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Preface to the June 2021 Issue

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

The Banking and Finance Law section in this edition is quite extensive, also providing input on one of the most debated legal topics of our time: crypto assets and how they fit in to the Turkish legal system.

The Competition Law section of this issue comprises of six articles in light of the vast developments of this quarter. The two new Communiques on the De Minimis Exception and the Commitment Mechanism are explained in detail. The De Minimis Exception will introduce a new outlook on a wide range of cases. Furthermore, the commitment and settlement mechanisms, taken from the European competition doctrine, will provide novel alternatives for investigated undertakings. The section on Competition Law also explains the legislative process of the settlement mechanism as the Draft Regulation is still under public consultation as the time of writing. Lastly, this section explains two significant merger control decisions; one of them being the most recent no-go decision the Board rendered, which is a rare occurrance.

Another important development is assessed under the Employment Law section. In line with the realities of COVID-19, this section addresses the Regulation on Remote Working, which provides a framework for what the employers should and should not do, in terms of remote working employees.

Finally, the Data Protection Law section provides an all-encompassing outlook on the recent decisions of the Turkish Data Protection Board and the White Collar Irregularities section guides the readers through the do`s and don’ts of an internal investigation.

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

June 2021

Corporate Law

Authorizing Third Parties with Limited Powers: Proxy or Registered Authorized Signatory?

Companies, regardless of their types and sizes, often need to appoint individuals other than their board members, to perform certain tasks arising from their day-to-day operations. Under Turkish corporate law system, granting such powers can be done by issuing a power of attorney in favour of someone, or by appointing a person as a registered authorized signatory with limited powers. This article will be outlining the differences between the two, from companies' points of view.

I. Power of Attorney

A power of attorney establishes a contractual relationship between the parties as regulated under the Turkish Code of Obligations No. 6098 ("**TCO**"). Pursuant to the law, holder of a power of attorney ("**proxy**") has the following statutory obligations: to comply with the instructions of the issuer of the power of attorney (**"grantor"**), to execute the acts in person, to adhere to the grantor's instructions, carrying out transactions diligently, and accounting for their acts, which all are subject to certain exceptions (not included in this article). When issuing a power of attorney, it should be borne in mind that a proxy is merely a representative acting on behalf of the grantor; consequently, the grantor remains liable for the proxy's acts. Nonetheless, the grantor will have the right to claim damages if the proxy breaches his/her obligations.

Regarding the extent of the powers, the powers contained in a power of attorney depend on the specific wording, which is usually drafted by the grantor itself. A power of attorney may be drafted as a "general power of attorney," authorizing the person to carry out transactions for the account and on behalf of the company in various areas; or in contrast, it may be drawn up just to grant precise powers for specific matters. The proxy may be authorized to represent solely, or restricted only to act with joint signatures of other proxies.

Execution of a power of attorney is completed by having the duly signed power of attorney document certified by a notary public if it is being issued in Turkey. The signature circular of the company, evidencing the authority of the real person signatory to issue the said power of attorney on behalf of the company, must also be presented to the notary public. If the power of attorney will be issued abroad, it has to be notarized and apostilled/legalized. In the case that a power of attorney is granting authority to act before the land registries, it will need to be executed by the notary public in a specific statutory form. There is again a special format requirement for individuals, if they wish to issue power of attorneys on inheritance or marital matters.

The issuance process may differ where a joint-stock or a limited liability company is issuing a power of attorney to authorize the proxy before banks. With respect to joint-stock companies, the board of directors must decide on the issuance and content of the power of attorney. For limited liability companies, board of directors and general assembly resolutions on this matter would be required.

The contractual relationship arising from a power of attorney can be terminated by either of the parties, unilaterally. In order to duly revoke a power of attorney, a letter

of dismissal must be executed by a notary public and must be sent to the other party, if the power of attorney has been issued in Turkey before the notary public. If a power of attorney concerns a party residing abroad, the notarized document will have to be sent through consulates as per the Notification Law No. 7201. In order to avoid a potentially lengthy process, even more so if it involves persons living abroad, the common practice is to insert a validity period in powers of attorney. A power of attorney would also automatically terminate upon completing the obligations contained, and upon death, incapacity, or bankruptcy of the parties. Nevertheless, a power of attorney will be deemed valid against bona fide third parties who could not know of such termination.

II. Registered Authorized Signatory / Signature Circular

The second option for companies is to appoint a registered authorized signatory with limited powers ("**authorized signatory**"), as stipulated under the Turkish Code of Commerce No. 6102 ("**TCC**"). In order to appoint an authorized signatory, which is subject to registration before the trade registry, the company's articles of association must contain wording to explicitly allow such appointment. These persons will be authorized to act in accordance with the internal directive of the company, which shall set out the limits for various signatory categories.

The appointment process is as follows: first, the board of directors must issue an internal directive, setting out the scope of powers assigned to the authorized signatories, indicating whether they are authorized to act solely or jointly. The internal directive should not name the persons to whom the powers are assigned to, but only the powers assigned. The board of directors' resolution containing the internal directive must be notarized, registered with the relevant trade registry, and announced in the trade registry gazette. Secondly, board of directors in joint-stock companies and board of directors and general assembly in limited liability companies must resolve on appointment of the authorized signatories in accordance with their internal directive. This resolution must also be notarized, registered with the relevant trade registry, and announced in the trade registry gazette. In addition, the authorized signatories will be required to submit their signature declarations to the trade registry. Finally, the company has to issue a signature circular showing the personal details as well as the signature specimens of all of its authorized signatories for convenience.

The revocation of powers must also be registered with the trade registry, and announced in the trade registry gazette in order to be binding on third parties. It is also worth noting that in practice, the signature circulars are deemed to expire at the end of the office term of the authorizing board of directors, which is a maximum of 3 (three) years for joint-stock companies and could be unlimited term in limited liability companies. Therefore, following the election of a new board of directors, it would be necessary to resolve on the re-appointment of authorized signatories and re-issuance of a signature circular, even if the authorized signatories remain unchanged.

III. Conclusion

Although serving similar purposes, granting authority through a power of attorney and by appointing an authorized signatory differ, mainly in the procedures

and validity periods. Appointment of an authorized signatory can be a lengthy procedure whereas a power of attorney can be executed almost immediately. Companies will need to make a decision on a case-by-case basis and proceed with the more suitable option by considering the matters covered in this article.

Banking and Finance Law

New Dynamics of Turkish Financial Markets: Savings Finance Regime

I. General Overview

"Savings finance activities " are defined as saving money for a certain period of time for the acquisition of residential or business property or vehicles, providing financing to clients for this purpose and managing the accumulated savings according to principles of interest-free financing and subject to the realization of conditions precedent under a contract. The fundamental feature that distinguishes this activity from other financing models is that the right to obtain the financing is subject to having accumulated savings for a period of time. In this financing model, while some of the clients are saving money, the others are receiving financing; thereby in effect the clients finance each other.

As this model had been gaining excessive use in practice, Turkish regulators published the Law No. 7292 on Amending the Law on Financial Leasing, Factoring and Financing Companies and Certain Laws ("**Law No. 7292**") on March 7, 2021 to regulate the savings finance system, supervise companies engaging in savings finance activities and to protect the rights and interests of the clients participating thereunder. The Law No. 7292 also changed the name of the relevant law on this matter to Law No. 6361 on Financial Leasing, Factoring, Financing and Savings Finance Companies ("**Law No. 6361**").

In this article, we will take a look into the significant provisions that this amendment has introduced to the Law No. 6361 in relation to the savings finance system.

II. Establishment Procedure

The Law No. 6361 requires companies which plan to engage in savings finance activities to obtain permission from the Banking Regulation and Supervision Authority ("**BRSA**") in order to be incorporated and initiate their activities.

Furthermore, the Law No. 6361 stipulates certain requirements with respect to corporate finance and structure of the savings finance companies. For instance, companies engaging in savings finance activities must be incorporated as joint-stock companies, with a share capital amount of at least TRY 100 million, and include the phrase "Savings Finance Company" in their titles; their shares must be issued as registered shares; their founders must have certain qualifications such as having financial strength, not being charged with imprisonment for specific crimes etc., and articles of association of the savings finance companies must be in line with the provisions of the Law No. 6361.

III. Scope of Activities and Restrictions

The Law No. 6361 regulates the permitted activities of savings finance companies in detail. Accordingly, they are obliged to arrange separate saving plans for each client and client group.

The Law No. 6361 obliges savings finance companies to segregate their savings fund accounts from their other accounts. In order to protect the clients' rights and

interests, savings finance companies are prohibited from using the savings funds for any purpose other than fulfilling the liabilities arising from the savings finance agreements. In addition, savings funds cannot be withheld under a right of retention; made subject to a transfer, assignment or exchange of receivables; pledged or put up as collateral. Furthermore, these funds cannot be subject to an attachment, injunction, lien or included in the bankruptcy process, with the exception of clients' receivables arising from savings finance agreements. The Law No. 6361 also requires savings finance companies to engage in activities in line with interest-free financing principles.

Similar to other financing companies (*i.e.,* the financial leasing companies, factoring companies, and financing companies) savings finance companies cannot engage in any activity other than the core business.

The Law No. 6361 prohibits savings finance companies from financing any debts unless the debt arises from the acquisition of residential or business properties, or vehicles. Savings finance companies are also banned from providing financing (except for those under the savings finance agreements), lending to third parties, and acquiring shares of other companies. It is worth mentioning that savings finance companies are not allowed to finance the acquisitions of residential and business properties or vehicles which are registered abroad.

IV. Savings Finance Agreement

The savings finance agreement is a new type of agreement that the Law No. 6361 has brought to the financial markets. The agreement obliges the savings finance companies to manage their clients` accumulated savings, to repay these funds. to provide financing, and also enables them to request an organization fee from their clients.

The execution of savings finance agreements is regulated in a similar way as other financing agreements. The Law No. 6361 also regulates clients' rights of withdrawal and termination in detail. The right of withdrawal may be exercised within 14 days following the execution of the agreement without any reason or paying any penalty, and the clients may terminate their savings finance agreements until the end of their savings period.

V. Significant Precautions

BRSA is allowed to make the necessary arrangements and to take all kinds of measures about savings finance companies by setting certain limits and standard ratios, in order to identify, monitor, measure and evaluate risks. The savings finance companies are obliged to comply with these limits and ratios that may be set as per the law, and to notify the BRSA immediately in case they reach or exceed the thresholds of such limits and ratios.

The BRSA is authorized to request savings finance companies to take the necessary measures within a period it deems appropriate and subject to a plan it approves, and to postpone the allocation dates for savings finance companies, if:

(i) Total value of their liabilities exceeds the total value of their assets, or their assets are in danger of not meeting their liabilities by maturity, or the asset quality deteriorates in a way that may weaken the financial structure;

(ii) Their equity funds are not sufficient to carry out their activities safely, due to the deterioration of the balance between income and expenses;

(iii) Requirements related to internal control, accounting, information processing, reporting systems are not complied with or there is an issue preventing the audit;

(iv) Their equities drop to one third of their paid-in share capital;

(v) They fail to establish an adequate and effective risk management system for measuring and managing exposed risks;

(vi) They pose a risk to the financial system in terms of trust or stability;

(vii) They adopt decisions and carry out transactions and implementations in breach of the Law No. 6361 as well as the relevant regulations and decisions of the BRSA.

The Law No. 6361 obliges the savings finance companies to set aside five per thousand of the organization fees they collect, from their income accounts, for payments to be made to savings owners in case of liquidation. The BRSA is authorized to increase this ratio up to three times on company basis and to determine the procedures and principles for its implementation.

