant.

Furthermore, although there are references made to a High Court of Appeals decision, the Court evaluated that the limits of the conditions set forth in the relevant High Court of Appeals decision are vague and leave the sphere of private life unprotected. Moreover, the Court evaluated that a clear and constitutional assessment has not been made on whether the method that constitutes a violation on the applicant's private life and personal data is proportionate, and whether the intended purpose can be achieved with different methods.

Consequently, the Court concluded that due to the fact that the public authorities' positive obligations are not fulfilled in the present case, the right to request the protection of personal data within the scope of the right to respect for private life regulated in Article 20, is violated.

III. Decision numbered 2018/6161[48]

This decision is regarding a violation of the right to an effective remedy in connection with the right to request the protection of personal data, as a result of

[48] https://www.resmigazete.gov.tr/eskiler/2022/12/20221220-4.pdf (Last accessed on April 10, 2023).

the failure of a company operating in the electronic communications sector which did not provide the applicant with the information requested about his mobile number usage.

According to the Court's decision, the applicant requested Internet data, log records, IMEI information and the date of "Hot Spot" use of the years 2014 and 2015 with regards to his mobile service which is provided by a company named "A. İletişim Hizmetleri A.S." He also requested the log records for the dates when his phone shared a single IP number with other subscribers when he used his mobile internet. The applicant stated in his application that the company's customer services rejected his application by stating that this information can only be shared if it is requested by a court, accordingly the applicant filed a lawsuit before Istanbul Anadolu 1st Consumer Court and claimed that the information he requested pertains to his private life and should be shared with him.

Further, the company stated in their defense petition that the farthest date the applicant can request call details from the company through various means, was two years from the date of request; that under the data protection and consumer laws the company is not required to provide some of the information that the applicant requested, the fact that the information regarding the applicant's own use, which can be determined by the applicant himself, does not constitute violation of any rights, and the company does not have the means or any obligation to provide the data it does not process or record.

Istanbul Anadolu 1st Consumer Court dismissed the case by stating that the information which the claimant requested the court to obtain from the company related to factual data, rather than the exercise of a right or regarding a legal relationship. The applicant's appeal was also rejected due to the merits on the grounds that the information requested is beyond the obligatory minimum information and such information can be provided to judicial authorities pursuant to a judicial verdict, to identify perpetrators in case of crimes under Article 8 of the Law No. 5651 and same as the first degree court, deemed that the request related to factual data rather than a right or legal relationships and the applicant could not claim and prove before the Consumer Court that there is an actual benefit worthy of legal protection. The applicant then made an individual application before the Constitutional Court.

At this stage, having exhausted all domestic legal remedies, the applicant claimed that the company rejected his application by stating that this information can only be shared if it is requested by a court and he was deprived of the right to access to personal data, the right to learn if the data is accurate or not and the right to request the correction of data if it is not accurate, as the Consumer Court dismissed his case and that his right of protection of personal data, respect for private life, right to legal remedies and right of property are violated.

Upon finding the case admissible, the Court evaluated that the data subject to the case should be considered as personal data and an assessment in terms of the right to an effective remedy along with the right to respect for private life should be conducted.

Moreover, the Court stated that the first instance court did not examine the merits of the case, and when dismissing the case, did not provide a reason in accordance

with the requirements of the right to request the protection of personal data under the Article 20 of the Constitution, and that it did not provide relevant and sufficient justification which could justify such an implementation. The Court further evaluated that the courts did not discuss or clarify the obligations of the company in terms of access to personal data and by not examining the merits of the case, they had rendered an effective and theoretically available legal remedy, ineffective. In other words, a legal remedy that might have been considered effective at the theoretical level was not given a chance to succeed in practice, due to the interpretation of the courts.

The Court emphasized that the Constitution is binding for legislative, executive, judicial and administrative authorities as well as other entities and persons and Article 138 of the Constitution regulates that the judges shall give judgments based on their conscientious opinion in compliance with the Constitution, the legislation, and the law. Therefore, the regulations and other secondary legislation applicable to a dispute must be evaluated in light of principles and safeguards under the Constitution, when they are open to interpretation.

Consequently, the Court concluded that the applicant's right to an effective remedy with respect to his right to request the protection of personal data, has been violated due to the courts' interpretation that did not allow the case to be examined based on its merits.

