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LEGAL INSIGHTS QUARTERLY

September 2023 – November 2023

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Preface to the September 2023 Issue

The September 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 focuses on a very specific topic and sheds light on the liability of shareholders and legal representatives for public receivables and tax debts of limited liability companies.

Furthermore, the Capital Markets section discusses the concept of public disclosure obligation and focuses on its aims from the perspective of shareholders and investors.

The Competition Law section of the September 2023 issue includes reviews on two mergers and acquisitions cases, one of which scrutinizes the natural gas market and the other discussing a Phase II review that concerns the FMCG market. This section further provides insight into the Competition Board's assessment on "most favoured customer" practices. Lastly, a commitment application which resulted in the Competition Board imposing interim measures also takes its place amongst the diverse assessments under this section.

Moving on, the Employment Law section discusses the Constitutional Court's recent decision in Law No. 5953 on the Regulation of Relations Between Employers and Employees in the Press, noting that the provisions regarding entitlement to severance payment therein significantly and unjustifiably differs from those set out under the Turkish Labor Law.

The Dispute Resolution section provides a look into the Council of State's noteworthy decision, which clarifies that even where the main parties of a dispute do not exercise their right to appeal, the intervening parties are entitled to appeal the final decisions rendered by the courts.

Moreover, the Data Protection Law section includes various decisions rendered by the Turkish Data Protection Authority on the right to respect for private life and the right to demand the protection of personal data.

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.

September 2023

Corporate Law

The Liability of Shareholders and Legal Representatives for Public Receivables and Tax Debts of Limited Liability Companies

As stipulated by Article 602 of the Turkish Commercial Code numbered 6102 ("***TCC***"), in principle, limited liability companies are liable for their debts and obligations, and such liability is limited to their own assets. Accordingly, the shareholders of a limited liability company are not personally liable for the company's debts and obligations; their only obligation is to pay their share of the subscribed capital. This means the creditors of a limited liability company can only have recourse against the company's assets to recover their receivables. Indeed, such creditors cannot initiate claims or execution proceedings against the shareholders, even if the company goes into liquidation or becomes bankrupt.[1] As one of the basic tenets of the limited liability principle, the company's assets and shareholders' assets are deemed to be separate.

However, in the case of public receivables, there are certain exceptions to this principle. Pursuant to Article 35/1 of Law No. 6183 on the Collection Procedures of Public Receivables ("***Law on Public Receivables***"), the shareholders of limited liability companies are directly liable (pro rata their shares in the company's capital) for the public receivables that cannot be collected in whole or in part, or are understood to be unrecoverable from the company, and in such a case execution proceedings can be initiated against these shareholders under the Law on Public Receivables.

It is important to note that according to Article 3 of the Law on Public Receivables, the term "*public receivable*" includes all the receivables listed under Article 1 and 2 of the same law, such as charges, fees, fines, tax penalties, tax debts and default interests levied by the State and public institutions.

Furthermore, as per paragraphs 2 and 3 of Article 35 of Law on Public Receivables, in case a shareholder transfers its shares in the company, the transferor and transferee will be jointly and severally liable for the payment of public receivables predating the transfer. Where the shareholder at the time when a public receivable has accrued, is different from the shareholder on the date the said public receivable becomes due and payable, then both of these persons/entities will be held jointly and severally liable for the payment of public receivable.

Accordingly, it might be concluded that the lawmaker aims to grant a privilege to public institutions over the other creditors and to pave the way for pursuing limited liability companies' shareholders to recover public receivables. Nevertheless, it should be kept in mind that the liability of shareholders for public receivables is regarded as secondary, and the company should be primarily held liable for such receivables. In other words, to be able to have recourse to the shareholders' assets, the public institutions would first have to try and fail to recover the public receivable from the company.

In addition, pursuant to Article 35 *bis* of Law on Public Receivables, the public receivables that cannot be recovered or are understood to be unrecoverable wholly or

[1] Ortaklıklar Hukuku, Prof. Dr. Oruç Hami Şener, pg. 748

partially from legal entities, can be collected from the personal assets of legal representatives.

A similar provision with regard to the legal representatives' liability is stipulated under Article 10 of the Tax Procedure Law No. 213. Accordingly, as the legal representatives are responsible for fulfilling the obligations of legal entities as taxpayers, those taxes and related receivables that cannot be wholly or partially collected from the taxpayer entities, can be collected from their legal representatives. The liability of legal representatives under these articles should also be deemed secondary.

It is also important to note that from a corporate law perspective, legal representatives refer to directors with signatory authority, as well as such other representatives that may have delegated authority and duty to pay the company's public receivable liabilities.

In the light of the foregoing provisions, there have been certain contradictory decisions regarding the shareholders' liability for public receivables in limited liability companies, and whether it is the shareholders or legal representatives who should be pursued first. To that end, the Council of State's General Assembly for the Unification of Judgments rendered a decision,[2] stating that there is no requirement to first pursue the legal representatives before going after the shareholders of limited liability companies. In light of this decision, the legal representatives and shareholders of a limited liability company can be pursued at the same time for the recovery of unpaid public receivables. Nonetheless, this liability should be deemed to be a secondary liability for both legal representatives and shareholders, with the primary liability to pay the public receivables resting with the company itself.

[2] Decision numbered 2013/1 E. and 2018/1 K. dated December 11, 2018, published in the Official Gazette numbered 30807 dated June 20, 2019 *available at* https://www.resmigazete.gov.tr/eskiler/2019/06/20190620-10.pdf (Last accessed on July 21, 2023)

Banking and Finance Law

Payment of Share Capital by Foreign Shareholders and Exporting Share Capital from Turkey

I. Introduction

Share capital companies to be incorporated in Turkey must commit to a certain capital share before the company is incorporated, or, if it is an already incorporated company and a cash capital increase is planned, such capital shares must be paid within the time period stipulated in the relevant laws. That said, if the capital amount is to be paid by a foreign shareholder residing abroad, this is subject to separate regulations. Similarly, if Turkish residents would like to incorporate a company, join a shareholding or incorporate a branch office abroad or in free zones in Turkey, these are also subject to special regulations. Accordingly, in this article, we will provide an analysis about the payment of foreign capital share and export of capital from Turkey, as respectively regulated under Articles 8 and 10 of the Capital Movements Circular of the Central Bank of the Republic of Turkey dated May 2, 2018 ("***Circular***").

II. Payment of Foreign Capital Share

Article 8 of the Circular, which sets out the special requirements and restrictions on the payment of foreign capital shares, applies when a company is being incorporated in Turkey by foreign persons, or a capital share is to be paid to an already incorporated company. In this regard, the share capital to be paid in cash by the foreign shareholder residing abroad will be deposited in a bank in Turkey.

As per the Circular, the bank to which the capital amount is deposited will check whether the funds indeed come from the foreign shareholder abroad. For funds which are determined to be capital payments, transactions shall be carried out in the manner specified in the articles of the Circular on payment of capital share in subscribing to the company as a founder, payment of the share subscription fees in capital increase and acquisition of shareholder interest. The foreign capital share quantum may also be paid in Turkish Lira.

According to the Circular, the term "foreign capital" will also include the foreign capital amounts sent to Turkey from free zones.

Foreign shareholders will be required to comply with certain other requirements when depositing the foreign capital share consideration in a bank in foreign currency, within the framework of the Turkish Commercial Code No. 6102, and for the relevant bank to receive the cash as foreign capital consideration. Accordingly, it is important that a cash declaration form is filled-out by the foreign shareholder, which will state the purpose of depositing the foreign currency is "foreign capital share", identify the person submitting the cash declaration form and submit a written declaration by the person bringing the foreign capital share in cash.

Furthermore, if a foreign currency purchase certificate or a receipt is requested for converting the foreign currency or currency notes received as foreign capital share price into Turkish Lira, certain information regarding the foreign shareholder and capital must also be set out on the foreign currency purchase certificate or receipt, such as (i) name of the company with foreign capital, (iii) name of the foreign shareholder, (iii) country of origin of the foreign capital, (iv) the method of arrival of the foreign capital (remittance etc.), (v) the amount of foreign capital, (vi) US dollar equivalent of the foreign capital amount (intermediary bank cross exchange rate), (vii) Turkish Lira equivalent of the foreign capital amount (intermediary bank foreign exchange buying rate), (viii) reason for transfer of the foreign capital share, and (ix) the industry sector where the foreign capital share originates from.

III. Share Capital Export from Turkey

The cash capital payments to be made by Turkish residents to incorporate a company, join a shareholding or incorporate a branch office abroad or in free zones in Turkey is also subject to certain rules and restrictions.

As per Article 10 of the Circular, if Turkish residents would like to export share capital from Turkey by incorporating a company, joining an existing shareholding or incorporating a branch office, this is only possible by paying the cash capital through banks, and the capital-in-kind is to be processed within the framework of customs legislation. In

addition, pursuant to Article 10/4 of the said Circular, persons resident in Turkey may also incorporate liaison offices, representative offices and the like, abroad.

In the event of a share capital transfer abroad, the banks that will carry out the transaction in question fill out a form regarding the details of the transfer and send it to the Ministry of Treasury and Finance and the Ministry of Trade within 30 (thirty) days from the date of each transaction. In addition, the Central Bank may also request that the General Directorate of Statistics be notified of share capital payments transferred abroad, for record-keeping purposes.

IV. Conclusion

The payment of capital shares by non-resident foreign shareholders into Turkey and similarly the export of capital by Turkish residents to entities abroad or in free zones, are particularly important in terms of monitoring the payment of capital shares and the inflows and outflows of funds to and from Turkey. In this regard, the Circular provides a consistent structure and accordingly, it is important for shareholders to comply with the applicable rules and regulations mentioned above, when paying foreign capital shares.