The Law No. 6361 regulates a specific liquidation process to be applied to savings finance companies. In this regard, the BRSA is authorized to revoke the operating licenses or decide to liquidate the savings finance companies, if certain financial risks are identified and the relevant company fails to take the measures as required by the BRSA, or if the measures are not deemed sufficient.

VI. Non-Compliance

Failure to comply with the provisions related to the savings finance agreements and savings finance activities are subject to certain administrative fines. Additionally, a penalty of imprisonment between six months and two years, and a judicial fine shall be imposed on those who violate the provisions related to the withdrawal from and termination of savings finance agreements.

The Law No. 6361 provides imprisonment between two and five years for the persons who engage in savings finance activities without being duly authorized, as well as a judicial fine. Security precautions (such as confiscation of property, confiscation of gains and revocation of licenses and permits) are imposed on legal entities that benefit from the crime. Also, the workplaces where unlicensed savings finance activities are carried out may be closed down temporarily or permanently (if unlicensed activities are continued despite the temporary closure).

The Law No. 6361 allows BRSA to apply to the courts to obtain a temporary injunction to suspend the activities and advertisements of businesses carrying out savings finance activities without being authorized. The injunction measures continue until they are lifted by the court's decision. In the event that these violations occur on the internet, the BRSA may decide to remove the content and/or block access to such websites. Additionally, Law No. 6361 also authorizes the BRSA to order the liquidation of savings finance companies operating without permission.

VII. Conclusion

In recent years, the savings finance model had been increasingly used in Turkey to purchase houses and vehicles, which grabbed the BRSA`s particular attention. Consequently, the Turkish regulators have introduced significant provisions related to the savings finance system in order to

supervise companies already engaging in these activities, in order to protect the rights and interests of the clients.

A Long-Awaited Development: Draft Regulation by the Turkish Banking Regulator on "Sharing of Confidential Information"

The Turkish Banking Regulation and Supervision Agency ("**BRSA**") published a draft regulation to clarify a long-awaited obligation under Banking Law No. 5411 ("**Banking Law**"). Draft Regulation on the Sharing of Confidential Information determines the scope, form, procedure and principles regarding the sharing and transferring of confidential bank and customer secrets ("**Draft Regulation**").[1] The Draft Regulation was published on the BRSA's website in February 2021 for public consultation and is yet to be published in the Official Gazette as of the date of this edition of Legal Insights Quarterly.

The Draft Regulation is based on Articles 73 and 93 of the Banking Law[2] and it is important as it expands and clarifies the application of the Article 73, which is critical in terms of transfer of customer information, which could also include personal data. Article 73 prohibits the sharing of such data with domestic or foreign third parties without an instruction or request received from the customer. The relevant article of the Banking Law explicitly states that this condition must be fulfilled even if an explicit consent is received from the customer within the scope of Law No. 6698 on Protection of Personal Data ("**DPL**").[3]

The Draft Regulation basically clarifies the scope of the confidentiality obligation, any exceptions, and the definition of "customer secret," along with determining the general principles and procedure regarding the sharing and transferring of confidential information, including the transfers which are exempted from the confidentiality obligation specified in the fourth paragraph of the Article 73 of the Banking Law. These clarifications will bring some guidance and also relief from uncertainty, for the banks and other institutions which are subject to the Banking Law.

The persons who have confidentiality obligation is defined in the Draft Regulation as: Those who, by virtue of their positions or in the course of performance of their duties, have access to bank or customer secrets are not permitted to disclose such confidential information to any person or entity other than the authorities explicitly authorized by law.[4] This obligation will also be applicable in cases where the information classified as a customer secret is obtained and learned through methods which are not automated nor part of any data recording system.

What constitutes a "customer secret"?

The Draft Regulation expands on the term "customer secret." It reiterates the Banking Law clause that, specific to banking activities, real and legal persons` data which comes into being after the customer - bank relationship is established, becomes

[1] Available at https://www.bddk.org.tr/ContentBddk/dokuman/mevzuat_1069.pdf (Last accessed on April 2, 2021)
[2] Available at https://www.tbb.org.tr/en/Content/Upload/Dokuman/1/Banking%20Law.pdf (Last accessed on April 2, 2021)
[3] Available at https://www.kvkk.gov.tr/Icerik/6649/Personal-Data-Protection-Law (Last accessed on April 2, 2021)
[4] Article 4 of the Draft Regulation

a customer secret. It further adds that, any information which may indicate that a real or legal person is a customer of the bank, is also considered to be a customer secret. However, even if a customer relationship has not been established, the confidentiality obligation will also be applicable in the event of receiving or learning the customer secrets held by another bank.

Moreover, per the Draft Regulation, a data that existed before the customer relationship was established with the bank, becomes a customer secret if it is processed in a way that identifies such person as a bank customer on its own or when processed together with the customer secret data that is created after a bank-customer relationship is built.

Exceptions to the confidentiality obligation

According to the Draft Regulation, sharing the information classified as a bank or customer secret with authorities which are explicitly authorized by laws, does not constitute a violation of the confidentiality obligation. The Draft Regulation further regulates the exceptions to the confidentiality obligation, providing that a confidentiality agreement is executed and limited to the specified purposes.

Although the Banking Law includes most of these exceptions to some degree, the Draft Regulation further clarifies and separates them more distinctly. Whereas the Banking Law merely states the circumstances under which customer secrets can be shared, the Draft Regulation additionally includes the persons with whom the customer secrets can be shared under such circumstances.

For instance, the Draft Regulation deems providing information and documents to service providers to be used in transactions related to the service provisions as an exception, provided that necessary administrative and technical measures are taken, while the Banking Law made it an exception to learn customer or bank secrets during the course of meeting information and document requests to use in transactions related to receiving of services. The altered provision in the Draft Regulation appears to be aimed at addressing the issues that service providers encounter, when obtaining the necessary customer data to perform their services for banks.

The exceptions also include providing information and documents to parent companies, including credit institutions and financial institutions residing abroad, having ten percent or more shares in the capitals of the banks, within the scope of preparation of consolidated financial statements, risk management and internal audits.

This exception also includes sharing data with the controlling shareholder, or a group company that such controlling shareholder/parent company nominates to provide services for the preparation of financial statements or consolidated risk management, provided that the sharing is limited to the purposes mentioned in the relevant exception clause, and subject to a executing an confidentiality agreement which also ensures that the other party shall take the necessary technical and administrative measures.

The Draft Regulation, however, mandates that a copy of such confidentiality agreement, the purposes of sharing, administrative and technical measures and title and country of residence for all third parties (including controlling partner/parent company) with whom the

customer secrets were shared, must be periodically reported to BRSA; comprising a period of six months; and all such sharing activities that directly identifies the customer or makes them identifiable must be readied for audit and such information shall be sent to BRSA when requested using a method that BRSA finds applicable.

General principles and applicability of the data protection legislation

Further to the foregoing, the Draft Regulation determines the general principles and procedures regarding the sharing and transferring of confidential information. In principle, customer and bank secrets can be transferred only for specified purposes and is limited to the data required by these purposes, in accordance with the principle of proportionality. The Draft Regulation further defines the minimum requirements that should be met for considering that the transfer of the information is in line with the principle of proportionality.

The Draft Regulation refers to the DPL, stating it is obligatory to comply with the general principles regulated under Article 4 of the DPL while sharing the confidential information of the real person customers. However, the Draft Regulation strictly prohibits the transfer of the personal data related to health and sexual life to domestic or foreign third parties, using a customer secret confidentiality exception as grounds, even if such personal data are considered as customer secrets.

Cross-border transfers

It appears that the Draft Regulation aims to provide some relief to necessary domestic and cross-border transfers, where communication with a foreign bank, payment service provider, payment or messaging system is necessary and it is a mandatory element of the transaction to share customer secrets (*e.g.,* fund transfers, letter of credit, letter of guarantee etc). For such transfers, the initiation of the transaction by the customer or a customer entering an order through distribution channels are considered as a duly made request or instruction under the relevant clause.

However, the Draft Regulation authorizes the Banking Regulation and Supervision Board ("**Board**") to prohibit the sharing of all kinds of confidential data comprising customer or bank secrets with third parties abroad, when deemed necessary, based on its evaluation of economic security.

Moreover, under the exceptions, the Draft Regulation emphasizes the application of the reciprocity principle with respect to sharing customer or bank secrets with a third party abroad. The Draft Regulation authorizes the Board to restrict, cease or prohibit the sharing of customer or bank secrets under exceptions, with those parties that are identified as not complying with the reciprocity principle.

Information sharing committees

Finally, in the context of the Draft Regulation, banks are obliged to establish an Information Sharing Committee, which will be responsible for (i) coordinating the sharing of the information classified as customer and bank secrets, by taking into account the principle of proportionality, (ii) evaluating the suitability of the requests to share data, and (iii) maintaining a record of these evaluations.

The Draft Regulation is currently open to public consultation as BRSA announced that comments on the Draft Regulation

might be emailed [5] to the authority, and therefore may undergo some changes before entering into force.

Turkish Central Bank Bans the Use of Crypto Assets in Payment Transactions

The Central Bank of the Republic of Turkey ("**Central Bank**") recently issued a new regulation which prohibits the use of crypto assets as payments for transactions. The Regulation Prohibiting the Use of Crypto Assets for Payments ("**Regulation**") [6] was published on the Official Gazette dated April 16, 2021 and becomes effective as of April 30, 2021.[7]

Crypto Asset is defined in the Regulation as, all intangible assets that are digitally created with distributed ledger or similar technology and distributed over digital networks; but, are neither characterised as fiduciary (fiat) money, bank money, or electronic currency, nor as a payment, security, or other capital market instrument.

The Regulation prohibits the direct and indirect use of crypto assets in (i) payments transactions, and (ii) the provision of payment services and electronic currency exports. The Regulation draws a broad context for payment transactions by also including those entities that provide payment services and export electronic currency. The Regulation prohibits these entities from providing or developing any service that pertains to such a business model.

The Regulation sets forth that these procedures and principles apply to all entities that carry out exports with electronic currency and provide payment services, as well as those entities that transfer funds to and from platforms or intermediaries of these platforms that buy, sell, deposit, transfer and export crypto assets.

In conclusion, while proscribing the use of crypto-assets in general terms within payment transactions, the Regulation defines the term "crypto-asset" broadly and characterizes the types of entities that may be affected by the Regulation accordingly.

Upon the publication of the Regulation, Central Bank also made an announcement on the matter, and stated that the use of crypto assets in payments might cause irreparable harm on the parties of such transactions and that allowing the use crypto assets might also undermine the confidence in the current payment methods and instruments. The officials of Central Bank further stated that the use of crypto assets in payments might pose various risks on the parties of the transaction, such as the risk that crypto assets might be used in illegal activities due to their anonymous structure, and extreme fluctuations in their market values.

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[5] duzenleme@bddk.org.tr

[6] The Regulation Prohibiting the Use of Crypto Assets for Payments is enacted per Article 4/3 (I) (f) (4) of Central Bank Law and Articles 12/3 and 18/6 of Law No. 6493 on Payment and Securities Settlement Systems, Payment Services and Electronic Money Institutions.

[7] https://www.resmigazete.gov.tr/eskiler/2021/04/20210416-4.htm (Last accessed on May 20 2021)

Capital Markets Law

The Changes Proposed by the Draft Communiqué to the Tender Offer Procedures in Turkey[8]

Article 26/1 of the Turkish Capital Markets Law ("**Law**") provides that the acquirer of shares entitling management or voting rights has to make tender offers to purchase the other shareholders' shares.

The Turkish Capital Markets Board's ("**Board**") Communiqué on Tender Offers No II-26.1 ("**Communiqué**"), governing tender offers, had previously been amended three times. This article will cover the latest changes proposed with the Draft Communiqué No. II-26.1.ç Amending the Communiqué on Tender Offers No. II-26.1 ("**Draft Communiqué**"), which mainly concerns the scope of mandatory offers, calculation of the amount and value of the shares and exceptions to mandatory offers.