Internet Law

Constitutional Court's Recent Decision on Social Media Posts by an Employee

On October 21, 2019, a journalist who was employed as an editor in a newspaper applied to the Constitutional Court, alleging that her employment contract was terminated due to the posts in her social media account, in violation of freedom of expression, The Constitutional Court accepted this application with number 2019/38252 on January 11, 2023,[49] on the grounds that the fundamental right of freedom of expression was violated.

According to the Constitutional Court's decision, the Applicant worked under an employment contract with an indefinite term, in one of the national newspapers in Turkey until July 29, 2016. The employer newspaper terminated the employment contract of the Applicant due to the fact that the Applicant used defamatory wording and hate language in her social media posts. Later, the applicant filed a lawsuit with a claim for reinstatement against the employer, stating that the termination was unjust and invalid. The trial court ruled in favour of the applicant as the employer had not asked the applicant for her statement of defense in the termination process. However, the employer's appeal against the Labor Court's decision was accepted by the Regional Court of Justice on the grounds that the termination is valid since the Applicant's posts were contrary to the newspaper's broadcasting policy and damaged the relation of the trust between the employee and employer. Therefore, the

[49] https://www.resmigazete.gov.tr/eskiler/2023/03/20230307-20.pdf (last accessed on April 17, 2023).

applicant's employment contract was terminated on the basis that her expression of her views had damaged the trust between the employer and the applicant.

Upon this ruling, the Applicant made an individual application before the Constitutional Court. The Applicant claimed that terminating her employment contract due to her social media post, without justifying which posts she made affects her business life, violates her freedom of expression and right to a fair trial.

Finding the case admissible, the Constitutional Court assessed that the employer did not explain in what way and due to which posts the Applicant had breached her duty of loyalty to her employer within the framework of the principles specified while performing her duty. Accordingly, it was also not established that these social media posts were made during working hours, with work tools, or at the workplace, or that the applicant had failed to fulfil her responsibilities arising from the employment contract for these reasons. The Constitutional Court further stated the courts did not conclude that these posts had any connection to the applicant's job, workplace, or employer. It was also not explained why the sharing led to a breakdown of trust between the employer and the applicant or caused negativity in the workplace.

The Constitutional Court further evaluated that considering the acts of the Applicant, the penalty of terminating the employment contract, which was applied without explaining which post of the Applicant harms the trust relationship with the employer, is an extremely heavy sanction for achieving the intended goal, in terms of the weight of termination of employment contract on freedom of expression. The Constitutional Court further evaluated that the relevant provision of the Labor Law (Article 18-termination on valid grounds) was subjected to an extreme interpretation and based on the indirect limitation of the expressions of opinions and that the courts of first instance did not act in accordance with the principles guaranteed by the freedom of expression.

Consequently, the Constitutional Court accepted that the Applicant's freedom of expression has been violated and ruled that a labor court must reassess the case and that the Applicant must be paid 10,264.60 Turkish Liras for legal fees.

Telecommunications Law

Draft Communiqué on the Implementation of Annex-6 of the Regulation on Service Quality in Electronic Communications Sector

As per the Regulation on Service Quality in Electronic Communications Sector ("***Regulation***"),[50] operators are obliged to comply with service quality provisions and show utmost diligence to provide the services within the scope of their authorizations without interruption. Accordingly, operators are obliged to submit reports including their calculations regarding service quality criteria on a quarterly basis, as well as provide explanations regarding the differences between the calculations/reporting periods, along with their reasons.

[50] https://www.mevzuat.gov.tr/mevzuat?MevzuatNo=14269&MevzuatTur=7&MevzuatTertip=5 (last accessed on April 19, 2023).

Accordingly, Information and Communication Technologies Authority ("***ICTA***") has published the Draft Communiqué on the Implementation of Annex-6 of the Regulation on Service Quality in Electronic Communications Sector ("***Draft Communiqué***") with its Board Decision numbered 2023/DK-THD/33 and dated January 17, 2023.[51] The Draft Communiqué stipulates the procedures and principles regarding the determination and calculations of service quality criteria and target values.

Draft Communiqué tabulates and introduces the new service quality criteria under Annex-1, which are **(i)** invoice complaint rate and **(ii)** credit complaint rate on pre-paid lines. Invoice complaint rate is calculated as **the ratio of the number of invoices** subject to complaints regarding the accuracy of issues such as talk time, internet usage time, tariff, service, discounts, campaigns, and the total invoice amount including tax, **to the total number of invoices** regardless of whether the complains are valid or not. Credit complaint rate on pre-paid lines is calculated as **the ratio of the number of the complaints** by the subscriber using prepaid line regarding the credit accuracy on the issues such as talk time, tariff, service, discounts, campaigns, and taxes **to the total number of subscribers using prepaid line** regardless of whether the complains are valid or not. In the table in Annex-1, the target values for both criteria is less than or equal to "1" ("***≤1***").