Capital Markets Law

Public Disclosures in Turkish Capital Markets

I. Introduction

The purpose of public disclosure in capital markets is to help protect the interests of shareholders and creditors of companies, prevent relevant persons from being deceived and ensure proper supervision of the company. The public disclosure obligation also protects investors by ensuring their access to accurate information, which also bolsters the reliability of the capital markets. In this context, the Capital Markets Law No. 6352 ("***CML***") regulates the principles regarding public disclosure in detail and sets certain obligations on issuers of capital market instruments. Accordingly, our aim in this article is to explain the concept and procedural practices of public disclosure under Turkish capital markets law.

II. The Concept of Public Disclosure

The purpose of the public disclosure obligation is to keep reliability of the market at a high level and to ensure that those who trade in the market receive the most accurate information at the right time and in the correct method. The information disclosed to the market under the public disclosure obligation is assessed by all persons who may have an interest in the company, such as existing or prospective investors, creditors or directors.

Companies with public disclosure obligations are required to use the Public Disclosure Platform ("***PDP***") to communicate their information to the concerned parties. Pursuant to the CML, those who are obliged to make public disclosures are required to submit the information to be disclosed to the PDP and announce it to the public through the platform.

The public disclosure may take the form of an ongoing disclosure obligation, or by separate disclosure of material events.

III. Ongoing Public Disclosure Obligations

As per Article 14 of the CML, the issuer is obliged to prepare and submit its financial

statements and reports to be disclosed to the public or required by the Capital Markets Board ("***Board***") in a timely, complete and accurate manner, in accordance with the regulations determined by the Board in terms of form and content. The issuer and its board members are responsible for the proper preparation and submission of the said statements and reports, their truthfulness and accuracy. Furthermore, the issuers are obliged to have the particular financial statements and reports, which are determined by the Board and prepared according to the Turkish Accounting Standards, examined in accordance with the Turkish Auditing Standards by independent audit firms listed by the CML, and to obtain an independent audit report showing they comply with the principle that the information given is a true, fair and accurate representation of the company.

Pursuant to the Communiqué on Principles Regarding Financial Reporting in Capital Markets No. II-14.1 ("***Communiqué No. II-14.1***"), entities that submit their financial reports to PDP for public disclosure are also obliged to announce their annual and interim financial reports on their websites where they can be easily accessed by users of the financial reports, after they have been publicly disclosed.

As per Article 6 and 7 of the Communiqué No. II-14.1, companies are obliged to prepare their annual financial reports in accordance with the principles set out in the Communiqué. The following entities are also required to prepare interim financial reports for 3, 6 and 9-month periods in accordance with the relevant principles: (i) enterprises whose issued capital market instruments are traded on a stock exchange and/or other organized market places, (ii) investment institutions, (iii) investment trusts, (iv) portfolio management companies, and (v) mortgage finance institutions.

In addition, companies whose capital market instruments are traded on a stock exchange and/or other organized marketplaces, are required to disclose their audit reports to the public together with their financial reports.

IV. Public Disclosure of Material Events

As mentioned above, disclosure of financial statements and reports to the public is among the ordinary activities of companies, and the relevant regulations require that financial statements and reports are disclosed to the public in detail, on an ongoing basis. That said, under special circumstances, companies may also be required to disclose certain other information to the public. Accordingly, the CML provides that information, events and developments that may affect the value and price of capital market instruments or the investment decisions of investors shall also be disclosed to the public by issuers or related parties.

Pursuant to the Communiqué on Material Events No. II-15.1("***Communiqué No. II-15.1***"), publicly traded companies are obliged to disclose material events to the public. The Communiqué No. II-15.1 defines "inside information" as follows: Information, events and developments that have not yet been disclosed to the public that may affect the value and price of capital market instruments or the investment decisions of investors. Accordingly, the issuers are required to make disclosures in case they become aware of any changes to inside information or to previously publicly disclosed matters. That said, if the inside information is

disclosed to third parties by an issuer or a person acting for or on behalf of an issuer in the ordinary course of its business or in the ordinary performance of its duties, such information shall also be disclosed to the public by the issuer.

The issuer will also be required to make a public disclosure in the event that a change occurs in the activities, financial structure and management/capital relations of the issuer's parent company and its subsidiaries within the framework of the definitions set out in the Board's regulations on financial statements and this change causes a significant change in the issuer's activities, financial and management/capital structure.

In addition, pursuant to the Communiqué No. II-15.1, in the event of any news or rumours about the issuers, which may affect the value and price of capital market instruments or the investment decisions of investors, and which are announced to the public for the first time through media organs or other means of communication, or which have a different content than the information previously disclosed to the public; it is obligatory for the issuers to make a public disclosure within the framework of the principles set forth in this Communiqué as to whether the news are true and complete reflection of the circumstances. The issuer will comply with this obligation without waiting for any warning, notification or request by the Board or the relevant market exchange.

On the other hand, future assessments are not required to be disclosed to the public. That said, with certain exceptions, all transactions in shares representing the capital and other capital market instruments based on these shares, which are carried out by persons who have executive authority in the company and/or their related persons, and by the real or legal person main shareholder of the issuer, shall be disclosed to the public by the person making the transaction.

V. Conclusion

The continuous and other important information needed by investors in capital markets has resulted in the obligation of public disclosure by issuers of capital market instruments. With the current regulation, the public disclosure obligation not only protects the investors but also the market itself. Within the scope of the principle of public disclosure, all actors in the capital markets can access information on the relevant company without the requirement of investment, and any investor is able to evaluate their own investments. This increases the confidence in capital markets and keeps them strong.

Competition / Antitrust Law

Turkish Competition Board's Comprehensive Analysis of the Liberalising Natural Gas Market: BOTAŞ-SOCAR Turkey Decision

I. Introduction

On April 18, 2023, the Turkish Competition Authority (the "***Authority***") published the Turkish Competition Board's (the "***Board***") reasoned decision,[3] in which the transaction concerning the establishment of a joint venture by and between Boru Hatları ile Petrol Taşıma A.Ş. ("***BOTAŞ***") and SOCAR Turkey Enerji A.Ş. ("***SOCAR Turkey***") ("***BOTAŞ-SOCAR Turkey Transaction***") was

[3] The Board's decision dated 01.08.2022 and numbered 22-34/539-218.

unconditionally approved pursuant to Law No. 4054 on Protection of Competition ("***Law No. 4054***") and the relevant provisions of Communiqué No. 2010/4 on the Mergers and Acquisitions Requiring the Approval of the Competition Board ("***Communiqué No. 2010/4***").

The Board's decision provides an up-to-date insight into the dynamic and ever-growing Turkish natural gas market, building upon the examinations and evaluations under the Board's previous decision concerning the establishment of a joint venture by and between BOTAŞ and State Oil Company of Azerbaijan Republic ("***SOCAR***") (the "***BOTAŞ-SOCAR decision***")[4] and the Authority's Natural Gas Markets Sector Research.[5]

II. An Overview of the Turkish Natural Gas Market

Before delving into the details of the BOTAŞ-SOCAR Turkey Transaction, the Board considered it useful to provide an updated overview of Turkey's energy profile with a specific focus on natural gas, which currently corresponds to 27% of Turkey's primary energy consumption. In this respect, following a brief introduction to the background of the liberalisation of the Turkish natural gas markets, the Board indicated the latest trends in these markets, compared with the progress made by Turkey so far on the objectives of liberalisation, the Organized Wholesale Market (the "***OWM***") and becoming a hub.

In Turkey, the milestone for the liberalisation of the natural gas markets is Law No. 4646 on Natural Gas Market ("***Law No. 4646***") which entered into force in 2001. Law No. 4646 enabled the actors in the private sector to enter the market for natural gas operations, with the objective of liberalising the natural gas market '*to ensure supply of good-quality natural gas at competitive prices to consumers in a regular and environmentally sound manner under competitive conditions.*'[6]

Amongst the different administrative and practical developments regarding this liberalisation process over the years, there are cutting-edge developments referred to in the Board's decision, such as the creation of the Continuous Trading Platform (the "***CTP***") through the operation of the OWM. The Board evaluated that the CTP and the OWM have contributed to the development of competitive markets in both the short and the long term, by way of objectively and transparently providing daily and weekly reference prices for the natural gas in the market. The Board also shared its expectations for Turkey to become a significant hub based on the operation of the CTP, through which it is anticipated that the transaction volume will be increased along with new entrances of the international actors to the market.

III. The Board's Assessment on the Relevant Product Markets

As part of the examination of BOTAŞ-SOCAR Turkey Transaction, the Board provided information on the parties and their activities in Turkey. Accordingly, the Board stated that (i) BOTAŞ is a government-owned enterprise active in the

[4] The Board's decision dated 08.05.2018 and numbered 18-14/254-120.
[5] The Authority (July 2012) Natural Gas Markets Sector Research *available at* https://www.rekabet.gov.tr/Dosya/sektor-raporlari/7-rekabet-kurumu-dogal- (last accessed on July 10, 2023).

[6] Law No. 4646, Article 1.

import, export, wholesale etc. of gas products and (ii) SOCAR is an international company wholly owned by the Azerbaijan government and it is active in, among others, the production, transmission, processing, and sales of gas products. SOCAR has 31 subsidiaries in Turkey, including SOCAR Turkey. The Board assessed that both of the parties had activities in different levels of the gas and petroleum supply-value chain.