I. Changes Proposed Under the Draft Communiqué

- Shareholders

The Draft Communiqué clarifies that the offerees will be the shareholders of the target company on the date of the disclosure to the public regarding acquisition of shares/management control.

- Calculation of Share Amounts

The calculation of the share amounts of the companies listed on the stock exchange will be as follows: deducting the amount of shares sold (if any) between the disclosure date and the starting date of the actual purchase offer period, from the end of day net balance, on a "last-in-first-out" basis. The calculation includes matched orders as well. The list of the shareholders and their respective share amounts shall be submitted to the target company by the Central Securities Depository of Turkey ("**MKK**"), 1 (one) business day before the actual offer period starting date.

- Information Form

The Draft Communiqué extends the liability arising from any incorrect, misleading, or incomplete information on the mandatory information form to the investment firm and the authorized person(s) who signed the mandatory information form.

- Additions to the Circumstances Which Do Not Trigger the Tender Offer Obligation and the Exceptions to Mandatory Offers

Pursuant to the Draft Communiqué, it will be compulsory for the person(s) acquiring the management control to announce when the acquisition falls under the non-triggering circumstances listed under Article 14 of the Communiqué, latest within the following 2 (two) business days. The proposed additions to the non-triggering circumstances are as follows:

- Where shares are acquired from the shareholders with managing control or from the shares newly issued by a capital increase, provided that the acquired voting rights are 50% or lower and the management control is being shared for the first time pursuant to a written agreement, in equal or lower ratios with those shareholders who had control prior to the share transfer,

[8] This article was also published on Mondaq on March 8, 2021. https://www.mondaq.com/turkey/shareholders/1044204/the-changes-proposed-by-the-draft-communiqu-to-the-tender-offer-procedures-in-turkey

- Where squeeze-out and sell-out rights arise simultaneously with the acquisition of management control,

- With regard to companies listed on the stock exchange, where the management control is changed due to the existing shareholders' acquisition of shares by way of a capital increase with no limitations on new share purchases,

- Where management control is obtained involuntarily, due to reasons such as freezing of the voting rights of other shareholders, reduction of the capital by way of share redemption, amendments to share privileges under the articles of association, or the company buying back its own shares.

The new exceptions to mandatory offers under the Draft Communiqué are the instances where control of management is transferred as a result of the inheritance of an estate or the legal matrimonial property regime between the spouses.

- The Mandatory Offer Price

The draft purchase price calculation methods remove ambiguity of the applicable methods under different scenarios, *i.e.,* when acquiring the management control of the target company directly or indirectly, or whether the target company is listed on the stock exchange and not. Moreover, in addition to its right to take measures or put restrictions on transactions which are deemed to be market manipulations pursuant to Articles 101 and 107 of the Law, the Board will also have the right to have the share prices re-calculated or to suspend the tender offer, if it concludes that there are on-going extraordinary developments affecting the economy or the industry.

- Brokerage Agreement

Under the Draft Communique, shares which are banned from transactions or subject to legal disputes or other third party claims cannot be excluded from the mandatory offer by way of incorporating a clause into the brokerage agreement. If the offer concerns such shares, their purchase prices will be reserved under a separate and interest-bearing account, until the ban is lifted, or the legal claim is resolved.

- Interests

The Draft Communiqué proposes to replace the TLREF (Turkish Lira Overnight Reference Rate) with TRLIBOR concerning Turkish lira. Furthermore, the bidder will be exempt from the increased purchase price by reference to TLREF, in cases where the actual tender offer process cannot commence on time through no fault on part of the bidder.

II. Conclusion

The enactment of the Draft Communiqué is predicted to be a good step forward for removing the ambiguities on procedures and principles governing mandatory tender offers which will benefit both the bidders and the offerees. With the clarification of the scope of the mandatory offers and the additional exception, the acquirers will have more confidence to engage in transactions. Moreover, the increased liabilities on investment firms and their authorized directors signing the information form will also ensure that the companies shall provide accurate information.

Disclosure Requirement: The Keystone of Creating a Fair and Reliable Market

1. Introduction

It is essential for investors to gain reliable information from publicly-held companies in order to make any sound investment decision. The disclosure requirement aims to provide accurate and up-to-date information to potential investors in order to create a fair market for them. The public disclosure of information pertaining to the publicly-held companies enables the investors to have equal access to the information provided, which they will be able to duly assess before making any investment decisions.

Along with the potential investors, the disclosure requirement is also crucial for the shareholders (current investors) of the publicly-held companies. Through the disclosed information, the shareholders will be able to acertain the current status and activities of publicly-held companies, evaluate their current investments and decide whether to withdraw from a partnership or not. It is therefore very important that pertinent and sufficient information is shared timely with current and potential shareholders. It is in this light that we will focus on the statutory disclosure requirements for publicly-held companies in Turkey.

2. Legal Framework

Public disclosure is mainly regulated under the Capital Market Law numbered 6362 ("**CML**"). According to Article 15 of the CML, information, events, and developments that may affect the value and price of capital market instruments or the investment decision of investors shall be disclosed to the public by issuers or the related parties.

In addition to the provisions of CML, the Communiqué on Disclosure of Material Events (II-15.1) ("**Communiqué No: II-15.1**") sets forth the principles regarding the disclosure requirements of publicly-held companies. Generally, the Communiqué No: II-15.1 requires disclosure with respect to the following situations and matters: (i) inside information, (ii) unusual price and quantity movements, (iii) verification of news or rumors, (iv) forward-looking statements, (v) transactions of persons having administrative responsibility, (vi) changes in capital structure and management control, (vii) share-based securities, (viii) general information, (ix) general assembly meetings and capital increases, and (x) issuers offering non-share securities to the public. The Capital Markets Board has also issued the Material Events Guide to bring some clarity to provisions of the Communiqué No: II-15.1, in practice.

3. What, When and How to Disclose

a. What to Disclose

The main purpose of the disclosure requirement is to create a reliable market and to provide accurate information to all actors of the market at the right time. In order to achieve this goal, the disclosed information must be accurate, full, objective, equally accessible and understandable by everyone. Under the CML, it is mandatory to disclose certain types of information. On the other hand, publicly-held companies can also disclose particular types of information (*e.g.*, sustainability report) on a voluntary basis.

Within the framework of the statutory disclosure requirement, "information" itself is divided into two categories: (i)

information which must be disclosed continually, and (ii) information which must be disclosed in the event of specific circumstance or changes (material events) determined by the applicable law. An example of information subject to continual disclosure is the disclosure of financials. According to the Communiqué on Principles of Financial Reporting in Capital Markets (II-14.1) ("**Communiqué No: II-14.1**"), annual financial statements, annual financial reports, annual activity reports prepared by the board of directors and audit reports are required to be disclosed annually on the website of publicly-held companies and on the Public Disclosure Platform ("**PDP**"). Interim reports are to be disclosed within a 3 (three) month period on the website of publicly held companies and on the PDP.

On the other hand, material events disclosures are required in case of certain specific circumstances as determined by Communiqué No: II-15.1. According to Communiqué No: II-15.1, material events are grouped mainly under 2 (two) separate categories: (i) inside information and (ii) ongoing information. Inside information is the non-public information, events, and developments that may affect the value or price of securities or the investment decisions of investors. Inside information should be related to a specific incident, which should be deemed significant by a reasonable investor when making an investment decision; should be non-public, provide an advantage to the user of this inside information, and should be able to affect the value or price of securities, or the investment decisions of investors in case of its public disclosure. Ongoing information is all information, events, and developments that fall outsidere the definition of inside information. In that regard, the ongoing information could be the changes in capital structure and management control, and any information related to the partnership and general assembly.

In addition to the inside information and ongoing information, according to Article 18 of the Communiqué No: II-15.1, following events should also be disclosed to public: (i) board of directors' resolutions relating to date, time, place and agenda of general assembly meeting; (ii) information on use of the right to attend general assembly meetings, and the total voting rights at the assembly; (iii) decisions taken by the board of directors or the general assembly about distribution of profits; (iv) list of attendees and minutes of the general assembly meetings; (v) if a general assembly meeting cannot be held, the reasons thereof and date of the next meeting, (vi) the resolution of the board of directors regarding the issuance of new shares, and use of preemptive rights on newly issued shares, and information about the exchange process in the case there arises the right of cancellation and exchange of issued shares due to a capital increase.

As per the Communiqué No: II-15.1, publicly-held companies are obliged to make disclosures in case of following events: (i) a change in the prices or trading volumes of securities which cannot be explained by ordinary and usual market conditions, (ii) news or rumors about issuers that diverge from the information which has previously been disclosed to public, or is disclosed to public for the first time through press and media or by other means of communication, and which may affect the value and price of securities or the investment decisions of investors, (iii) forward-looking statements, subject to the discretion of the publicly-held companies, and (iv) all transactions executed by the

persons having administrative responsibility, those persons closely related to them, and by the issuer's parent company with regard to shares representing the capital and other securities relying upon such shares.

If and when the direct or indirect shares or voting rights of a natural person or legal entity or of other natural persons or legal entities acting together with that natural person or legal entity in the capital of a publicly traded issuer reach or fall below 5%, 10%, 15%, 20%, 25%, 33%, 50%, 67% or 95%, the duty of disclosure is performed by the said persons; however, if and when the direct or indirect shares or voting rights of investment funds belonging to a founder in the capital of an issuer reach or fall below 5%, 10%, 15%, 20%, 25%, 33%, 50%, 67% or 95%, the duty of disclosure is performed by the said founder. Falling below or reaching these thresholds will trigger a public disclosure requirement.

Lastly, all relevant communiqués and regulations of the Capital Market Board should be checked and evaluated for each specific case considering that these could also stipulate further disclosure requirements.

b. When to Disclose

Publicly-held companies are obliged to fulfill their disclosure requirements within certain specified periods, as stipulated under the relevant communiqués of the Capital Market Board. On the other hand, specific updates or developments and material events, other than information regarding capital and management control, must be disclosed to the investors immediately. For example, in accordance with Article 9 of Communiqué No: II-15.1, if and when any information about material events, which also includes forward-looking statements, is intended to be disclosed to the public through press and media or by other means of communication, a disclosure is also to be made in PDP prior to or concurrently with the said disclosure, or if such information is inadvertently disclosed in a public meeting, the relevant PDP disclosure is made immediately.

Insider information and any changes to such information which was previously disclosed to the public, must also be publicly disclosed, whenever they occur or as soon as the issuers become aware of them.

c. How to Disclose

In Turkey, the PDP was established in order to create an online platform where publicly-held companies, along with the other entities with similar disclosure obligations, can disclose the information they wish to convey to the public. Disclosures thus made via PDP, a website operated by the Central Registry Agency, are to comply with the format, content, and terms of requirements determined by the relevant laws, Capital Market Board, and/or the PDP. For example, publicly-held companies must follow the format annexed under the Communiqué No: II-15.1 while disclosing a material event on the PDP, and must use an electronic signature to authenticate the information submitted.

4. Conclusion

To provide a secure, transparent, and reliable environment for operations in capital markets, it is important for shareholders and potential investors to be informed about certain issues pertaining to the publicly-held companies' activities. Publicly-held companies have statutory

requirements to dislose certain particular information via the PDP and on their websites, so that shareholders and potential investors are able to assess the disclosed information before taking the next step. By providing the mandatory information through PDP or on the publicly-held companies' websites, it is ensured that each shareholder and potential investor has equal access to the same data, and no actor will have an unfair advantage over others.