Accordingly the Draft Communiqué sets forth that the operators with more than 200,000 subscribers are obliged to **(i)** calculate their performance regarding the criteria in the table in Annex-1 *(including invoice complaint rate and credit complaint rate on pre-paid lines)* and **(ii)** send the service quality calculations for the previous period by submitting a report every quarter, including the table in Annex-1 *(until the end of January, April, July and October of each year)*.

Pursuant to Article 7/4 of the Draft Communiqué, ICTA might publish the service quality figures or oblige the relevant operators to publish them. Moreover, as per Article 8 of the Draft Communiqué, ICTA is authorized to audit or have it audited, *ex officio* or upon complaint, whether the information regarding the quality of service reported and/or published is accurate or whether the operators comply with the target values set for them. In case relevant operators fail to comply with its obligations, ICTA will send a written warning to the violating operators and publish such failures on its own website for one month. Moreover, as per Article 15 of the Regulation on Administrative Sanctions, in case of such failures, operators might face with administrative fine up to 2% of their net sales in the previous calendar year.

The Draft Communiqué will enter into force on its publication date, to be effective as of July 1, 2023.

[51] Available at here: https://www.btk.gov.tr/uploads/boarddecisions/elektronik-haberlesme-sektorunde-hizmet-kalitesi-yonetmeligi-ek-6-nin-uygulanmasina-iliskin-teblig-taslagi-na-iliskin-kamuoyu-gorusu-alinmasi/33-2023-web.pdf (last accessed on April 19, 2023).

White Collar Irregularities

Istanbul Anti-Corruption Action Plan: New Anti-Corruption Compliance Standards are Introduced

The Istanbul Anti-Corruption Action Plan ("***IAP***") is an initiative of the Organisation for Economic Co-operation and Development ("***OECD***"), with the main objective of collecting and publishing empirically supported data on anti-corruption measures adopted by OECD Member States. In furtherance of such objective, monitoring teams whose members consist of peer-review experts and representatives appointed by the OECD, conduct what is called "*rounds of monitoring*" on certain countries. Upon conducting questionnaires, carrying out on-site visits, and examining public records, monitoring teams draft "base-line reports" wherein empirical findings of "rounds of monitoring" are gathered into an extensive report.

Since 2003, IAP Reports have gone through major expansion in their application, both regionally and substantively. For instance, for IAP's "fifth-round of monitoring", which is expected to conclude with the publication of the fifth-round of monitoring base-line report in 2023, the OECD has published two advisory documents that introduce novel standards for anti-corruption compliance in Member State countries.

To elaborate, the Istanbul Anti-Corruption Action Plan 5th Round of Monitoring Assessment Framework ("***Framework***") introduces 9 "Performance Areas" which contain "indicators" for calculating assessment scores of monitored countries.[52] Istanbul Anti-Corruption Action Plan 5th Round of Monitoring Guide ("***Guide***"), on the other hand, includes the rationale behind such indicators.[53] As is, the Framework and the Guide together direct monitoring teams to apply these normative standards while assessing the state of a country's anti-corruption compliance, and frame the following criteria.

I. Assessment of Anti-Corruption Policy

According to the Framework, indicators of anti-corruption policies are (i) being evidence based and up-to-date, (ii) being developed in an inclusive and transparent manner, (iii) being effectively implemented, and (iv) having ensured coordination, monitoring, and evaluation thereof. These indications are evaluated based on research, analysis, or assessments by non-governmental stakeholders, general population, business, employee, expert, or other surveys, and policy documents.

II. Conflicts of Interest and Asset Declaration

According to the Framework, monitoring teams must examine (i) the existence of an effective legal framework for managing conflict of interest, (ii) whether such legal framework is properly enforced, (iii) whether asset and interest declarations apply to high corruption risk public

[52] https://www.oecd.org/investment/anti-bribery/corruption/acn/Istanbul-Anti-Corruption-Action-Plan-5th-Round-Monitoring-Assessment-Framework-ENG.pdf (Last accessed on April 14, 2023)
[53] https://www.oecd.org/corruption/anti-bribery/corruption/acn/Istanbul-Anti-Corruption-Action-Plan-5th-Round-Monitoring-Guide-ENG.pdf (Last accessed on April 14, 2023)

officials, have a broad scope and are transparent for the public and digitized, and (iv) whether there is unbiased and effective verification of declaration with enforcement of dissuasive sanctions. This section envisages certain government officials and high-placed political figures (*e.g.*, presidents) to make asset and interest declarations annually.