The relevant product markets were defined as the markets for (i) the exploration and production of natural gas, (ii) the transportation of natural gas through international lines, (iii) the wholesale of natural gas (both upstream and downstream wholesale markets) in terms of the horizontal relationships, whereas for the vertical relationships, the relevant product markets were defined as the markets for (i) the transmission activities and natural gas wholesale, (ii) the storage and liquidated natural gas ("***LNG***") activities and natural gas wholesale, (iii) the upstream wholesale (import/export) and downstream wholesale and (iv) the distribution of natural gas and retail sales to end-customers. The Board defined the relevant geographic market for the exploration and production of natural gas as "worldwide", whereas it defined the relevant geographic market for upstream and downstream wholesale of natural gas as "Turkey" on the grounds that country prices differ based on the energy profile of the country.

During its assessment on the relevant product market, the Board concluded that BOTAŞ is the national incumbent company with high market shares in both upstream and downstream wholesale of natural gas markets (*i.e.*, 94% and 92% respectively).

IV. The Board's Competitive Assessment on the Transaction

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

As for the market for exploration and production of natural gas, the Board noted that BOTAŞ's investments in exploration and production through the joint venture would contribute to the development of the natural gas markets in Turkey. The Board therefore decided that the transaction is far from restricting competition.

In terms of the market for the transportation of natural gas through international lines, the Board stated that BOTAŞ and SOCAR exercise joint control over Trans-Anatolian Natural Gas Pipeline ("***TANAP***") which means that (i) the horizontal relationship between BOTAŞ and SOCAR has existed before the BOTAŞ-SOCAR Turkey Transaction and that (ii) TANAP's share is limited in the wholesale market in Turkey (in terms of total consumption).

In terms of the market for the wholesale of natural gas, the Board noted that BOTAŞ was dominant in the market, whereas SOCAR does not have an import licence. The Board therefore concluded that the transaction would not lead to an anti-competitive effect and would not result in competitive risks such as supply/capacity restraints or high prices.

The Board also assessed the retail sale-wholesale relationship between the parties, since SOCAR also controls Bursa and Kayseri distribution companies. The Board stated that the total market share of these distribution companies in Turkey is below 10% and noted that considering (i) the limited existence of the SOCAR Group in

the upstream market and (ii) their 10% share in the downstream market, there is no input and/or customer restraints against existing or potential competitors. The Board also noted that since the joint venture aims for searching and transportation investments, which would increase the liquidity, the retail level of the market would also benefit from the investments.

In addition, the Board also stated that considering the current globalisation in the worldwide markets for gas, target companies which are created with the objective of regional competition (*i.e.*, the transaction at hand) would assist Turkey to become a hub in the market.

V. Conclusion

The Board stated that the BOTAŞ-SOCAR Turkey Transaction would not raise competitive concerns such as market foreclosure or higher prices. In light of the foregoing competitive assessment of the Board, it is concluded that there would be no significant impediment to effective competition under any plausible market definition as a result of the contemplated BOTAŞ-SOCAR Turkey Transaction. Indeed, the assessment of the Board shows that the creation of a joint venture with the participation of BOTAŞ would contribute to the development of the Turkish natural gas markets, primarily supporting the strategically advantageous position of Turkey, and leading Turkey to achieve its liberalisation objectives and become a hub in the market.

Turkish Competition Board's Detailed Block Exemption Evaluation of MFC Practices in the Getir Decision[7]

Most Favoured Customer ("***MFC***") clauses applied by online platforms are closely scrutinized by the Turkish Competition Board (the "***Board***"). In the past, the Board rendered various decisions[8] on their assessment and the Turkish Competition Authority (the "***Authority***") evaluated MFC practices in its digital markets studies.[9] Recently, the Board assessed the matter with regards to Getir Perakende Lojistik A.Ş.'s ("***Getir***" or "***Getir Yemek***") practices ("***Getir decision***")[10] and provided a summary of the assessments it had made so far on MFC practices.

In the *Getir decision*, the Board assessed a complaint concerning the allegations that Getir violated Articles 4 and 6 of Law No. 4054 on Protection of Competition ("***Law No. 4054***") by imposing MFC practices on the restaurants registered on its online food ordering/delivery platform. The Board

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[7] First appeared in ILO on July 27, 2023 with the title "*Turkish Competition Board's recent decision on MFC practices*" (https://www.gurkaynak.av.tr/Content/dosya/1603/turkish-competition-boards-recent-decision-on-mfc-practices-30199-4191722.pdf)

[8] Some examples include the Board's *Yemek Sepeti* decision dated June 9, 2016, and numbered 16-20/347-156 and Board's *Kitapyurdu* decision dated November 5, 2020, and numbered 20-48/658-289.

[9] Turkish Competition Authority, Reflections of Digital Transformation on Competition Law, April 2023, Ankara. (Available at: www.rekabet.gov.tr/Dosya/dijital-piyasalar-calisma-metni.pdf; last accessed: June 14, 2023); Turkish Competition Authority; E-marketplace Platforms Sector Inquiry Final Report, April 2022, Ankara. (Available at: e-pazaryeri-si-raporu-pdf (rekabet.gov.tr); last accessed: June 14, 2023).

[10] The Board's decision dated September 15, 2022, and numbered 22-42/606-254.

launched a preliminary investigation based on a complaint, and within the scope of the preliminary investigation, the Authority carried out an on-site inspection at Getir's premises and requested information from various stakeholders in the sectors. Further to its preliminary investigation, the Board unanimously decided not to initiate a fully-fledged investigation against Getir based on the assessment that, *inter alia*, (i) Getir is not in a dominant position in the relevant market and (ii) the concerned practices and the vertical agreements between Getir and the restaurants could be also considered within the scope of the Block Exemption Communiqué on Vertical Agreements ("***Communiqué No. 2002/2***").

I. Background Information on Getir and the Relevant Market

Getir is active in various sectors, and, under Getir Yemek, it serves as an online food ordering/delivery platform that brings restaurants together with users who wish to place food orders by offering online food order services and, subject to the request of the restaurant or the consumer, the delivery services. Getir Yemek mainly operates by collecting sales referral commissions from restaurants over the order amounts in return for its services. If delivery services are also required, Getir Yemek collects additional delivery service fees calculated based on the order amount. Overall, the platform has a dual-market nature as it serves two different groups (the order placers are the end-user group, and restaurants are the commercial user group).

In its decision, the Board noted that players in the market have similar business models and the Board is observed to have adopted assessments similar to the ones it adopted in its past decisions in this sector[11] whilst evaluating the relevant market.

Since the complaint concerns Getir Yemek's practices in online food ordering services, the Board concentrated on such services in its decision. Accordingly, the Board considered that, *inter alia*, services provided via telephone, a restaurant's own website or mobile application, are not substitutes for online food ordering platform services, both from the perspective of customers and restaurants. Similarly, it assessed that third-party websites and social media platforms that contain restaurant and menu information do not operate in the same market as online food order/service platforms. For these reasons, the relevant product market for the intermediary services provided was defined as the "online food ordering service platform services market".

As for the geographic market assessment, the Board noted that end users can use online food ordering and delivery platforms without any geographical restrictions and experience the same service regardless of the region. In this regard, the Board noted that although there may be some regional effects in the online food ordering and delivery platform services market, the relevant geographic market can be defined as "Turkey" considering the ability of buyers and sellers to access the relevant services across the country.

II. Getir's Most Favoured Customer Practices

In the decision, the allegations raised revolved around the narrow and wide MFC practices of Getir Yemek. Overall, as also

[11] The Board's *Yemek Sepeti* decision dated June 9, 2016, and numbered 16-20/347-156.

defined by the Board in the *Getir* decision, MFC practices are fundamentally an assurance by a provider not to offer more advantageous terms to another customer. Narrow MFC arrangements compare terms with the direct channel of the supplier and require the application of the same terms adopted by the supplier. Wide MFC arrangements extend to sales over other platforms or resellers (*i.e.,* competing buyers) and required application of the same terms offered by the supplier to other buyers. Accordingly, as also noted in the Board's *Getir* decision, under a narrow MFC arrangement, the provider can offer lower prices or more favorable conditions to competitor undertakings but cannot offer these prices and conditions in its own direct sales channel. Conversely, in the case of a wide MFC practice, the provider will not offer a price lower than the price offered to the undertaking benefiting from the MFC practice or more advantageous conditions to competitor undertakings and through its own direct sales channel.

The Board concluded that Getir Yemek's agreements with the member restaurants foresaw narrow MFC conditions and required restaurants to adopt prices, campaigns, and promotions that they provide via their own sales channels on the Getir Yemek platform. In other words, when member restaurants apply better prices, discounts, campaigns, or promotions at their physical stores, through their sales channel, or their own apps/websites, they are required to adopt these prices and conditions on Getir Yemek.

For completeness, the Board determined that while the relevant provisions were included in the agreements drawn up during the establishment period of Getir Yemek, they were not included in the later agreements drafted and made (after 2019). Accordingly, the Authority investigated whether Getir Yemek adopted *de facto* MFC practices.

During the on-site inspections carried out, the Authority's case handlers seized documents that indicated that Getir Yemek implemented *de facto* MFC practices vis a vis its member restaurants. The Board found that Getir Yemek restricted restaurants from providing more advantageous offers on their own sales channels and other platforms that compete with Getir Yemek. Overall, the Board determined, *inter alia*, that Getir Yemek closely monitored prices and sales conditions of the restaurants on other sales channels via various practices such as fake calls and if it determined that the restaurant offers more favourable prices and conditions on its own sales channels and/or the competitor sales channels, it warned the relevant restaurant manager and closed restaurants for order on the platform/rejected transactions of the relevant restaurants on Getir Yemek.