Competition Law / Antitrust Law

Newly Introduced Settlement Mechanism Under Turkish Competition Law[9]

In an effort to take one step further in harmonizing the Turkish Competition Law with the EU legislation, the Turkish Competition Authority ("***Authority***") has recently introduced the settlement mechanism under Article 43 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***") and the relevant Draft Regulation on Settlements ("***Draft Regulation***").[10]

(i) A General Insight into the Settlement Mechanism Provisions under Law No. 4054

The main points of the new settlement mechanism have been set out in Article 43 of Law No. 4054 through the amendment in June 2020. Based on this, the Turkish Competition Board ("***Board***") may initiate the settlement process, in view of the procedural efficiencies and any differences of opinion regarding the existence or scope of the violation.

As per Article 43, a settlement process can only be commenced after the initiation of the investigation and concluded before the official service of the investigation report, *i.e.*, the statement of objections, which identifies the competition law concerns. Once the parties officially confirm their intentions for settlement by a written application to the Authority, the Board sets a definitive time period for the undertakings to submit a settlement letter. Since the time period is definitive, the Board would not consider the submissions made after the conclusion of the period. Following the submissions of the undertakings, if the Board finds them acceptable and decides to settle, then the investigation will be closed with a final decision, including the finding of a violation and administrative monetary fine, which may be reduced by up to 25% as a result of the settlement procedure. The parties would also still be eligible for an additional reduction on the fine as per Article 17(6) of Law No. 5326 on Misdemeanors. However, the Board's decision on the administrative fine and the matters set out under the settlement decision are final, and therefore, cannot be appealed before a higher court. The Law No. 4054 authorizes the Board to issue secondary legislation, in the form of a regulation, to determine the other implementation procedures and fundamentals of the settlement process. As for the scope of applicability of the settlement mechanism, Law No. 4054 does not set any restriction in terms of the nature of the violation.

[9] This article was also published on Mondaq on April 8, 2021. (https://www.mondaq.com/turkey/cartels-monopolies/1055812/newly-introduced-settlement-mechanism-under-turkish-competition-law)

[10] For the original Turkish text of the draft Regulation and the related announcement, see https://www.rekabet.gov.tr/tr/Guncel/uzlasma-yonetmeligi-taslagi-kamuoyu-goru-2972668cf887eb11812c00505694b4c6

(ii) Application of the Settlement Mechanism under the Draft Regulation

The Competition Authority has recently announced the Draft Regulation and initiated a public consultation process that will be open to submissions until April 19, 2021. Although the current text is not final, it still provides an early guidance on what to expect with regard to the Competition Authority's implementation of the settlement mechanism.

Firstly, the Draft Regulation gives the Board the discretion to choose which cases to settle, based on procedural efficiencies and the following factors which may be taken into consideration. The factors set forth under Article 4 of the Draft Regulation are ***(i)*** the number of parties under investigation, ***(ii)*** whether a significant portion of the investigation parties applied for settlement, ***(iii)*** the scope of the violation and the nature of the evidence, and ***(iv)*** whether it is possible to come to a mutual agreement on the existence and scope of the violation. These factors seem to be loosely based on those listed under the European Union ("EU")`s Notice on Conduct of Settlement.[11]

Following the submission of the settlement letter, the Board could terminate the settlement procedure for some or all of the investigation parties, at any time until the settlement decision, if ***(i)*** it is understood that the anticipated procedural efficiencies will not be achieved, or it is not possible to come to a mutual agreement with the parties to the investigation on the existence and the scope of the violation, ***(ii)*** there is a risk of concealment of evidence, or ***(iii)*** there are risks with respect to the confidentiality of certain processes.

The structure of the settlement process is mapped out in the Draft Regulation with the following steps:

1. Start of the Process

The parties to the investigation will convey their request for a settlement to the Board, in writing. At this point, the Board may accept or refuse the settlement request and/or invite other parties. Aside from the parties themselves, the Authority may *ex officio* initiate the process as well and invite the investigation parties to settlement negotiations. At this point, the written request needs only to include a simple of declaration of the investigation party's wish to initiate a settlement procedure, without an acknowledgment of guilt.

2. Settlement Talks (Negotiations)

Similar to the European practice, based on the Draft Regulation, the settlement parties will have a negotiation phase with the Authority. After receiving the written request, if the Board accepts the settlement request (and, the investigation parties duly accept the Board`s invitation) the Authority will arrange the settlement negotiations as soon as possible. The fact that the negotiations have started does not denote any admission of guilt. Therefore, the parties may pull out of the negotiations until the settlement text is submitted.

If there are multiple settlement talks being run with different investigation parties, it is essential that these are conducted separately. As per Article 6 (5) of the Draft Regulation, the case handlers will provide

[11] Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases. ("***Notice on Conduct of Settlement***") (Consolidated text available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02008XC0702%2801%29-20150805)

the following information to the settlement parties, on the condition that the confidentiality of the investigation is not compromised.

- The content of the allegations against the settlement party,

- The nature, scope, and duration of the alleged violation,

- The redacted version of primary evidence which forms the basis of the alleged violation, in order to inform the settlement party of the content and scope allegations,

- The reduction rate from the monetary fine that could be applied if the process were to be concluded with a settlement,

- The range of the administrative monetary fine that can be rendered against the settlement party.

The settlement party will have the chance to express its views with regard to the foregoing, during the settlement talks. In order to put the parties' statements on record, the negotiation discussions will be documented in writing, under an official affidavit, to be agreed upon by the negotiation attendees.

3. Interim Settlement Decision

Upon the completion of the settlement negotiations with the Authority, the Board will render an interim decision. According to Article 7 of the Draft Regulation, the Board's interim decision would include ***(i)*** the nature, scope, and duration of the alleged violation, ***(ii)*** the maximum and the minimum administrative monetary fine ratio calculated as per the Regulation on Fines, ***(iii)*** the reduction rate to be applied on the fine as a result of the settlement, ***(iv)*** if applicable, the maximum and minimum reduction rate due to leniency, ***(v)*** the maximum and minimum administrative monetary fine ratio and amount to be rendered, ***(vi)*** a definitive time limit of no longer than 15 days for the submission of the settlement text, ***(vii)*** a declaration stating that the Board will not be bound by these facts if a settlement proposal is not submitted during the time period granted.

With respect to the calculation of fines and the reductions to be applied, Article 7 makes clear that if the maximum fine calculated under the Regulation on Fines exceeds %10 of the annual turnover of the undertaking in question, then this will be reduced to %10 of the turnover, and the settlement reduction will be applied on top of this reduced amount, and if there is also a pending leniency application, this would mean that the two fine reductions (due to settlement and leniency) will be combined and applied together.

Once the interim settlement decision is issued, the matters therein cannot be subject to further negotiation.

4. Settlement Letter Submission

After the interim decision is issued, if the settlement parties agree with the matters set forth therein, they will submit a settlement letter which would include ***(i)*** express declaration of admission as to the existence, scope, duration and consequences of the violation, and acceptance of the liabilities arising from the violation, ***(ii)*** the acceptance of the maximum monetary fine ratio and amount, as expressed in the interim settlement decision, ***(iii)*** a declaration that the settlement party was sufficiently informed and had the opportunity to express its own views and explanations with respect to the allegations, and ***(iv)*** *[Acceptance of]* the fact that the administrative monetary fine and the issues under the settlement text cannot be appealed by the settlement party.

The settlement submission is required to be signed by the authorized representative of the settlement party. This text is kept as internal Authority correspondence. The Draft Regulation is unclear on what happens if the settlement letter does not cover the criteria set by the interim decision, *i.e.,* whether the Board could reject the settlement application as a whole, or allow a second submission amended in order to mitigate the deficiencies of the first letter.

It is noteworthy that **once the investigation party submits the settlement letter, this letter cannot be withdrawn.** This process also shows resemblance to the EU settlement practices, although not completely alike. According to paragraph 20 of the Notice on Conduct of Settlement, the formal settlement request is to include ***(i)*** acknowledgment of the infringement, ***(ii)*** the maximum amount of fine the parties expect and would accept, ***(iii)*** confirmation regarding sufficient knowledge on the Commission's approach and that they have had a chance to be heard, ***(iv)*** confirmation on that they do not expect further investigation (*i.e.,* oral hearing) provided that the Commission accurately reflects the settlement submissions in the statement of objections and the decision, and ***(v)*** the parties agreement to receive the statement of objections and the final decision pursuant to Articles 7 and 23 of Regulation (EC) No 1/2003.

5. Settlement Decision

The investigation is finalized (with respect to the relevant settlement party) within 15 days after the settlement submission is entered into the Authority records. That means, the investigation will not continue if a final settlement decision is rendered. Therefore, similar to the EU practice, once the settlement decision is rendered, the settlement party will not be in a position to utilize its remaining defense rights.

The Authority will publish a reasoned decision regarding the settlement. As the Draft Regulation states, the settlement decision will comprise the usual elements of a Board decision as provided in Law No. 4054, most important of which are: the claims of the parties, the summary of legal and economic topics discussed, the opinion of the case handlers, the assessment of all evidence and defences, legal reasoning, conclusion, and dissenting opinions. It will also include the claims regarding the settling party, the nature, scope, and duration of the alleged violation; the evidence the violation was based on; and the settlement party`s admission to the violation and acceptance of the monetary fine.

If the investigation continues for other undertakings who did not settle, the reasoned settlement decision will not be served before the final decision of the investigation. In any case, this settlement decision would not be subject to appeal. The Draft Regulation does not provide any information whether the Authority would publish a short-form decision regarding the settlement so long as the investigation is ongoing for the parties that did not settle.

6. A Non-Settlement Decision

If the settlement party withdraws from the settlement process during negotiations, or the Authority decides to end the settlement process for any reason, the usual investigation process will continue. It is noteworthy that in such a case, the statements made by the parties during the negotiation phase are removed from the file and cannot be used as legal grounds for the final decision. Therefore, the

explanations and declarations submitted by the settlement party during the negotiations, are excluded from the case file and cannot be used against the said party in the investigation decision. This is similar to the EU practice under the Notice of Conduct of Settlement, where, in the event that the Commission decides to opt out of the settlement procedure "*(...) acknowledgments provided by the parties in the settlement submission will be disregarded by the Commission and could not be used in evidence against any of the parties to the proceedings.*"

7. Confidentiality

The settlement party cannot disclose the contents of the settlement talks nor the information it had access to during the settlement process, until a final decision is rendered with regards to the other investigation parties. If confidentiality is breached, the settlement decision may be withdrawn, and a new investigation initiated. This breach of confidentiality may be deemed as an aggravating factor in determination of the fine in the upcoming investigation.

(iii) Reduction Rate on the Administrative Monetary Fine Following a Settlement Decision

The Draft Regulation sheds light on a number of elements in terms of the administrative monetary fine that were unclear in Article 43 of Law No. 4054.

Firstly, Article 4 of the Draft Regulation provides that the Board has discretion to grant a settlement reduction of maximum 25%, meaning that the actual reduction of fine due to settlement may turn out to be less than 25%.

Prior to the settlement submission, the Board's interim decision will have informed the settlement party of ***(i)*** the maximum and the minimum administrative monetary fine ratios, calculated in accordance with the Regulation on Fines; ***(ii)*** the reduction rate as a result of the settlement; and ***(iii)*** the maximum and minimum administrative monetary fine ratio and amount to be rendered. Therefore, prior to submitting the irrevocable settlement letter, the settlement party will have an approximate idea of what the monetary fine would be, in terms of the maximum and minimum amounts to be indicated.