III. Protection of the Whistleblowers

According to the Framework, the monitored country should ensure that (i) whistleblower protection is guaranteed under its legislation, (ii) effective mechanisms are in place to ensure that whistleblower protection is applied in practice, (iii) there is a dedicated agency for whistleblower protection has clear powers defined in law and is operational in practice, and (iv) whistleblower protection system is routinely provided.

IV. Business Integrity

The Framework directs monitoring experts to evaluate for indications that (i) the board of directors of listed/publicly traded companies are responsible for oversight of risk management, including corruption risks, (ii) disclosure and publication of beneficial ownership information of all companies registered in the country, as well as verification of this information and sanctioning of violations of the relevant rules is ensured, (iii) there is a mechanism to address concerns of companies related to violation of their rights, and (iv) the State ensures the integrity of governance structure and operations of state owned enterprises.

V. Public Procurement Integrity

The public procurement systems must (i) be comprehensive, (ii) be competitive, (iii) impose dissuasive and proportionate sanctions, and (iv) be conducted transparently.

VI. Independence of the Judiciary

According the Framework, signs of an independent judiciary are (i) merit-based appointment of judges whose tenures are guaranteed in law and practice, (ii) appointment of court presidents and judicial remuneration and budget do not affect judicial independence, (iii) status, composition, mandate, and operation of the Judicial Council guarantee judicial independence and integrity, and (iv) judges are held accountable through impartial decision-making procedures.

VII. Independence of the Public Prosecution Service

The indications for assessing prosecutorial independence are listed as, (i) the Prosecutor General is appointed and dismissed transparently and on objective grounds, (ii) appointment, promotion, and accountability of prosecutors are based on fair and clear mechanisms, (iii) the budget of the public prosecution service, remuneration and performance evaluation of prosecutors guarantee their autonomy and independence, (iv) the status composition, functions, and operation of the Prosecutorial Council guarantee the independence of the public prosecution service.

VIII. Specialization within Anti-Corruption Institutions

Monitored countries must have specialized anti-corruption institutions in place which satisfy the following standards: (i) the investigators and prosecutors must be ensured to have anti-corruption specialization, (ii) the functions of identification, tracing, management and return of illicit assets must be performed

by the specialized officials, (iii) appointment of heads of the specialized anti-corruption investigative and prosecutorial bodies must be transparent and be merit-based, with their tenure in office protected by law, and (iv) the specialized anti-corruption investigative and prosecutorial bodies must have adequate powers and work transparently.

IX. Enforcement of Corruption Offenses

Framework requires that (i) liability for corruption offenses is enforced, (ii) the liability of legal persons for corruption offences is provided in the law and enforced, (iii) confiscation measures are enforced in corruption cases, and (iv) high-level corruption is actively detected and prosecuted.

Intellectual Property Law

Constitutional Court Rules on the Effect of the Prolonging the Protection Period of Copyrights from 50 Years to 70 Years

I. Introduction

The changes to the legal periods for any concept can raise question marks with respect to its effects on the ongoing legal transactions and/or pending legal processes. For example, when the protection period for copyrights was prolonged to 70 years, its effects for copyrights that had already completed the 50-year protection period became an issue.

Indeed, the protection period for copyrights had been 50 years after the passing away of the artist, pursuant to Article 27 of the Law of Intellectual and Artistic Works ("***LIAW***"), until it was amended in 1995 and prolonged to 70 years, without any transition provision.

The effects of prolongation were recently evaluated by the Constitutional Court through its decision numbered 2018/25857 dated September 14, 2022, which was published in the Official Gazette[54] dated October 21, 2022, and further insight was provided on the ongoing discussion.

II. The Background of the Dispute

Mehmet Akif Ersoy, the poet of the Turkish National Anthem, had a lot of poems published in several journals and he passed away in 1936. Accordingly, the heirs of Mehmet Akif Ersoy could enjoy the copyright protections for those poems for 50 more years, *i.e.*, until 1986, as per Article 27 of LIAW.