In the decision, it is understood that Getir Yemek argued that MFC practices help protect its brand image and investments. Moreover, it is understood that Getir Yemek adopted such practices in order to compete in an efficient manner *vis a vis* strong competitors (such as Yemek Sepeti) in the relevant market and taking into consideration the consumer habits that prevail in the relevant market.

Against this background, the Board assessed Getir Yemek's MFC practices within the context of Article 6 of Law No. 4054 and under Article 4 of Law No.4054, taking into consideration past assessments of the Board under these two types of violation.

III. The Board's Assessment and Conclusion

The Board initially carried out an assessment under Article 6 and considering the positions of other competitors in the market (such as Yemek Sepeti and Trendyol Yemek), concluded that Getir Yemek did not possess market power that would allow it to act independently of its competitors and customers, and therefore, it is not in a dominant position.

Regarding the assessment under Article 4, the Board analysed Getir Yemek's practices in terms of Communiqué No. 2002/2. Considering that Getir Yemek acted as a platform marketing the food services of restaurants and provides intermediary services between restaurants and consumers, the Board noted that the agreements between Getir Yemek and its member restaurants are vertical agreements and may be evaluated under the scope of Communiqué No. 2002/2.

In principle, as per Communiqué No. 2002/2, MFC practices may benefit from block exemption provided that the market share of the party that is beneficiary of the clause does not exceed 30% and that the other conditions stipulated in the Communiqué No. 2002/2 are met.

As also referred by the Board in its *Getir* decision and as also stipulated in the Guidelines on Vertical Agreements, the Authority recognizes the pro-competitive nature of MFC practices and adopts a "rule of reason" approach in analysis of their anti-competitive effects. Accordingly, the undertakings' and competitors' positions in the relevant market, the object of the MFC practice, and the specific characteristics of the market are taken into consideration when assessing these clauses. As noted by the Board and as also stipulated in the relevant Guidelines, MFC practice can have positive effects on competition, such as protecting brand image, preventing free-riding, and encouraging investments specific to commercial relationships, they may also have adverse effects, including price rigidity, facilitating coordination, creating entry barriers, and excluding competitors from the market and that the likelihood of anti-competitive effects is higher if the party benefitting from the MFC practice has market power. As noted in the Board decision, theories of harm on wide and narrow MFC practices are provided in more detail in the relevant digital market studies.

In light of the foregoing, the Board assessed Getir Yemek's market share based on sales data from the previous year and its commission revenue, (considering that the actual revenue of the platform derives from commission fees). The assessments revealed that Getir Yemek's market share, both in terms of sales and commission revenue, was below 30%. Moreover, the Board concluded that Getir Yemek's practices did not include any further restrictions that would risk a block exemption. Consequently, the Board determined that the narrow and wide MFC practices adopted by Getir Yemek fell within the scope of the block exemption, and there is no need to launch an investigation against Getir.

IV. Comments

The Board's decisional practice to date and the relevant legislation shows that MFC practices are regarded to pose risks for competition, if the market powers of the undertakings benefiting from such practices are high. Indeed, in principle, an agreement containing MFC practices may benefit from block exemption provided that the market share of the party that is

beneficiary of the clause does not exceed 30% and that the other conditions stipulated in the Communiqué No. 2002/2 are met. On this note, the Board's *Getir* decision, which stems from a preliminary investigation initiated by the Board as a result of a complaint made in relation to Getir Yemek's MFC practices, sheds light on the evolving dynamics and power distribution among participants of the online food order-delivery sector while also showcasing the Board's established understanding and evaluation of MFC practices. In the decision, the Board finds that Getir's MFC practices could benefit from block exemption and that such practices do not violate Articles 4 and 6 of Law No. 4054.

Turkish Competition Board Rejected the Commitments Proposed and Imposed Interim Measures Against Online Betting Platform Nesine

I. Introduction

The Turkish Competition Board (the "***Board***") has recently published its reasoned decision that imposes interim measures on certain exclusivity clauses. The clauses are between D Elektronik Şans Oyunları ve Yayıncılık A.Ş. ("***Nesine***"), an online betting platform, and Maçkolik İnternet Hizmetleri A.Ş. ("***Maçkolik***"), an online platform offering its users a large database regarding sports matches along with statistical data, such as live scores.[12] The Decision is a recent example[13] where the Board opts for imposing interim measures against an undertaking operating in online/technology markets. It is of significance given that it will have an impact on the markets for online betting and online live score services.

II. Background

The Board launched an investigation on July 7, 2022 to determine whether Nesine had violated Articles 4 and 6 of Law No. 4054 on the Protection of Competition ("***Law No. 4054***") by way of exclusive agreements. These Advertising Sales Services Agreements ("***Agreements***") between Nesine and Maçkolik were to be effective for 2019-2021 and 2022-2024 periods.

Within the investigation period, Nesine submitted a commitment letter offering to terminate the investigation by way of commitments. The Board therefore initiated commitment negotiations with Nesine. Upon the submission of the first commitment package, the Board sought Nesine's competitors' and other third parties' feedback on the commitments. Upon receiving their feedback, the Board rejected the first commitment package. It also notified Nesine that the entity could submit a revised version of the first commitment package to the Authority's review, for one time only.

Nesine revised the first commitment package and submitted a new version on May 4, 2023. The Board once again rejected the commitments offered by Nesine.

While the investigation phase was ongoing, the Board discussed whether the exclusive agreements of Nesine could pose the risk of causing serious and irreparable harm until the final decision of the Board. It decided to impose interim measures

[12] Board decision dated 15.06.2023 and numbered 23-27/520-176.

[13] The Board recently opted for imposing interim measures in its Whatsapp (11.01.2021; 21-02/25-10), Nadirkitap.com (17.12.2020; 21-54/753-333) and Trendyol (30.09.2021; 21-46/669-334) decisions.

regarding the agreements between Nesine and Maçkolik.

III. Contractual Relationship Between the Undertakings

The Agreements between Nesine and Maçkolik include exclusivity clauses that prohibit Maçkolik from making the advertising spaces on its website available to Nesine's betting competitors.

The Board sought the view of other online betting dealers competing with Nesine. These firms submitted, *inter alia*, that

- Maçkolik is the most popular website among sports and football fans. In terms of the instant number of users, it appeals to an audience actively betting. Therefore, the website gets a remarkably high number of visits.
- Due to the exclusivity clause, Nesine's competitors are incapable of signing any advertisement contract or sponsorship with Maçkolik.
- Online betting dealers' activities are obstructed due to exclusive redirection from the betting bulletins available on Maçkolik to Nesine. Combined with the media dominance of Nesine, the Agreements almost foreclosed the market.

IV. The Board's Assessment Regarding Interim Measures

In cases where there is a genuine urgency due to risks of serious and irreparable damage, the Board is entitled to take interim measures to preserve the status quo prior to the infringement. The Board's decisions show that it applies interim measures in exceptional cases which have particular dynamics that may lead to irreparable damage.

In the Decision, the Board notes that Nesine has a notable market share in light of its number of members, games played and revenue generated. It further notes that legal entry barriers, alongside its vast consumer portfolio and brand recognition, also demonstrate Nesine's market power. Maçkolik, according to the Board, (i) has a higher traffic rate in comparison to other score tracking websites, (ii) it is the most preferred live score tracking application in Turkey and (iii) is considerably ahead of its competitors. The competitors of Nesine noted that the legalization of live betting in Turkey in 2019 increased the importance of live score tracking and further increased the usage of Maçkolik by consumers. Maçkolik itself confirmed that their activity has been increasing, due to the legalization of live betting. Maçkolik also noted that, although there were other local undertakings operating in the market in the past, Maçkolik is currently the market leader. Although international undertakings have entered the Turkish market, their activities remain limited as they do not have any local offices in Turkey.

Against the foregoing, the Board considered that Maçkolik is an important online platform for those online betting companies that want to advertise their services in Turkey.

In terms of numerical data, the Board considered (i) the revenue that Maçkolik generated through its advertisement agreements, (ii) live bets placed through the platforms of virtual dealers, (iii) total number of clicks, and (iv) number of clicks directed to Nesine from Maçkolik. Analyzing the foregoing information, the

Board noted that (i) the amount paid by Nesine to Maçkolik accounted for a considerable portion of Maçkolik's advertisement revenue, (ii) although there are websites which allow live score tracking, Maçkolik is the prominent player in the industry, (iii) the click numbers of Nesine are substantial and, (iv) Maçkolik is an important advertising platform when the number of click directed from Maçkolik to Nesine are evaluated.

The Board also delved into the advertisement spaces on Maçkolik's website and noted that Nesine had advertisements both in banner and pop-up forms. Relatedly, if the users were to click on the betting ratios for a certain game on Maçkolik's website, they were directed to Nesine. Although all competitors of Nesine wanted to work with Maçkolik, they were unable to do so, due to the exclusivity clause.

Nesine claimed that it has invested in Maçkolik as part of certain business development projects and the exclusivity clauses ensured that both parties could get returns from the investments and Nesine mainly fulfilled the financial and workforce demand stemming from these business development agreements. The Board found that these projects would further enhance the number of advertising spaces provided by Maçkolik to Nesine, hence creating competitive concerns for Nesine's competitors.