While there is no direct reference to the inclusion of aggravating and mitigating factors, since the fines are said to be calculated in accordance with the Regulation on Fines, this may also mean that the aggravating and mitigating factors therein will be taken into account during the calculation. Therefore, there is a hypothetical risk that, as a result of the admission of guilt, the minimum fine would be set at the highest percentage. According to the Regulation on Fines, fines are calculated by first determining the base fine, which ranges between 2% to 4% for cartels, and between 0.5% to 3% for other violations. This is a risk as the maximum amount of monetary fine specified by the interim decision may turn out be equal to the worst case scenario, including the highest base fine and the inclusion of all the aggravating factors. In such scenario, the settlement party has the choice to withdraw from the settlement process, and let the investigation process continue as usual, in which case the explanations made by the settlement party during the negotiation process will be excluded from the investigation.

It is noteworthy that the Draft Regulation sets a limit to the ratio of the maximum administrative monetary fine that could be

taken into account in terms of the interim decision, which is 10% of the annual turnover. Thus, if it turns out the maximum ratio would exceed this, it would be capped at 10% in any case, and this capped maximum amount would be taken into account for the possible settlement reduction. Therefore, this theoretical risk would not be more than 10%, minus the settlement reduction. According to Article 7 of the Draft Regulation, the amount of the reduction in the fine will also be notified to the settlement party with the interim decision.

(iv) Conclusion

Aside from some notable differences as to scope (limited to cartels for the EU as aside to "no scope restriction"), reduction ratio and appealability of the settlement decision, the Draft Regulation does correspond with the settlement mechanism in the EU, in general. In terms of timing, considering that the public consultation will conclude on April 19, 2021, it may be a while before the Draft Regulation text is finalized and enacted. Accordingly, changes may be made on the Draft Regulation that may substantially alter the proposed settlement process once it is enacted.

De Minimis Principle: The Newly Introduced Communiqué No. 2021/3 On Agreements, Concerted Practices and Acts and Conducts of Association of Undertakings That Do Not Appreciably Restrict the Competition

1. Introduction

Law No. 7246 on Amendments Concerning Law No. 4054 on the Protection of Competition has been published in the Official Gazette and entered into force on June 24, 2020 ("**Amendment Law**"). As discussed throughout this section, in addition to clarifying certain mechanisms in Law No. 4054 on Protection of Competition ("**Law No. 4054**"), the Amendment Law also introduced new substantive mechanisms and procedural changes, among others the *de minimis* principle for agreements, concerted practices, or decisions of association of undertakings, except hardcore violations.

In order to shed light on details on the process and procedure related to application of the newly introduced *de minimis* principle, the Authority published its Communiqué No. 2021/3 on the Agreements, Concerted Practices and Decision and Practices of Associations of Undertakings which Do Not Appreciably Restrict Competition (the "**De Minimis Communiqué**" or the "**Communiqué**") on March 16, 2021.

2. *De Minimis* Principle

The *de minimis* principle, previously an alien concept to Turkish competition law, was introduced to Law No. 4054 by the amendment of Article 41(2), with the aim to re-direct the public resources to more significant violations.

Before the introduction of the *de minimis* principle, Turkish practice was bound to decide on the matters that are not necessarily significant, but pushing the boundaries of the existing regulation. The Competition Board (the "***Board***") used Article 9(3) of Law No. 4054 in a way that was similar to a *de minimis* principle, [12]

[12] For instance, in the Board's *Raw Meatball* decision (October 10, 2019, 19-03/13-5), the Board decided to issue an opinion letter pursuant to Article 9(3) of Law No. 4054 although there was concrete evidence showing a price-fixing agreement, a mechanism for monitoring of that agreement, a penalty

whereby the Board had the authority to issue an opinion letter to undertakings to terminate the infringement, instead of bringing upon them the full force of the law. However, as Article 9(3) is not a *de minimis* principle, the implementation standards, as in when the Board would engage Article 9(3) on procedural efficiency grounds, were unclear. Thus, introduction of the *de minimis* principle, which enables the Board to prioritize cases, appears to be compatible with the strategy to set an efficient procedural process and contributes to legal certainty and consistency. Furthermore, this amendment also supports the Amendment Law's goal to bring the Law No. 4054 closer to the European Union *acquis*.

By virtue of this newly introduced principle, the Board can decide not to launch a full-fledged investigation for agreements, concerted practices and/or decisions of undertakings / association of undertakings which do not exceed certain market share thresholds. *De minimis* principle is applicable to agreements falling under Article 4, although not for 'hard core' violations including price fixing, territory or customer sharing and restriction of supply. In other words, cartels do not benefit from the *de minimis* principle.

The Amendment Law refers to "turnover" and "market share" thresholds for the *de minimis* exception but leaves the setting of the threshold to the Board. The limits of the safe harbor introduced by the Amendment Law are now clarified with the *De Minimis* Communiqué.

mechanism for breach and the effects of this agreement on the market.

3. *De Minimis* Communiqué

By virtue of the *De Minimis* Communiqué, undertakings will have legal certainty as to which actions fall within the scope of *de minimis* principle.

In fact, the *de minimis* principle introduced under Article 41(2) of Law No. 4054 and the relevant *De Minimis* Communiqué, is closely modeled with the European Commission's ("**Commission**") Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union ("**TFEU**") ("**De Minimis Notice**").

Article 1 of the *De Minimis* Communiqué sets out the main goal of the relevant legislation as "*to set out the procedures and principles regarding the criteria to be used to identify agreements, concerted practices and decisions and practices of associations of undertakings which do not significantly restrict competition in the market, so that they can be excluded from an investigation in accordance with Article 41(2) of Law No. 4054, with the exception of evident and hardcore violations*." In line with this description, the *De Minimis* Communiqué aims to direct the resources and time of the Authority towards the resolution of more critical competition law issues and to introduce a "procedural economy" tool for certain violations.

The "evident and hardcore" violations that are left out of the *De Minimis* Communiqué`s scope are defined as those agreements, decisions and/or concerted practices which also aim to directly or indirectly prevent, distort or restrict competition in the market for a good or service, or which have led or may lead to such effects. As a step further, the *De Minimis* Communiqué also exemplifies

these violations under two categories, *i.e.*, evident and hardcore violation in horizontal and vertical relations. The examples under the two respective categories are (i) "*price fixing among competing undertakings, allocation of customers, suppliers, regions or trade channels, restriction of supply amounts or imposing quotas, collusive bidding in tenders, sharing competitively sensitive information including future prices, output or sales amounts*" and (ii) "*fixing the flat or minimum sales prices of the buyer in a relationship of undertakings operating at different levels of a production or distribution chain.*"

The Communiqué sets certain market share thresholds to determine the agreements, concerted practices, or decisions of association of undertakings that will benefit from the *de minimis* principle. Accordingly, Article 5 of the *De Minimis* Communiqué stipulates the following categorization and thresholds to describe which agreements/decisions would be deemed not to appreciably restrict competition:

(i) If the agreement is signed between competing undertakings: cases where the total market share of the parties to the agreement does not exceed 10% in any of the relevant markets affected by the agreement for the agreements signed between competing undertakings

(ii) If the agreement is signed between non-competing undertakings: cases where the market share of each of the parties does not exceed 15% in any of the relevant markets affected by the agreement

(iii) If the agreement cannot be classified as between competing undertakings or between non-competing undertakings: In such a case, the provision for agreements signed between competing undertakings would be applicable.

(iv) Decisions of undertaking associations: Cases where the total share of the members of an association of undertakings does not exceed 10% in any of the relevant markets affected by the decision.

(v) If the agreement is signed between competing and non-competing undertakings, as well as decisions, which include vertical restrictions: If parallel networks created by similar vertical restrictions cover more than 50% of the relevant market, the thresholds set out under Article 5 of the Communiqué are applied as 5%.

In addition to the above, Article 5(5) of the Communiqué also states that if the market shares of the contracting parties or members of the association of undertakings are above the specified thresholds by a maximum of 2% during the agreement or the decision period for two consecutive calendar years, it will not be deemed to be appreciably restricting competition in the market.

4. *De Minimis* Notice

Parallel to Article 4 of Law No. 4054, Article 101 of the TFEU also prohibits those agreements and concerted practices which have the object or effect of preventing, restricting or distorting competition. As an auxiliary provision linked with Article 101 of TFEU, *De Minimis* Notice was introduced to set out market share thresholds under which it can be presumed that an agreement does not appreciably restrict competition. Thus, the *De Minimis* Notice provides legal certainty

for undertakings in determining which agreements can be presumed to be lawful as they do not create an appreciable effect on competition.

The Communiqué bears significant similarities to the EU Commission's *De Minimis* Notice, particularly on the framework of the newly introduced principle and the thresholds set under Article 5 of the Communiqué. Although the extent of the discretion granted to each authority differs, since the Board may still choose to initiate an investigation in cases that fall within the scope of the *De Minimis* Communiqué, where the *De Minimis* Notice sets out that the Commission will not institute proceedings in such cases; it is still observed that, similar to the *De Minimis* Notice, the Communiqué also provides rather a safe harbor for certain non-significant agreements.

The most significant similarity lies in the fact that the market share thresholds set in the Communiqué are closely modeled to the *De Minimis* Notice. Similar to the Communiqué, the *De Minimis* Notice also stipulates that agreements between actual or potential competitors with a combined market share of less than 10% and those between non-competitors whose market share does not exceed 15% can benefit from the *de minimis* "safe harbor." Further, the market share threshold of 10% that is applicable in cases where the agreement cannot be classified as between competing undertakings or between non-competing undertakings is also the same in both legislations. Similarly, both the *De Minimis* Notice and the Communiqué hold the view that agreements do not appreciably restrict competition if the relevant market share thresholds are not exceeded by more than 2 percentage points during two successive calendar years.

Besides, both the Communiqué and the *De Minimis* Notice exclude hardcore restrictions from their scope. The *De Minimis* Notice notes that it does not cover agreements which have as their object the prevention, restriction or distortion of competition within the internal market which is covered by the definition of evident and hardcore violations in the Communiqué.

Moreover, the method of calculation of the market shares in both legislations does not show significant difference. In both jurisdictions, the market shares are calculated based on the sales value in the market, or based on the purchase value where appropriate. If value data are not available, estimates based on other reliable market information, including volume data may be used.

5. Conclusion

All in all, it is observed that Turkish competition regime has adopted a similar approach to the European legislation, with regard to the newly introduced *de minimis* principle and ultimately brought the Turkish competition law practice closer to the European competition law practice. With the application of this principle, the Board may decide to forego a full-fledged investigation, or to terminate an on-going investigation if it decides that the relevant agreements, concerted practices or decisions do not appreciably restrict competition based on the *De Minimis Communiqué*. However, certain points, such as the necessity to file a request to benefit from the *de minimis* principle is yet to be determined with the Board's decisional practice.

The Board Approves the Transaction in the Port Services Market, But Not the Excessive Scope of the Non-Compete Obligation

The Turkish Competition Board ("**Board**") assessed the application for QTerminals W.L.L.'s ("**QTerminals**") acquisition of sole control over Ortadoğu Antalya Liman İşletmeleri A.Ş. ("**Ortadoğu Antalya**"), which is ultimately controlled by Global Yatırım Holding A.Ş. ("**Global Yatırım**") through Global Liman İşletmeleri A.Ş. ("**Global Liman**").[13]

The target Ortadoğu Antalya is active in the management and operation of the port in Antalya ("**Port Akdeniz**"). The acquirer QTerminals, on the other hand, was incorporated for the operation of Hamad Port in Qatar and is active since September 2017. QTerminals is solely controlled by Mwani, which is in turn ultimately controlled by the Ministry of Transportation and Communication of Qatar. After the completion of the transaction, Mwani will acquire the sole control over Port Akdeniz.