After the poet passed away, his son-in-law, re-published his poems that were written in the Arabic alphabet and created the work called "Safahat" in the Latin alphabet. The heirs of the poet assigned the financial rights of this work called "Safahat" to a publishing house named Inkılap in 1943.

In 1987, after the end of the copyright protection period for the poems of Mehmet Akif Ersoy, a writer named M. Ertuğrul Düzdağ, created and published a work called "Mehmet Akif Ersoy ve Safahat – Tam Metin ve Safahat Dışında Kalmış 54 Şiir"[55]

After the publication of M. Ertuğrul Düzdağ's work, LIAW was amended in 1995 and the copyright protection period was prolonged to 70 years, which makes

[54] https://www.resmigazete.gov.tr/eskiler/2022/10/20221021-5.pdf

[55] In English "*Mehmet Akif Ersoy and Safahat – Full text and 54 other poems not included in Safahat*.

the work of M. Ertuğrul Düzdağ fall into the period of newly-amended copyright protection of 70 years with respect to the poems of Mehmet Akif Ersoy even though the copyright protection term of 50 years was concluded on the date when the work of M. Ertuğrul Düzdağ was created.

On the other hand, M. Ertuğrul Düzdağ assigned the financial rights of his work called "Mehmet Akif Ersoy ve Safahat – Tam Metin ve Safahat Dışında Kalmış 54 Şiir" to another publishing house named Çağrı for 99 years.

III. The Evaluations of the Court

Upon the publication of the work of M. Ertuğrul Düzdağ by Çağrı, Inkılap initiated a compensation lawsuit based on violation of the copyright in 2006. The first instance IP Court accepted the lawsuit in 2011 and explained in the decision that the use of Safahat in the latter work's editions dated earlier than the prolongation in 1995 is not illegal, as the latter work was created after the end of the copyright protection for Safahat that was applicable at the time. The court further explained that the amendment as to the prolongation of the copyright protection period includes the works for which the protection period was ended and the protection for those works re-starts. Therefore, the first instance court concludes that the editions of the work of M. Ertuğrul Düzdağ dated after the prolongation violate the copyright of Inkılap for Safahat. It is also important to note that this evaluation of the court contradicts the expert report that was obtained during the evaluation.

The decision was appealed by both parties and 11th Civil Chamber of the High Court of Appeals only accepted the appeal of Inkılap, which concerned the amount of the compensation. The first instance IP court re-evaluated this issue and accepted the lawsuit with a higher amount of compensation in favor of Inkılap.

This decision was also appealed yet the appeal application was rejected based on merits. The request for revision of the decision was also rejected. Therefore, the issue was brought before the Constitutional Court as an individual application as a last resort.

IV. Legal Evaluation and Reasoning of the Constitutional Court

First of all, the Constitutional Court evaluated whether the latter work of M. Ertuğrul Düzdağ called "Mehmet Akif Ersoy ve Safahat – Tam Metin ve Safahat Dışında Kalmış 54 Şiir" is subject to a proprietary right. The Constitutional Court determined that this issue is directly in relation to the merits of the case and reached the following conclusions:

i. As there is no transition provision to rely on for the resolution of whether the latter work is subject to copyright, this issue should be resolved on the basis of general provisions and the principle of the rule of law.

ii. The latter work, *i.e.*, the work of M. Ertuğrul Düzdağ entitled "Mehmet Akif Ersoy ve Safahat – Tam Metin ve Safahat Dışında Kalmış 54 Şiir", was created in and publicized as of 1987. Therefore, the said work was made public before the prolongation. Accordingly, this work is subject to a proprietary right.

iii. As there is no clear provision abolishing those rights that arose before the prolongation, it cannot be concluded that the copyright for Safahat re-starts, as this would be a violation of rule of law principle.

> Therefore, The Constitutional Court finds that the applicable law was not implemented in accordance with the principles of rule of law or legal certainty.

Accordingly, the Constitutional Court decided that the decision of the first instance IP court violates Article 35 of the Turkish Constitution.

V. Conclusion

The decision of the Constitutional Court brought a new approach to this discussion, and it was concluded that re-starting the copyright protection for the works whose copyright protection had already ended before the prolongation would be a violation of the Turkish Constitution due to the legal uncertainty that would arise. Accordingly, the Constitutional Court provided further insight on the discussion on the matter and ruled that the adaptation work created after the end of the copyright protection but before the prolongation dated 1995 does not violate the financial rights of the original work.

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