The Board noted that the Agreements, in addition to the exclusivity terms, also provided that Maçkolik would have to refund the investment back to Nesine, if it failed to match the "click number commitment", which ultimately would lead to Maçkolik allocating more of its advertising spaces to Nesine, indirectly obstructing competitors of Nesine to advertise at Maçkolik's website, even if there had not been any direct exclusivity clauses within the Agreements.

V. Conclusion

The Board decided to impose interim measures removing all exclusivity provisions from the Agreements between Nesine and Maçkolik, noting that such provisions may cause serious and irreparable damage. The Decision is noteworthy, given that the Board carried out an in-depth analysis into Nesine's market position in the online betting market prior to the reasoned decision.

As noted above, interim measures are exceptional, given that they require certain conditions upon which the Board should carry out a detailed analysis at a considerably short timeframe, without waiting for the decision to be rendered at the end of the investigation. Moreover, in terms of the investigations into allegations of abuse of dominance, the Board may carry out a dominance test before concluding that an interim measure is necessary.[14] That being said, in this case, the Board did not carry out a dominance test prior to imposing interim measures with regard to a potential concern of abuse of dominance.

[14] *See, Krea* (29.09.2022, 22-44/652-281), *Trendyol* (30.09.2021, 21-46/669-334).

The Approach of the Turkish Competition Board in the Phase II Investigation Regarding the Acquisition of Certain Stores by Migros in the Fast Consumption Goods Market

I. Introduction

The Turkish Competition Board ("***Board***") published its reasoned decision regarding the acquisition of the tenancy rights and fixed assets of 25 stores ("***Target Stores***") of Ay-Mar Ticaret Ltd. Şti. ("***Aymar***") by Migros Ticaret A.Ş. ("***Migros***").[15]

It is worth noting the Board has assessed many acquisitions by Migros in the past. In some of them, the transaction was cleared by the Board without commitments[16] whereas the Board cleared certain acquisitions by Migros on the condition that Migros divests certain stores to maintain the competitive nature of the market.[17]

In assessing the transaction at hand, the Board first defined the relevant product and geographic markets. After delineating the borders of the market in which the transaction is expected to affect, the Board went on to assess these effects and finally unconditionally cleared the transaction.

II. Relevant Product and Geographic Markets

The Board stated that there will be horizontal effects on the organized retail market, where the activities of Migros and Aymar overlap. There would also be vertical effects on the retailing market as Anadolu Group, which controls Migros, also operates as a supplier in the non-alcoholic beverages markets, fresh vegetables and fruits market and wholesale retail market, which are the upstream supply markets of the retailing market.

The Board stated that the market that will be horizontally affected by the acquisition is the FMCG organized retail market. FMCG retailing is the service of selling products such as food, beverages, personal care and cosmetics products, and household cleaning products with high shelf turnover rates, short-term stocks and continuous consumption, to end users. In terms of the vertically affected market, the Board determined the overlapping markets as the "stationery market", "fresh fruit and vegetable market" and the "wholesale and retail market".

Referring to its previous decisions, the Board emphasized that the customer attraction area of the stores depends on their capacity, meaning that the larger the store, the more customers it will attract. Therefore, the Board considered this fact in defining the relevant geographic markets.

III. The Board's Assessment

The Board first assessed the horizontal overlapping markets, compared the state of competition before and after the notified transaction is implemented, and evaluated the position of its competitors in the relevant market, the existence of a balancing buying power and market entry opportunities.

The Board analyzed the market shares in terms of both the sales area and sales revenues and stated that although HHI values may raise competitive concerns, as a result of the detailed market share

[15] The Board's Migros decision dated 23.06.2022 and numbered 22-28/449-181.
[16] The Board decision dated 18.04.2018 and numbered 18-11/204-95, and decision dated 13.12.2018 and numbered 18-47/736-356.
[17] The Board's decision dated 09.02.2017 and numbered 17-06/56-22.

analysis conducted in this section (fluctuations in the market shares of the undertakings, the downward trend in the share of Migros, and the fact that the high market share of Migros is due to a single store with a wider geographical area of influence, than the stores subject to the transfer in terms of the three geographical areas of influence), it is considered that HHI values cannot be considered as a sole indicator in assessing the transaction.

The Board then analyzed the growth trends in market share and stated that the market is not in a static structure, that the undertakings currently operating in the market are growing in the market by opening new stores, and that fluctuations and changes may occur in the market share data above if the said growth trend continues.

Regarding vertical overlapping markets, Anadolu Group, which controls Migros through its subsidiaries and affiliates, operates as a supplier in the non-alcoholic beverages, stationery, fresh vegetables and fruits market, which is the upstream market of the FMCG organized retailing market in which Migros operates.

The Board evaluated the possibility of market closure based on the possibility of input and customer restriction. Regarding input restriction, the Board noted that considering the share of Migros in the entire retail market, Anadolu Group would not be able to compensate its losses in the supply market if it restricted product supplies to Migros' competitors, through the sales to its own stores. As a result, the Board evaluated that it would not be rational for Anadolu Group to terminate the supply of inputs to its competitors in the retail market, within the scope of the input restriction.

In addition, since there are alternative organized retail stores to which the possible suppliers that may be excluded from the Target Stores can direct their sales (for example, almost every retailer in the organized channel sells cola drinks) and since the traditional channel is a channel through which the suppliers make most of their sales in general, it is seen that the suppliers excluded from the stores of the merged undertaking have a chance to compensate for their losses in case of a possible exclusion. Therefore, it is assessed that the notified acquisition will not cause competitive concerns in any market where there is vertical overlap, through customer restriction.

Accordingly, the transaction subject to the notification will not result in input or customer restrictions in the markets where there is vertical overlap, and therefore, will not significantly reduce effective competition in the said markets.

IV. Conclusion

The Board evaluated that the transaction subject to the notification is not likely to result in a significant reduction of effective competition in any goods or services market, in whole or in part of the country, in particular the creation of a dominant position or the strengthening of an existing dominant position, and hence the Board authorized the transaction subject to the notification.

Employment Law

The Constitutional Court has Cancelled a Fundamental Requirement for Severance Payment of Journalists and Changed Its Calculation Method

I. Introduction

The Constitutional Court ("***Court***"), through its recent Decision ("***Decision***") dated May 4, 2023 and numbered 2021/62 E. 2023/89 K., found (i) the first paragraph and (ii) second sentence of the seventh paragraph of Article 6 of the Law on the Regulation of Relations Between Employers and Employees in the Press No. 5953 ("***Law No. 5953***") to be unconstitutional.

II. Evaluations in the Decision

In the Decision, the above-mentioned provisions of Article 6 of Law No. 5953 were assessed in terms of the principle of equality within the context of the right to property.

1. The evaluation of first paragraph of Article 6 of Law No. 5953

Before the Court delved into this assessment, it was initially determined that this provision falls within the scope of the right to property as this provision sets out the conditions of eligibility for journalists working under an employment contract, to receive severance payment upon the termination of their employment.

Further to this determination, the Court compared the statutory conditions of eligibility for severance payments which were applicable to (i) employees subject to Law No. 5953, (ii) employees subject to Turkish Labor Law No. 4857 and (iii) the provisions under the previous Labor Law No. 1474. According to Article 6 of the Law No. 5953, only those journalists who have been working for an employer under an employment contract for a minimum of 5 years will be entitled to severance payment, while employees who are subject to Turkish Labor Law and Article 14 of previous Labor Law No. 1475 are deemed become eligible for severance payment with only one year of employment contract. The Court found that this difference between journalists and other employees in terms of eligibility to receive severance payment lacked objective or reasonable grounds, regardless of certain advantages that journalists have under Law No. 5953 in comparison to the employees subject to Turkish Labor Law No. 4857.

Based on the above determinations and evaluations of the Court, the first paragraph of Article 6 of Law No. 5953 is found to be in violation of Articles 10 and 35 of the Turkish Constitution and therefore annulled.

2. The evaluation regarding the second sentence of the seventh paragraph of Article 6 of Law No. 5953

According to this regulation, the severance payment is calculated on the basis of the employee's salary for the last month, pro rata multiplied by the total number of years in their last employment (seniority), however, if the last year of their employment was less than 6 months, then this portion would not be taken into account. For example, if the journalist had a seniority of 7 years and 4 months, his/her severance payment consists of 7 times last months' salary only, with the last 4 months' portion of seniority disregarded. As opposed to that, the Court considered the statutory framework under the Turkish Labor Law and the previous Labor Law No. 1475, which take the full duration into

account for calculation of severance payment.

All in all, the Court pointed out difference between the two groups of employees and noted that the journalists are put in a disadvantageous position with no reasonable or objective grounds that could justify such difference.

Based on the above determinations and evaluations of the Court, the second sentence of the seventh paragraph of Article 6 of Law No. 5953 is found to be in violation of Articles 10 and 35 of the Turkish Constitution and therefore annulled.

III. Conclusion

The Decision concludes that the above-mentioned provisions of the Law No. 5953 gave rise to a discrimination between employees who were subject to Turkish Labor Law and the employees subject to Law No 5953, in terms of their entitlement to severance pay, and that this difference cannot be justified in any way. Such approach and assessment of the Court might be guiding and influential in bringing the two legislations closer and more aligned with each other in terms of matters where these laws have different stipulations for the same kind of entitlements, without any logical basis for such difference.

Dispute Resolution

Council of State Ruled that Intervening Parties are Entitled to Appeal Final Decisions even if the Parties of the Dispute Do Not Exercise Their Right to Appeal

I. Introduction

In order to remedy the contradiction between the divergent precedents from different chambers of the Council of State, the General Assembly on the Unification of Judgments of the Council of State ("***General Assembly***"), with its judgment numbered 2021/4 E, 2023/1 K. ("***Decision***") ruled that even though the main parties of a dispute do not exercise their right to appeal, the intervening parties are entitled to appeal the final decisions rendered by the courts.