The Board first evaluated the parties' activities in Turkey and then globally, to determine the relevant product markets for the transaction. Port Akdeniz is a multi-purpose port with cruise and container terminals, as well as bulk cargo, general cargo and project cargo terminals. QTerminals and its ultimately controlling entity Mwani are terminal operators in Qatar providing container, general cargo, roll-on/roll-off, livestock and offshore supply services. The Board noted that QTerminals and Mwani do not have any activity in Turkey and defined the relevant product markets as "dry bulk, general cargo, container handling market" and "cruise port services" markets.[14]

As for the relevant geographical market, the Board followed the "catchment areas" criterion. The relevant criterion aims to cover the geographical area in which ports can compete, by taking into account all the ports and/or geographical areas that the relevant port provides services to or receives services from. The Board noted that it is important to take into account the hinterland of Port Akdeniz when determining the geographic market. Accordingly, separate geographical market definitions were made for each market: For the dry bulk, general cargo, container handling market, the geographical market was defined as the West Mediterranean; and for the cruise port services, it was Turkey.

The Board stated that QTerminals and Port Akdeniz's activities horizontally overlap in terms of port services. On the other hand, the Board concluded that there is no overlap in terms of their activities in Turkey since QTerminals and its ultimately controller are not active in Turkey. Accordingly, the Board found no affected market in Turkey and stated that the transaction would not significantly lessen the efficient competition in any relevant product market in Turkey.

On the other hand, the Board separately evaluated the content and the scope of the non-compete obligation imposed on the seller party Global Liman within the context of ancillary restraints. The Board stated that the share purchase agreement includes provisions on non-compete

[13] The Board's decision dated November 26,2020 and numbered 20-51/708-316.

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

obligations and no-poaching arrangements. The Board emphasized that the relevant non-compete obligation was brought against Global Liman in a way that would encompass Turkey in its entirety in terms of geographical area. The Board then referred to the evaluations set forth in the Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints ("***Guidelines***") and stated that (i) in order for a non-compete clause to be considered as ancillary restraint, its scope in terms of duration, subject, geographic area and persons must not exceed the reasonably necessary level, (ii) non-compete obligations not exceeding three years are generally deemed reasonable, (iii) non-compete obligations for more than three years may also be allowed depending on the specific dynamics of the case (such as the nature of the know-how and the level of customer loyalty) and (iv) non-compete obligations must be limited to the geographic areas where the seller is active prior to the transaction.[15]

Accordingly, the Board stated that the seller (Global Liman), in addition to the energy, real estate, and finance sectors, is active in port operations and manages Port Akdeniz, Bodrum Kruz Port and Kuşadası Ege Port. The Board stressed that the non-compete obligation imposed on Global Liman covers Turkey in general.

The Board then examined the suitability of the non-competition obligation in light of the framework drawn in the Guidelines within the context of ancillary restraints. By referring to the parties' explanations, the Board held that the relevant clause does not cover cruise port services. As for the other relevant markets (*i.e.*, dry bulk, general cargo, container handling market), the relevant agreement imposed a non-compete obligation on Global Liman for Turkey in general and for a period of eight years. The Board stated that Port Akdeniz's activities are limited to the Western Mediterranean region and thus the area affected by the transaction consists of the Western Mediterranean. Accordingly, the Board found that the relevant clause exceeds the geographic scope of the seller's activities and therefore is not reasonable. The Board also concluded that the parties could not sufficiently explain the necessity of the scope of this clause from economic and other perspectives.

Consequently, while approving the relevant transaction on the basis of lack of significant impediment of competition in the absence of affected markets in Turkey, the Board concluded that the non-compete obligation imposed on Global Liman can only be deemed an ancillary restraint on the condition that the scope of the relevant obligation is narrowed down to the Western Mediterranean region.

The Board's decision is important as it shows the Board's stance in terms of non-compete obligations brought in the context of concentrations, which are commonly seen in mergers and acquisitions. In this regard, the decision reveals that the Board is keen in evaluating ancillary restraints in terms of their scope and does not hesitate to deep dive into such clauses when it finds the scope of these clauses excessive.

[15] Guidelines provides that in exceptional circumstances such as when the seller has made investments to enter into new regions, restraints concerning these regions may also be accepted as necessary and reasonable.

Milestone Decisions for the Implementation of the 'Ne Bis In Idem' Principle in Turkish Competition Law

I. Introduction

The Turkish Competition Board's ("**Board**") and the High State Court's two very recent decisions carry great importance regarding the interpretation and application of the *ne bis in idem* principle under the Turkish competition law regime.

These new decisions have bolstered the High State Court's earlier approaches, where the *ne bis in idem* principle was applied to administrative sanctions, *e.g.,* disciplinary sanctions. [16] Indeed, before these new decisions, the High State Court had stated that *"The global 'ne bis in idem' principle is a principle that should also be applied to disciplinary law*."[17] With these new decisions, the Board and the High State Court did not only adopt a consistent approach for the implementation of the principle of *ne bis in idem* in cases concerning administrative sanctions, but also confirmed and paved the way for the implementation of this generally accepted legal principle in competition law cases.

Although the internationally accepted *ne bis in idem* principle first originated in criminal law, it is also pertinent to Turkish competition law. [18] This principle, by definition, provides that multiple lawsuits cannot be initiated, multiple judgments cannot be rendered, or multiple jeopardies cannot be imposed against the same person due to the same act. The principle applies to administrative sanctions that have the characteristics of criminal penalties,[19] and thus, to administrative monetary fines imposed by the Board, since they qualify as administrative sanctions of such nature.

II. The Board's Non-Fining Decision in Rakı Market[20]

In September 2011, the Turkish Competition Authority ("**Authority**") initiated a preliminary investigation against Mey İçki, a subsidiary of Diageo plc. in order to determine whether it had violated Article 6 of Law No. 4054 on Protection of Competition ("**Law No.4054**") in the Turkish market for rakı (traditional Turkish spirit). In November 2011, the Board found that there is no need for a full-fledged investigation. At this point, however, one competitor active in the same relevant product market initiated an appeal process against the Board's no-go decision. After a lengthy process, the High State Court decided to annul the Board's no-go decision, by a majority of votes in November 2018.

In May 2019, the Board initiated an investigation against Mey İçki in order to comply with High State Court's reversal decision. The investigation aimed at exploring the validity of allegations of abuse of dominance in the Turkish rakı market.

Following the investigation, the Board

[16] *See* for example, the decision of the 5th Chamber of High State Court (4.1.2018; 2016/20351 K. 2018/619).
[17] *Ibid*. For a parallel approach, *see* the decision of the 12th Chamber of the High State Court (12.10.2017; E. 2017/599 K. 2017/4803).
[18] Karabel, Gözde. Rekabet Hukukunda Ne Bis In Idem İlkesi *(Ne Bis In Idem Principle in Competition Law)*, 2015, Ankara s. 4. *See:* https://www.rekabet.gov.tr/Dosya/uzmanlik-tezleri/142-pdf#:~:text=Ne%20bis%20in%20idem%20ilkesi%2C%20ayn%C4%B1%20fiilden%20dolay%C4%B1%20ayn%C4%B1%20ki%C5%9Fi,veya%20ceza%20verilmemesini%20ifade%20etmektedir.(last accessed: April 15, 2021)
[19] *Ibid*.
[20] The Board's decision dated March 11, 2021 and numbered 21-13/173-74.

found with unanimous vote that (i) Mey İçki holds a dominant position in the rakı market, (ii) Mey İçki has violated Article 6 of Law No. 4054, and (iii) Mey İcki has been subjected to an administrative monetary fine for the consequences of the same strategy in the rakı market for the same period (2008-2011)[21] and that there is no room for further administrative monetary fine imposition, through its decision of March 11, 2021.

While the reasoned decision is not yet available, the Board acknowledged that the *ne bis in idem* principle should be applied. Therefore, the decision is a candidate to set a landmark precedent in terms of the interpretation of the *ne bis in idem* principle under Turkish competition law regime. The reasoned decision, which is expected to be published in the following months, is likely to provide insight on the direction the Turkish competition enforcement will be heading to in the coming years concerning the approach on the *ne bis in idem* principle.

III. The High State Court's Decisions Upholding the Board's Non-Fining Decision in Vodka and Gin Markets[22]

In April 2016, the Board launched an investigation against Mey İçki aiming to explore the validity of the allegations regarding Mey İçki`s abuse of dominance in the Turkish markets for vodka and gin.

After eighteen months of investigation, the Board found that (i) Mey İçki holds a dominant position in vodka and gin markets, (ii) Mey İçki has violated Article 6 of Law No. 4054 in the vodka and gin markets, and (iii) as Mey İçki has already received an administrative monetary fine for the consequences of the same strategy in the rakı (traditional Turkish spirit) market, [23] there is no room for another administrative monetary fine through its decision of October 25, 2017 ("**Non-Fining Vodka and Gin Decision**").[24]

Thus, the Board acknowledged once again that *ne bis in idem* principle should be taken into account in competition law cases. The decision was set to become a landmark precedent regarding the interpretation and application of the *ne bis in idem* principle under the Turkish competition law regime.

At that point, however, two competitors active in the same relevant product markets for vodka and gin initiated two separate appeals against the Board's Non-Fining Vodka and Gin Decision. Both lawsuits were dismissed as the first instance courts found that the non-fining part of the decision was lawful. Nevertheless, following these judgments, this time these competitors submitted their appeals to the regional administrative courts.

The regional administrative courts accepted the appeals of the plaintiffs, overturned the judgments of the first instance courts and annulled the Board's Non-Fining Vodka and Gin Decision. The regional administrative court noted that the vodka and gin markets are distinct from the rakı market and then went on to state that a violation that occurred in the vodka and gin markets should also be subject to a sanction. In this respect, the Non-Fining Vodka and Gin Decision was found to be unlawful "*considering that it is possible to*

[21] The Board's decision dated June 12, 2014 and numbered 14-21/410-178.
[22] The Decisions of the 13th Chamber of High State Court ((02.12.2020, E:2020/1941 K:2020/3508) and (02.12.2020, E:2020/1939 K:2020/3507)).
[23] The Board's decision dated February 16, 2017 and numbered 17-07/84-34.
[24] The Board's decision dated October 25, 2017 and numbered 17-34/537-228.

calculate the administrative monetary fine to be imposed, as a percentage of the annual gross revenue, set within the prescribed rate scale."[25]

Upon these decisions of the regional administrative court, this time, it was the Authority that initiated an appeal process before the High State Court. Eventually, the High State Court, which is the highest plenary judicial body for administrative cases, accepted the arguments on the necessity to apply the principle of *ne bis in idem.* The High State Court very recently reversed the regional administrative court's decisions, and accordingly, the non-fining part of the Board's Non-Fining Vodka and Gin Decision regained its validity. All in all, the administrative procedure before the courts against the Board`s Non-Fining Vodka and Gin Decision was accurately concluded in favor of the implementation of the principle of *ne bis in idem* in competition law.

The High State Court stated that the violations committed by undertakings with the same conduct within the scope of the execution of a single commercial policy, regardless of the markets involved, are not independent in terms of "the *market, nature* ***and*** *chronological period*" (emphasis added). They should therefore be evaluated as a single action and should not be penalized more than once.

Accordingly, the High State Court pointed out that the conducts that were found to constitute a violation in the vodka and gin markets (i) were the same as the conducts that were considered to constitute a violation in the rakı decision of 2017 and subjected to administrative fines, (ii) took place in the same period and (iii) were part of the whole general strategy of the undertaking. It therefore decided that (i) the Board`s Non-Fining Vodka and Gin Decision had been lawful and (ii) the regional administrative court decisions were devoid of legal accuracy.

By reversing the decisions of the regional administrative courts, the High State Court once again ensured that *ne bis in idem* principle would be consistently applied in Turkish competition law and emphasized that the Board should not render duplicate sanctions against the same undertakings for the same alleged conduct taking place at the same time period.

A No-Go Decision was Granted by the Turkish Competition Board to a "Joint to Sole Control" Transaction: TIL / Marport

The Turkish Competition Board ("the **Board**") has recently published its reasoned decision [26] pertaining to the acquisition of sole control of Marport Liman İşletmeleri Sanayi ve Ticaret Anonim Şirketi ("**Marport**") by Terminal Investment Limited Sàrl ("**TIL**").

The notified transaction concerned the acquisition of 50% of the shares and the sole control of Marport by TIL, from Arkas Group. At the time of the notification, Marport had been jointly controlled by TIL and Arkas Group and thus the transaction would result in a

[25] *See* Article 16(3) of the Law No. 4054: *"To those who commit behavior prohibited in Articles 4, 6 and 7 of this Law, an administrative fine shall be imposed up to ten percent of annual gross revenues of undertakings and associations of undertakings or members of such associations to be imposed a penalty, generated by the end of the financial year preceding the decision, or generated by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board."*

[26] The Board's decision dated August 13,2020 and numbered 20-37/523-231.

change of control, granting TIL sole control over Marport.

TIL was founded in 2000 and it invests in, develops and manages container terminals around the world. TIL is jointly controlled by Mediterranean Shipping Company ("**MSC**") and Global Infrastructure Partners ("**GIP**"). It holds indirect shareholdings in various Turkish port operating companies: TIL holds 70% of the shares in Asyaport Liman A.Ş. ("**Asyaport**") through its subsidiary Global Terminal Limited Sàrl ("**GTL**") and jointly controls Asyaport together with Ahmet Soyuer. TIL also holds %50 indirect shareholding in Assan Liman İşletmeleri A.Ş. ("**Assan**") which is active in the container and cargo handling services in Turkey.

Based on the parties' activities and its decisional practice, the Board defined the relevant product markets as "port management for container handling services," "port management for container handling services concerning transit traffic," and "port management for container handling services concerning hinterland traffic." In terms of the relevant geographic market, by considering the Economic Analysis Report of the Economic Analysis Department of the Authority and the characteristics of the ports and the sizes of the hinterlands of the ports along with the customer choices, the Board defined the relevant geographic market as "North-west Marmara" for the local cargo in the relevant product markets; however, the geographic market definition for the "port management for container handling services concerning hinterland traffic" was left open.

In its competitive assessment, upon evaluating the information provided by the parties to the notified transaction, the Board stated that the relevant transaction led to a horizontal overlap in the relevant product market for the "port management for container handling services" and a vertical overlap in the relevant product market for the "container line transportation." Furthermore, the Board pointed towards the fact that TIL operated in the relevant product market or in the sub segments of the relevant product market, and as TIL particularly had a significant market power in those markets, it was found likely that competitive concerns might arise pursuant to Article 7 of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**"). To that end, the Board highlighted that the transaction would be subject to evaluation under the "Significant Impediment to Effective Competition Test" (SIEC) within the framework of Article 7 of Law No. 4054.

In order to evaluate the pre- and post-transaction market structure, the Board assessed the relationship between TIL and MSC, and subsequently the relationship between Asyaport and TIL. It was noted that TIL was a company established mainly to secure the terminal capacity in the ports used by MSC. In this regard, MSC is currently the biggest customer of TIL. The same goes for Asyaport, as Asyaport renders almost entire of its services to MSC. In conjunction with this business relationship between MSC and TIL, the Board came to the conclusion that, even though Asyaport and TIL were two separate joint ventures, the two undertakings rendered their services almost entirely to MSC. In addition, even though TIL and Asyaport were two jointly controlled undertakings separate from MSC, the Board emphasized the trade relationship between TIL and MSC as well as the fact that none of GIP, which jointly

controlled TIL together with MSC, and the Soyuer family who jointly controlled Asyaport together with TIL had any activities in relevant product market. Thus, the Board stated, the influence of MSC on TIL and Asyaport was increased. Thereby, the Board evaluated that the activities of TIL and Asyaport were not independent from the activities of MSC, and that the activities of TIL and Asyaport formed a part of MSC's activities. More specifically, the Board assessed the sales figures of Marport's five major customers within the frame of transit and local loads between 2015 and 2019. Upon its substantial assessment, the Board inferred that in terms of local loads, MSC was the major customer of Marport. In a similar fashion, it was inferred that Asyaport almost entirely served to MSC regarding transit and local loads.

Furthermore, the Board evaluated the market shares of Marport and Asyaport for the port management for container handling services market for local loads in the North-west Marmara Region. The Board stated that, Marport was in the leading position as of 2019 in the relevant product market while Asyaport, on the other hand, was in the third place with the services it mainly provided to MSC. As the notified transaction concerned the inclusion of Marport to MSC's container handling activities carried out through Asyaport, the Board stated that it was evident that the market share of the MSC/TIL group in the port management for container handling services for local loads in the North-west Marmara Region would increase significantly. Furthermore, the Board stated that, despite the fact that Kumport was the second biggest undertaking operating in the relevant product market and an important competitor, the acquisition of sole control of Marport, the biggest player in the relevant product market by TIL, would further increase the concentration level in the product market in which the concentration level is significantly high at present, since MSC is currently operating Asyaport. In this regard, the Board stated that, considering that Marport and Kumport were the biggest players in the said product market, it could be inferred that the market is a narrow oligopolistic market which resembles a duopoly, noting that the other undertakings had relatively low market shares in the relevant product market.

Upon its Herfindahl-Hirschman Index ("**HHI**") based evaluation in the relevant product market, the Board concluded that the HHI level which had already been quite high pre-transaction (>2000), would further increase (would be approx. 4573 with an 1187 increase) post-transaction and the notified transaction would lead to an even narrower oligopolistic market. Thus, the notified transaction would create a further weakened price competition among the players as well as price increases.

Moreover, the Board evaluated the established capacity of the North-west Marmara Region ports combined, and Marport and Asyaport, separately. Upon its assessment, the Board stated that, bearing in mind that MSC was one of the biggest line operators on a global scale, when evaluated together with its significant presence in the area of liner shipping, the fact that MSC would operate a significant part of the container handling capacity of the North-west Marmara Region was likely to become a disadvantage for other line operators that use the ports in the Northern Marmara Region, and increased the costs for these line operators. The Board highlighted that this might especially be

the case when there was not enough capacity available for other line operators.

The Board also put emphasis on the fact that transit loads would be almost entirely handled in the North-west Marmara Region and thus as a result of the notified transaction, MSC would control 60% of the transit handling services therein. The Board stated that this would ultimately cause competitive concerns to arise.

Another point the Board evaluated is the planned railway line connecting Asyaport to the existing railway line. To that end, it considered the ongoing project that connects Asyaport to the existing railway line and stated that in the event that the relevant project is materialized, Asyaport would be capable of serving the North-west Marmara Region as well as Istanbul to a greater extent via the railway line extending into its port. Considering the above mentioned facts, the Board stated that Marport, located at the Ambarlı Port Facilities, handled approximately 90% of the total local load volume in the North-west Marmara Region. The Board also acknowledged that in the event that the relevant railway line project became operational, Asyaport would be a substitute to Marport. However, as TIL already holds 70% of the shares in Asyaport, and as the railway project will make Asyaport a substitute for Marport, the acquisition of Marport, the current biggest undertaking in the Ambarlı Port, by TIL would mean that the two ports that have been current competitors and/or future substitutes would be operated by the same undertaking, TIL.

In light of the foregoing, the Board ultimately concluded that the notified transaction would cause significant impediment of effective competition pursuant to Article 7 of Law No. 4054. Thus, the Board refused to grant approval to the relevant transaction based on the grounds that the notified transaction was likely to cause significant impediment of effective competition.

Although very rare, there have been other decisions in which the Board refused to grant clearance in similar product markets concerning port operation and marina services.

For example, in its *UN Ro-Ro* decision[27], the Board delved into substantive analysis regarding the significant barriers to entry and determined that if an undertaking aims to operate in the market for Ro-Ro transportation, it is required to possess at least three Ro-Ro ships. Also, the Board evaluated barriers to entry such as an undertaking which aims to enter into the market having to find an appropriate port for its operations with a suitable infrastructure and capacity for regular liner shipping. The Board also evaluated that the market has strong and established players, and this may cause an entry barrier too. To that end, the Board determined that high investment costs, the difficulty of finding alternative ports, the existing players' financial strength and brand recognition and previous unsuccessful entry attempts indicate that the barriers to entry into the market are high in this case. Consequently, the Board rejected the acquisition of Ulusoy Ro-Ro by UN Ro-Ro.

In its *Beta Marina Liman* decision,[28] the transaction concerned the acquisition of all shares of Beta Marina Liman and Pendik Turizm Marina by Setur. The Board ultimately refused to grant approval and rejected the transaction, as it reasoned that the transaction would lead Koç Holding,

[27] The Board's decision dated November 9, 2017 and numbered 17-36/595-259.
[28] The Board's decision dated July 9, 2015 and numbered 15-29/421-118.

which is the ultimate parent company of Setur, to become dominant in the İstanbul City Port Marina and impede effective competition in the relevant product market.

Finally, in its *Port Izmir I*[29] and *Port Izmir II* decisions,[30] the Board has taken into consideration (i) the overall capacity level, (ii) capacity usage levels and (iii) possible capacity increment in order to determine whether a transaction would lead to the creation or strengthening dominant position and thus restrict competition in the conventional cargo and container handling as well as cruise port services market. Ultimately, the Board decided to prohibit the transfer of the operating right of İzmir Port through its privatization by the Turkish State Railways to Alsancak Ortak Girişim Group (Izmir I) and Babcock and Brown-PSA-Akfen Ortak Girişim Group (Izmir II) as these transactions would lead to restriction of competition in the container handling services.

The New Communiqué on Commitments is Now in Force

I. Introduction

On March 16, 2021, the Turkish Competition Authority ("**Authority**") issued the Communiqué No. 2021/2 on Commitments for Preliminary Investigations and Investigations on Anticompetitive Agreements, Concerted Practices, Decisions and Abuse of Dominant Position ("**Communiqué**"), which was published in the Official Gazette on the same day.[31]

The legal basis of the Communiqué is Article 43 of the Law No. 4054 on the Protection of the Competition ("**Law No. 4054**"), which was amended by the Law No. 7246 Amending the Law on the Protection of Competition ("**Law No. 7246**") that entered into force on June 24, 2020. As per Article 43 of the Law No. 4054, relevant undertakings or associations of undertakings may offer commitments to eliminate the competition law concerns raised by the Authority, except in cases of explicit infringements and hard-core restrictions. The relevant article also provides that the rules and procedures of the commitment procedure will be established by a secondary legislation adopted by the Board. Before the Communiqué was published and the detailed legal framework was determined, the Board had already received its first requests to offer commitments and granted its decisions based on the amendment in the Law No. 4054.[32] However, the procedure to be followed in submitting the commitments had been unknown to the undertakings, which is now clarified by the Communiqué.

[29] The Board's decision dated June 5, 2007 and numbered 07-47/507-182

[30] The Board's decision dated June 20, 2007 and numbered 07-53/615-204.

[31] The announcement can be accessed at the following link: https://www.rekabet.gov.tr/tr/Guncel/taahhut-tebligi-resmi-gazete-de-yayimlan-ef03df362c86eb118136005056b1ce21 (Last accessed: April 13, 2021)

[32] *See* the Board's decision dated July 28, 2020, and numbered 20-36/485-212), the Board's decision dated November 5, 2020, and numbered 20-48/655-287), the Board's decision dated December 10, 2020 and numbered 20-53/746-334), the Board's decision dated December 10, 2020 and numbered 20-53/751-335) https://www.rekabet.gov.tr/tr/Guncel/turkiye-sigorta-reasurans-ve-emeklilik-s-30868ee30d54eb11812700505694b4c6 (Last accessed on April 13, 2021), https://www.rekabet.gov.tr/tr/Guncel/taahhut-muessesesi-uygulanmaya-devam-edi-8fee2335a854eb11812700505694b4c6 (Last accessed on April 13, 2021),

As per the authority vested by the aforementioned article, the Board had published a Draft Communiqué on Commitments Offered During Preliminary Investigations and Investigations on Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance ("**Draft Communiqué**") on the official website of the Authority on November 27, 2020 for public consultation. [33] As a result of the Authority's assessment of the opinions received within the scope of the public consultation, the Communiqué was published on March 16, 2021 by the Board with certain amendments.