II. Decision

The issue that caused the contradiction between various decisions of the different chambers of the Council of State is whether the intervening party is *per se* entitled to appeal, when the parties of the dispute have decided not to appeal the final decision of the court.

According to Article 31 of the Administrative Procedural Law, provisions of the Civil Procedural Law ("***CPL***") regarding intervention (of third parties into an ongoing dispute) shall also be applied to administrative law-related disputes. Within this scope, in accordance with Article 68 of CPL, the intervening parties are entitled to (i) make their case and submit their defenses, and (ii) take all procedural actions that do not jeopardize the intention and claims of the party on whose side they intervened the dispute. The preamble of Article 68 provides that intervening parties

are not entitled to take any actions or bring any defenses that would contradict the submissions or actions of the party on whose side they intervened. The rationale behind this article is the fact that intervening parties are authorized to participate in the litigation process only to support the defenses of the actual parties of the dispute.

However, the extent of (i) providing support only for the benefit of the actual parties of the dispute and (ii) restriction to not expand the claims of the actual parties to the dispute have been rather controversial, leading different chambers of the Council of State to render various divergent decisions on whether the intervening parties are entitled to appeal the final decisions handed down by the courts, in cases where the main parties of a dispute do not exercise their right to appeal. To unify the case law around this dispute, General Assembly considered the matter in depth and rendered this Decision.

The General Assembly evaluated the issue within the scope of the principles of (i) the right to a fair trial, and (ii) the right to apply for legal remedies. According to the Decision of the General Assembly, the right to apply for legal remedies stands for everyone having the right to assert allegations and defend their cases, as a plaintiff or defendant before judicial authorities in various stages of a dispute, including appeal. The aim of the intervention principle is to provide equal opportunities to those who will be affected by the final decision rendered in a dispute but are not involved in the dispute as parties. The Decision also refers to Article 36 of the Turkish Constitution regarding the right to a fair trial, which calls for a trial that is conducted fairly, justly, and with procedural regularity by an impartial judge.

In accordance with the Decision, Article 68 of CPL regarding intervention shall be interpreted within the scope of these principles, allowing intervening parties to have a fair trial and whereby the parties are granted the right to apply for legal remedies as much as possible. Accordingly, with the Decision, the General Assembly ruled that intervening parties are entitled to appeal the final decisions even if the parties to the dispute do not exercise their appeal rights themselves.

III. Conclusion

All in all, the current procedural legislation does not have an explicit provision on whether the intervening party has the right to appeal in cases where the actual parties of a dispute do not appeal the decision rendered by a court and this, therefore, led different chambers of the Council of State to render various divergent decisions. Taking into account the constitutional principles of (i) the right to a fair trial, and (ii) the right to apply for legal remedies, General Assembly now ruled that the intervening parties have and are entitled to exercise the right to appeal, even if the decision subject to the dispute is not appealed by the actual parties of such dispute.

Data Protection Law

Turkish Data Protection Authority's Recent Decisions on Protection of Personal Data

The Turkish Data Protection Authority ("***DPA***") recently handed down certain decisions related to the right to respect for private life and the right to demand the

protection of personal data.[18]

I. Decision numbered 2023/437[19]

The decision is regarding an attorney partnership's processing of personal data through text messages for debt recovery purposes. It concludes that the attorney partnership acted as a data controller, the processing was deemed lawful, and dismisses the request for sanctions and an audit regarding unlawful data acquisition.

According to the decision, an attorney partnership sent five text messages to a debtor of their client, for notification of debt and subsequent reminders. The applicant individual alleges that the attorney partnership failed to fulfil its obligation to duly inform the individual at the first contact or with respect to the recording of their telephone conversation. The applicant requested the data controller to be penalised due to their actions violating the provisions of the Personal Data Protection Law and asked for an audit to determine if any software/program/application was used to unlawfully obtain the debtors' personal data. They sought an investigation into the possibility of data collection practices that were not in compliance with legal requirements. In its response, the attorney partnership stated that the complaint procedure was not followed properly and that the individual does not have the right to apply to the attorney partnership, as they are deemed to be the data processors. The attorneys stated that their activities are limited with the scope of their legal services contract and the power of attorney granted specifically for the collection of debts, and that they acted in accordance with the legal obligations and procedures. They asserted that had have not used any unlawful software nor obtained the personal data unlawfully. They also highlighted that their website provided various payment channels and information to facilitate debt repayment, but no data collection took place through their website.

Ultimately, the DPA concluded that the attorney partnership should be considered a data controller as they have the authority to make decisions regarding the processing of personal data. The processing of personal data through text messages was deemed lawful, on the basis of the processing being necessary for establishing, using, or protecting a right. It was also determined that the attorney partnership's actions did not violate the principles of lawfulness, fairness, and proportionality. The request for sanctions and an audit regarding the use of software to unlawfully obtain personal data were rejected due to lack of evidence. Therefore, the DPA found no further action was necessary under the applicable laws.

II. Decision numbered 2023/426[20]

In the decision, the DPA imposed an administrative fine of 400,000 Turkish Liras on a company for unlawfully requesting e-Government Gateway passwords from individuals during purchases made on credit through multiple instalments, as this practice violated the obligations outlined in the relevant legislation, and additionally ordered the company to delete the unlawfully processed personal data and provide

[18] Decision numbered 2023/437 and dated March 22, 2023, decision numbered 2023/426 dated March 22, 2023, decision numbered 2023/78 dated January 19, 2023, and decision numbered 2023/4 dated January 5, 2023.

[19] https://www.kvkk.gov.tr/Icerik/7600/2023-437 (Last accessed on July 24, 2023).

[20] https://www.kvkk.gov.tr/Icerik/7599/2023-426 (Last accessed on July 24, 2023).

information about the implementation of the deletion process to the DPA.

The applicant alleged that the company, which was engaged in the provision of consumer financing, unlawfully requested e-Government Gateway passwords from individuals while purchasing goods on credit which was secured through promissory notes. More than one individual had reported that the company had requested their e-Government Gateway passwords, that they were aware of other persons who had been asked the same, and requested the DPA to take action. Upon the DPA investigation into the matter, the company responded that, the applicant had entered into consumer finance contracts with them, but due to this person's insufficient credit rating and being newly registered in the social security system, they had requested the applicant to bring a copy of their social security service records for the last six months, to the nearest branch. The company denied requesting e-Government Gateway passwords and stated that they only asked to see relevant records through the e-Government system with the applicant's consent. Consequently, the DPA concluded that, the company, as the data controller, had failed to ensure the security and protection of personal data by requesting e-Government Gateway passwords from individuals during instalment purchases. This practice did not have a legal basis under the provisions of the Law No. 6698. Therefore, the DPA accepted the applicant's request and fined the company for 400,000 Turkish Liras for violating the obligations stated in the Law No. 6698.

III. Decision numbered 2023/78[21]

This decision concerns the applicant's claim regarding the unlawful transfer of his/her debt information as a text message, to the corporate mobile numbers of a company, in which the applicant was a partner.

The applicant stated that as a result of cancelling the mobile internet subscription agreement between the applicant and the GSM operator, the applicant was falsely accused of having outstanding debts. The applicant claimed that the GSM operator authorized an attorney partnership to collect the debt, and the attorney partnership sent a text message to four different mobile phone numbers associated with the applicant's company, with the applicant's surname concealed but his/her name clearly visible, indicating the initiation of enforcement proceedings regarding the owed amount. The applicant further alleged that despite the lack of involvement of the company's employees who used the company lines in this matter, the applicant became aware of his/her debt information. Furthermore, due to the absence of any other individuals with the same name in the company, the applicant's identity was revealed in the mentioned text message, and the applicant argued that the purpose behind the transfer of the personal data to the company lines was not disclosed.

In their response, the attorney partnership stated that they were authorized by the GSM operator, under a service agreement and power of attorney, to handle the collection process of subscribers' debts. They claimed to have limited access to the system managed by the GSM operator,

[21] https://www.kvkk.gov.tr/Icerik/7596/2023-78 (Last accessed on July 24, 2023).

which enabled them to view and access only the personal data relevant to the debt collection process and send informational text messages accordingly. They also mentioned that the contract signed between them, and the client entity regulated the attorney partnership's obligation as a data processor. The attorney partnership asserted that they processed the applicant's personal data within the legal framework of the Law No. 6698, based on the legal grounds of necessity for the establishment, exercise, or protection of a right and the legitimate interests of the data controller.

The GSM operator, as the data controller, responded by stating that they shared only the personal data related to the applicant's identity, communication, and debt information with the attorney partnership for the purpose of debt collection.

Finally, the DPA decided that, (i) the attorney partnership, as the data processor, had failed to ensure the data was accurate and up-to-date by using the company's corporate communication numbers as belonging to the applicant in individual contracts with the data controller, (ii) no action can be taken towards the attorney partnership regarding the sending of a single text message to the phone numbers that are stated to be related to the applicant, as the attorney partnership did not have a verification capability regarding those numbers within their limited authorization.

IV. Decision numbered 2023/4[22]

This decision is regarding the applicant's claim on the unlawful sharing of personal data due to a cross-barcoding error by a courier company, in which the data controller later admitted their error. The DPA decided that the data controller had violated the law by sharing personal data without a legal basis and failing to ensure data security.

According to the decision, the applicant purchased a product from an e-commerce company and noticed after the delivery by the courier company that the package contained the address and contact information of another person (a third party) with a similar name. The applicant requested information on why personal data belonging to a third party was sent to him/her and whether his/her own personal data was also shared with third parties. The applicant claimed that the courier company had unlawfully disclosed its personal data. In its defense, the data controller (courier company) explained that during the barcode scanning process, a bulk barcode error occurred due to a mix-up with another customer's shipment, which had a similar name. They stated that the complainant's package was mistakenly barcoded and delivered to the third party, and vice versa. The data controller asserted that this was an isolated incident caused by a manual error during barcode scanning and not a systematic problem. They emphasized that personal data of customers is only shared with relevant departments, service assistants, the Information Technologies and Communication Authority, the Ministry of Transport, Maritime Affairs and Communications upon request, and authorized public institutions entitled to request personal data, solely for the performance of courier services.

In conclusion, the DPA found that the data controller had unlawfully shared the applicant's personal data with a third party due to a cross-barcoding error. It determined that the package, which should

[22] https://www.kvkk.gov.tr/Icerik/7598/2023-4 (Last accessed on July 24, 2023).

have been delivered to the applicant, was sent to the third party, resulting in the sharing of the applicant's personal data with the third party. The DPA further concluded that the data controller had violated the Law No. 6698 by transferring both the applicant's and the third party's personal data unlawfully and failed to ensure the necessary level of security to prevent unlawful processing of personal data and to promptly notify the data subject and the DPA in case of data breaches. The DPA imposed an administrative fine of 75,000 Turkish Liras.

Internet Law

Significant Amendments to the Internet Domain Names Communiqué

The communique amending the Internet Domain Names Communiqué was published in the Official Gazette dated June 10, 2023. There were a number of amendments to the provisions on the allocation, registration, use, management and storage of internet domain names in Turkey.

Significant changes were made to the responsibilities, authority and function of the Domain Registrars ("***DR***"):

a. As per the first paragraph of Article 5 of the Internet Domain Names Communiqué, the security fee to be paid by entities who intend to operate as DR and meet the pre-qualification requirements has been increased from 75,000 Turkish Liras to 100,000 Turkish Liras. This security fee will be increased each year according to the revaluation rate to be determined by the Ministry of Treasury and Finance in relation to the previous year.

b. According to Article 8 of the Internet Domain Names Communiqué, within the scope of the rules regarding the technical infrastructure, the IP address(es) used to connect to the test system will be different from the IP address(es) to which the DR connects to the real system.

c. As per Article 12 of the Internet Domain Names Communiqué, in case of working with a reseller, the DR will notify the ICTA within ten (10) business days, providing certain information about the reseller and any changes/updates to the same. The DR shall be liable for any violations of the legislative requirements by its reseller(s).

d. Pursuant to Article 14 of the Internet Domain Names Communiqué, during the Internet Domain Name (IDN) application process, the DR will ensure that the applicant will accept, declare and undertake that if an alternative dispute resolution process is initiated with respect to the IDN, the applicant will participate in the alternative dispute resolution process and the name, surname and e-mail information notified to the DR will be shared with the relevant Dispute Resolution Service Provider or the complainant. However, ICTA will have the authority to make the necessary corrections if it deems appropriate.

Amendments were also brought on the application and operation of the IDNs:

a. According to Article 15 of the Internet Domain Names

Communiqué, in the event that systemic errors during the IAA allocation procedures are reported by the DR or detected by the ICTA itself, the ICTA may decide to correct such records *ex officio*.

b. The provision on waiver" stipulating that internet domain name owners to cease using the domain name allocated to them before the end of the allocation period under Article 22 of the Internet Domain Names Communiqué has been removed.

c. Free forwarding, which had been previously available the instant the internet domain name was first allocated, has now been changed, as the amendment replaced the term "forwarding" in Article 27-(1) of the Internet Domain Names Communiqué with "allocation". Therefore, free-of-charge allocation will be made for domain names with the "gov.tr", "edu.tr", "tsk.tr", "bel.tr", "pol.tr", "k12.tr" extensions. However, IDNs with the extension "org.tr" have been excluded from this scope and therefore, free allocation will no longer be possible for domain names with the "org.tr" structure.

d. The term "trademark owners" in Article 27-(5) of the Internet Domain Names Communiqué has been replaced with "extension-based domain name ownership". In light of this, the "first come, first served" principle is applied to the eligible IDN allocations made in accordance with the extension-based domain name ownership priority provision.

e. Article 30 of the Internet Domain Names Communiqué on auction has been abolished and the wordings referring to auction in other provisions have been amended accordingly.

f. The phrase "using the automated means of the electronic connection to TRABIS" has been removed. Therefore, a DR is not permitted to apply for or allocate IDN on behalf of itself or any of its employees to store IDNs for the sale, assignment, or other similar purposes regardless of whether it uses the automated means of the electronic connection to TRABIS, or not. In such cases, administrative penalties might be imposed against the DR, including ceasing its activities. Moreover, the phrase "related third parties" in the same paragraph has been amended as "employee".

The amendment brings significant changes to the Internet Domain Names Communiqué's provisions related to the obligations and functions of DRs, as well as the application and allocation of IDNs. Therefore, relevant stakeholders should monitor the amendments and conduct their operations and applications according to the amended principle and procedures introduced.

Telecommunications Law

ICTA Has Published Turkey's Annual Electronic Communications Data For 2022

The Annual Market Data Bulletin (2023), the second annual sectoral bulletin regarding the electronic communications sector ("***Bulletin***") was published on the Information and Communication

Technologies Authority's ("***ICTA***") website on May 15, 2023.[23]

In the preface of the Bulletin, Chairman of the ICTA Board, Ömer Abdullah Karagözoğlu, states that the electronic communications sector continues to progress based on broadband internet, that both fixed-speed and mobile high-speed internet continue to be in demand in Turkey, and this situation triggers infrastructure investments, while both data rates and the amount of data used are ever-increasing.

The first part of the Bulletin entitled "General Data" indicates that the revenue from electronic communications services between the end of 2018 and end of 2022 had increased 24% annually on average. While the revenues of the electronic communications sector was 92,4 billion Turkish Liras for 2021, this had increased to 130,3 billion Turkish Liras for the year 2022. There was also a 3,3 fold increase in operator investments between 2018 and 2022 on a sectoral basis, with an average annual increase of 46%. Total investments in the electronic communications sector in 2022 was 31,1 billion Turkish Liras. Additionally, it is stated in the Bulletin that the total number of full-time employees of the operators has not changed significantly over the years, staying around 27,500 between 2018 and 2022.

It is observed that the number of persons who subscribe to electronic communications services in Turkey increases every year. While this number was 112,2 million in 2021, it approached 128,3 million in 2022. Inversely proportional to these, the total number of consumer complaints was found to be 302,000 in 2020, 273,400 in 2021 and 219,400 in 2022. In the Bulletin, the sharp increase seen in 2020 (from 170,900 complaints in 2019) is attributed to the Covid 19 pandemic, and the number of consumer complaints took a downward turn after 2020.

Second part of the Bulletin on "Broadband Data" indicates that internet usage rate in Turkey has increased by 16,6% in the last 4 years, the internet usage rate is 85% which is 66% above the world average. It is, however, necessary to focus on the definition of broadband before discussing the percentage data on this subject. ICTA stated that Broadband can be defined as a connection having the extensive bandwidth capacity to transfer data in both directions (download and upload) and maintain continuous connection with high speeds.[24] Internet access with continuous connection, e-mail, download and upload, e-commerce, distance learning can be given as examples for broadband applications. It could be concluded that while the fixed line is preferred when connecting to the internet via computers in the office and at home, mobile broadband access is preferred more often when connecting to the internet via mobile phones.

While the fixed broadband prevalence rate increased by 1,5% annually between 2018 and 2022, this rate was 3,3% in mobile broadband for the same years. Likewise, between 2018 and 2022, the number of fiber subscribers increased by 104%, while

[23] https://www.btk.gov.tr/uploads/announcements/yillik-pazar-verileri-bulteni-2023-yayimlandi/2023-yili-yillik-bu-lten-15-05-23.pdf (last accessed on July 24, 2023)

[24] https://www.btk.gov.tr/uploads/pages/slug/teknoloji-hizmetler-duzenleme-ve-dunyadaki-gelismelerle-genisbant.pdf (last accessed on July 24, 2023)

the increase in fiber infrastructure length was 45,7%.

In the third part of the Bulletin, the data regarding "Mobile Services" is discussed. For 2022, it has been reported that 97,2% of the population in Turkey is 4.5G subscribers. Furthermore, 50% of the total 4.5G subscribers across Turkey are found in Istanbul (22,11%), Ankara (6,03%), Izmir (4,29%), Bursa (2,92%) and Antalya (2,61%). In addition, it was stated that subscriber mobility between operators in mobile services was intense between the years 2018-2022.

In the fourth section which summarizes the data on fixed telephony services, it is stated that in recent years, fixed telephone service in Turkey has not shown a significant change in terms of subscriber numbers and prevalence. However, it was stated that a slight decrease was observed in the operator revenues in 2022. Likewise, it has been observed that the issue of fixed numbers porting is also stable, and a total of nearly 700,000 number porting transactions took place between the years 2018-2022.

Last part of the Bulletin provides data on Common Use Radio, Satellite Communication, Satellite Platform, Global Mobile Personal Communication via Satellite, Cable TV and Assistance Services. It is reported that with the increase in the prevalence of broadband internet and especially smart phones, access to information has become easier and this negatively affected some services, for instance the Directory Assistance Service. According to the Bulletin; both the number of calls and the call duration of the directory assistance service have been decreasing over the years. While the number of incoming calls was 670,000 in 2021, this number decreased to 500,000 in 2022.

White Collar Irregularities

Domestic and International Jurisdiction over White Collar Crimes

White collar irregularities, which are not currently defined or separately regulated under Turkish legislation, refer to those crimes committed by a person of a certain profession or holding a certain position, in the course of exercising their duties or in an official capacity. Under Turkish laws, the primary source of domestic law that governs corrupt acts is the Turkish Criminal Code No. 5237 ("***TCC***"). The TCC sets the definitions and punitive measures for crimes of bribery, malversation, malfeasance, embezzlement, and bid-rigging, in addition to other forms corruption such as negligence of supervisory duty, unauthorized disclosure of commercial secrets, and fraudulent schemes to obtain illegal benefits.

There are also secondary sources of law that govern specific fields of white collar crimes, such as, (i) Law No. 5549 on the Prevention of Laundering Proceeds from Crime, (ii) Regulation on Measures for the Prevention of Laundering Proceeds from Crime, (iii) Law No. 3628 on Declaration of Property and Combating Bribery and Corruption, (iv) Law No. 6415 on Prevention of Financing of Terrorism, (v) Public Procurement Law, (vi) Regulation on the Ethical Behaviour Principles of Civil Servants and Principles and Procedure of Application.

Besides domestic laws, in order to keep the pace with international developments in the legal anti-corruption scene, Turkey has also become a signatory to and/or has

ratified several European and international anti-corruption conventions such as (i) Council of Europe Criminal Law Convention on Corruption, (ii) Council of Europe Civil Law Convention on Corruption, (iii) Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, (iv) OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, (v) The United Nations Convention against Transnational Organized Crime, and (vi) The United Nations Convention against Corruption. In addition to multilateral treaties, Turkey is also a member of international bodies that monitor standards of anti-corruption compliance such as Group of States against Corruption ("***GRECO***") and Financial Action Task Force ("***FATF***"), and OECD Working Group on Bribery.

While there is no specific regulatory body regulating corporate or business fraud, the Financial Crimes Investigation Board ("***MASAK***") has broad roles in developing policies and improving legislation and collecting specific data to analyze and evaluate suspicious transaction reports in the context of financial crime. It also has specific regulatory powers in relation to money laundering.

The prosecution of corporate or business frauds, however, ultimately rests with the public prosecutors. Public prosecutors have the powers of investigation, enforcement and prosecution in the case of corporate or business fraud. Public prosecutors can perform actions they consider necessary, including conducting searches, and issue interim injunctions (such as freezing orders, confidentiality and disclosure orders, and orders for stay of execution) during the investigation phase of a corporate crime.

If the public prosecutor deems that the evidence so far collected gives rise to sufficient doubt that a crime has been committed, then the prosecution phase will be conducted under the supervision of the relevant judge responsible for that case. At this junction, Turkish national courts can exercise extra-territorial jurisdiction in accordance with the various multilateral and bilateral treaties Turkey has entered into.

In this respect, companies can also issue their own best practice regulations and guidelines to regulate fraud. There are, however, no official best practice regulations and guidelines. Guidelines issued by companies can, therefore, only be voluntary. Not complying with those rules would be subject to the internal consequences set out by that particular company.

In terms of international authorities' involvement in an investigation and/or enforcement of white collar crimes, there are several foreign anti-corruption laws with extra-territorial effect that all multinational companies are advised to be aware of.

One of the most well-known and prominent foreign anti-corruption law is the U.S. Foreign Corrupt Practices Act ("***FCPA***"), which criminalizes the bribery of foreign officials anywhere in the world for the purpose of preventing corruptly influencing of an official governmental decision in order to obtain a business benefit. The anti-bribery provisions in the FCPA apply to entities covered by it, which include (i) "issuers" - companies that have a class of securities or are required to file periodic reports with the

U.S. Securities and Exchange Commission, (ii) domestic concerns which are U.S. citizens, nationals, and residents, as well as any business entity that has its principal place of business in the United States or is organized under U.S. laws, and (iii) any other person who acts in furtherance of a corrupt payment while within U.S. territory which can reach foreign entities that operate outside of the U.S. if they make use of the mails or any means or instrumentality of interstate commerce or engage in any act in furtherance of a corrupt offer or payment while in the territory of the U.S. For this reason, the U.S. Department of Justice and the Securities and Exchange Commission have a wide range of jurisdiction in terms of investigating and sanctioning companies, resulting in criminal liability for many U.S. based companies with subsidiaries outside of the U.S.

Therefore, a prudent approach for multinational companies to adopt would be to devise and implement compliance programs aimed at detecting and preventing possible unlawful acts, which will raise awareness among employees about combating corruption with an eye towards global anti-corruption law compliance. Companies would also be well-advised to set up control and monitoring mechanisms to supervise the implementation of their anti-corruption policies. Periodic audits and implementing whistleblower protection procedures are some of the methods that can be used to control/monitor whether anti-corruption policies are being carried out in an effective manner. It is also advisable that corporate guidelines clearly indicate how and whom to approach in case of a suspected act of corruption.

Intellectual Property Law

The High Court of Appeals Changed Its Long-Standing Practice on Cumulative Protection Afforded by Trademark Infringement and Unfair Competition Provisions

I. Introduction

Under Turkish trademark law, the settled practice of the High Court of Appeals was that in cases where a trademark infringement has been established, it was deemed that there also existed unfair competition against the trademark proprietor. In other words, trademark infringement was treated as an act of unfair competition that violated the principle of honesty. This long-standing practice of the High Court of Appeals is changed through a recent decision of the High Court of Appeals ("***Decision***").

In the Decision, the High Court of Appeals has ruled that the act of trademark infringement does not constitute unfair competition, as the trademark infringement is addressed under the specialized trademark law and thus fell out of scope of the unfair competition protection, after the new Turkish Commercial Code No. 6102 was entered into force.

II. The Dispute subject to the Decision and Evaluation of the First Instance Court

In a civil action before Istanbul 2nd Civil Court of Intellectual and Industrial Property ("***First Instance Court***") where both parties were pharmaceutical companies, the plaintiff argued that the defendant's use of the phrase "*BUSTESIN*", which is visually and phonetically similar to Plaintiff's earlier trademarks "*UBISTESIN*" and

"*UBISTESIN FORTE'*, on goods of Class 5 constitutes trademark infringement against the plaintiff's trademark rights. Accordingly, the plaintiff mainly requested the determination of trademark infringement and unfair competition along with other connected claims.

As a result of the evaluation before the First Instance Court, the lawsuit was partially accepted. In its decision, the First Instance Court found the trademark use of the defendant confusingly similar to the trademarks of the plaintiff and accordingly accepted the trademark infringement claim, while it dismissed the plaintiff's unfair competition claims.

III. The Evaluation of the Regional Court of Appeals

The parties objected to the decision of the First Instance Court before the Regional Court of Appeals. The Regional Court of Appeals accepted the appeal of the plaintiff and stated that the defendant's use of the phrase "BUSTESIN", which is visually and phonetically similar to Plaintiff's earlier trademarks, falls within the scope of acts that constitute unfair competition due failing to comply with the principle of honesty. This was a direct application of the former long-standing precedents in such cases.

IV. The Evaluation of the High Court of Appeals

The defendant appealed the decision of the Regional Court of Appeal, before the High Court of Appeals. The High Court of Appeals overruled the decision of the Regional Court of Appeals through the Decision. The High Court of Appeals first addressed the former practice which labeled trademark infringement as an act of unfair competition and explained that these acts were considered as acts of unfair competition, because the previous Commercial Code No.6762 had specifically referred to "name, title and trademark" in the wording of Article 57/5.

Further to the explanations on the former practice, the High Court of Appeals explained in the Decision that the letter of Article 55/1-a-4 of the Turkish Commercial Code No. 6102 ("***TCC***"), which corresponds to Article 57/5 of the previous Commercial Code, intentionally excludes "name, title and trademark" and this is clearly explained in the reasoning of this provision by the lawmaker. As the High Court of Appeals quoted, in the reasoning of the provision, the legislator points out that since trademarks are already under the protection of the former Decree Law No 556 on the Protection of Trademarks (*which was the legal provision regarding trademark protection*); it was not necessary to put trademarks under the additional protection of the TCC and complicate the interpretation of cases.

Based on the foregoing, the High Court of Appeals concluded that since trademarks are under the protection of Industrial Property Code No. 6769, as well as the former Decree Law No 556, where applicable, and considering the wording of Article 55/1-a-4 of the TCC, it is not possible to maintain this former practice.

V. Evaluation of the Decision

The High Court of Appeals changed a long-standing practice, based on the reasoning that since the wording in Article 55/1-a-4 of the TCC no longer includes the protection of a "name, title or trademark", such acts would not constitute unfair competition. Considering the Turkish Commercial Code entered into force on July 1, 2012, *i.e.*, more than 10 years ago,

with no amendments to the relevant provisions, it is worth mentioning that the High Court of Appeals has changed this settled practice with this decision. Therefore, one might say that this kind of course correction is long overdue.

It is clear that this decision of the High Court of Appeals will have a major effect on the decisions of the first-instance courts and on-going litigations.

VI. Conclusion

With the decision of the High Court of Appeals, the Court changed its long-standing practice. It remains to be seen how this will be reflected in decisions of first instance courts and whether the High Court of Appeals will continue with this approach in future cases.

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