Although the Communiqué is generally in parallel with the wording under the Draft Communiqué which was opened for public consultation, it essentially brings different provisions regarding (i) the definition and the scope of the explicit infringements and hard-core restrictions, (ii) the preliminary examination phase, (iii) substance of the commitment text and (iv) the procedure to be followed if the Authority requires the commitments be revised.

In this Article, we will briefly explain the procedural and substantial rules surrounding the commitment mechanism by also pointing out how the Communiqué presents differences vis-a-vis the Draft Communiqué.

[33] *See* G. Gürkaynak, E. Duru, B. B. Çömlekçi, A. S. Çoruk, *The Beginning of A New Age: The Commitment Mechanism Introduced In Turkish Competition Law Enforcement,* Mondaq, January 16, 2021 for a more detailed assessment on the Draft Communiqué. (https://www.mondaq.com/turkey/cartels-monopolies/1029428/the-beginning-of-a-new-age-the-commitment-mechanism-introduced-in-turkish-competition-law-enforcement#) (Last accessed: April 13, 2021)

II. Initiating the Commitment Discussions

Under Article 6/1 of the Draft Communiqué, it had been provided that the commitment negotiations will start immediately after the submission of the request to offer commitments to the Authority. Yet, the Communiqué sets forth a so-called preliminary examination phase, where the Board will decide whether to initiate commitment discussions, considering the type of the infringement and other issues it deems necessary.

In order for the Board to initiate the commitment discussions, (i) the investigated practices should not constitute an explicit infringement or breach a hard-core restriction, (the scope of which will be explained further below), and (ii) the submission must be made by the end of the investigation stage, the deadline of which seems somewhat unclear.

(i) Type of infringement

In line with Article 43 of the Law No. 4054, Article 2 of the Communiqué excludes the explicit infringements and breach of hard-core restrictions from the scope of the Communiqué and draws the framework of what is an explicit infringement or a hard-core restriction.

Article 4 of the Draft Communiqué had defined the explicit infringements and hard-core restrictions as *"price fixing, allocation of territories and customer and controlling the amount of supply among the competitors."*

The Communiqué expanded this definition, which now reads as follows: "*Price fixing, allocation of customers, suppliers, territories and trade channels, restriction of supply and imposing quotas, bid rigging, sharing competitively sensitive*

information such as price, production or sales volumes planned for the future between competitors."

Also, the Communiqué now foresees that the resale price maintenance practices may not benefit from the Communiqué.

The types of excluded infringements given under the Communiqué are conclusive as Article 43/3 of the Law No. 4054 explicitly vests the Authority with the power to determine the rules and procedures concerning the commitment mechanisms, and the Board determines the scope of the application conclusively. As such, if the investigated practices are considered to fall within the scope of the explicit infringement and hard-core restrictions listed under Article 4 of the Communiqué, the Board can reject the request to offer commitments and discontinue the commitment procedure.

(ii) Deadline to submit the commitments

According to Article 5/1 of the Communiqué, undertakings can submit their requests to propose commitments within three months following their receipt of the investigation notice. The requests submitted after the term has expired will not be taken into account. On a separate note, Provisional Article 1 provides that regarding cases for which the decision to initiate an investigation was taken more than three months before the Communiqué has entered into force (*i.e.,* before December 16, 2020), the time bar under Article 5/1 of the Communiqué will not be applicable. To clarify, the undertakings against which an investigation has started before December 16, 2020, will be able to offer commitments at any time during the investigation stage, *i.e.*, until the investigation stage is over, as stipulated by Article 43/3 of the Law No. 4054.

Having said this, the Law No. 4054 is not very clear as to when the investigation stage is deemed to be over. Indeed, Article 45/1 of the Law No. 4054 states that "*The report prepared at the end of the investigation stage is notified to all members of the Board and the parties concerned.*" implying that the investigation stage ends with the receipt of the investigation report by the parties concerned and the Board.

On the other hand, Article 46/2 of the Law No. 4054 states that "*Hearing is held within at least 30 days and at most 60 days from the end of the investigation stage.*" and Article 48/2 sets forth that "*In cases where a hearing is not requested by the parties, and the Board does not decide to hold a hearing on its own initiative, the final decision is made within 30 days following the end of the investigation stage, pursuant to the examination to be performed on the file.*" Since, in practice, the oral hearings are held after the third written defence is submitted to the Authority (*i.e.*, long after the investigation report is served), these provisions imply that the investigation stage ends with the submission of the third written defence.

Those said, in *Arslan Nakliyat,* [34] which was published in November 2020 as the Board's very first reasoned decision regarding the commitment mechanism, the Board clearly notes that "(…) *the investigation stage is concluded with the third written defences before the hearing."* In *Arslan Nakliyat*, the Board also refers to its two decisions, namely the *Co-Re-Na* decision[35] and the *Türk Philips* decision,[36]

[34] The Board's decision dated July 28, 2020 and numbered 20-36/485-212.
[35] The Board's decision dated September 19, 2018 and numbered 18-33/557-275.
[36] The Board's decision dated December 26, 2019 and numbered 19-46/790-344.

which express that the investigation ended on the date that the third written defence was entered into the records of the Board.

In light of the Board's precedents and the relevant provisions, it is understood that the commitments may be submitted until the submission of the third written defence, in cases where the decision to initiate an investigation was taken by the Board before December 16, 2020 as per Article 5/1 of the Communiqué.

III. Procedure for the Commitment Mechanism

Along with its March 16, 2021 announcement on the Communiqué`s entry into force, the Board also published a chart illustrating the commitment process.[37]

The process starts with the Parties' submission of the written request to offer commitments (Article 5). After the submission of the written request the Board will either decide to initiate commitment discussions or reject the request, by considering the excluded infringement types and other issues it deems necessary (Article 6/1). If the Board rejects the request, the commitment procedure will be concluded (Article 6/1).

After the commitment procedure is initiated, if the parties decide to submit commitments, they must send a copy of the commitment text along with the non-confidential version, and a summary thereof to the Authority (Article 7/1). The period for the submission of a commitment will be determined by the Authority during the commitment discussions, depending on the stage that the examination has progressed to, and the scope of the commitment (Article 7/2).

Following that, the Board will evaluate whether the commitment eliminates the competition problems and other issues deemed necessary, by assessing the commitment letter in substance (Article 10/1). In case the Board finds the commitment appropriate, it may either (i) render a commitment decision which would be binding for the party concerned or (ii) request the opinions of third parties (Article 10/2). Should the Board render a commitment decision binding, the Board will also decide not to initiate an investigation, or as the case may be, discontinue the ongoing investigation (Article 10/2).

However, if after the first round of the commitment discussions or after evaluating the opinions of the third parties, the Board does not find the commitment acceptable, then the Board may decide to allow the Parties to make amendments to the commitment text. The Parties can amend the commitment text only once (Article 10/3 and 11/3).

Unlike the Draft Communiqué, Article 12/1 of the Communiqué provides that the commitment discussions will continue if the parties want to make amendments to the commitment as per Articles 10 and 11 of the Communiqué. The Draft Communiqué had regulated that the Parties would submit the amended commitment and the Board would decide either to render the commitment binding for the party concerned and not to initiate an investigation or, to discontinue the commitment procedure without re-initiating the commitment discussion process.

[37] *See* https://www.rekabet.gov.tr/Dosya/geneldosya/taahhut-sureci-semasi-pdf (Last accessed on April 8, 2021)

Following the commitment discussions, if the Board finds the amended commitment text to be acceptable, it will end the procedure and grant its final decision (Article 12/3 and 13/3). Since the Article 13/3 of the Communiqué provides that the Board will render a reasoned and final decision regarding the conclusion of the commitment procedure, this decision can be subject to the judicial review as per the Article 55 of the Law No. 4054.

IV. The Substance of the Commitment Letter

Article 8 and 9 of the Communiqué provides details on the main points that must be incorporated within the commitment text. According to Article 8 of the Communiqué, the commitment text must include (i) the competition problems to be resolved by the commitment, (ii) what the commitment is (iii) the start date, duration and method of implementation of the commitment (iv) any time periods to be complied with during the implementation, (v) under what conditions such periods can be expanded, (vi) the effect of the commitment to the market, (vii) how the commitment will meet the competition concern, (viii) how their compliance with the commitment can be monitored and other issues deemed necessary.

Moreover Article 9 states that behavioural or structural commitments can be offered individually or jointly. The offered commitment must be (i) proportional with respect to the competition concerns, (ii) adequate to address them, (iii) executable in the short term, and (iv) conducive to efficient implementation.

On a separate note, the provision under Article 9/3 of the Draft Communiqué stating that *"For the effective applicability, commitments which do not require monitoring are preferred."* is entirely done away with in the Communiqué. We assess that the removal of the said provision from the Draft Communiqué is quite appropriate as it results in a legal uncertainty on whether the commitments that will need to be monitored will be accepted by the Board.

V. Conclusion

Although the Communiqué is quite similar to the Draft Communiqué in essence, it still diverges from the Draft Communiqué in certain aspects. As such, the Communiqué brings a conclusive list of excluded types of infringement. The Communiqué also sets forth a so-called preliminary examination stage upon the submission of the request to offer commitment, where the request will be assessed in terms of type of infringement and other necessary issues. The Communiqué also differs from the Draft Communiqué with respect to the process after the amendment of the commitment text, by stating that the commitment discussions will continue.

Employment Law

New Regulation on Remote Working

I. Introduction

As the effects of COVID-19 surge, telecommuting/remote working has been dramatically increasing around the globe in almost all sectors since the beginning of the pandemic. In response to this, Turkish Ministry of Family, Labor and Social Services has introduced the Regulation on Remote Working, which was published in the Official Gazette dated March 10, 2021 and numbered 31419 ("**Regulation**").

The Regulation sheds light on miscellaneous issues concerning

telecommuting, such as conditions for converting the employment agreement in place into a telecommuting agreement, the type of works incompatible with working remotely, and precautions regarding occupational health and safety.

II. Provisions of the Regulation

(i) Form and Content

According to Article 5 of the Regulation, employment agreements with respect to telecommuting shall be made in writing and include the following:

a. Description of the work;

b. The way that work is conducted;

c. Time and place of work;

d. Remuneration and matters related to the payment of remuneration;

e. Work materials and equipment provided by the employer and obligations related to safeguarding of these;

f. Provisions on communications between the employer and the employee; and

g. General and special work conditions.

(ii) Procurement and Usage of Equipment and Work Materials

As per Article 7 of the Regulation, unless decided otherwise in the employment agreement, equipment and work materials, which are necessary for the telecommuting employee to produce goods and services, shall be procured by the employer in principle. If work materials are procured by the employer, a list of work materials which include the monetary value of these materials on the date they were handed to the employee shall be provided by the employer to the employee. The employer shall keep a signed copy of the said list in the employee`s personnel file. In case the list of work materials is already included in the employment agreement, or issued as an annex to it, there will be no need to issue an additional written list of work materials.

(iii) Determining the Working Hours

With regard to working hours of the telecommuting employee, Article 9 of the Regulation provides that the time period and duration of telecommuting shall be set out in the employment agreement. Parties may alter the working hours, provided that limitations prescribed in the legislation are complied with. Overtime work may be done upon the written request of the employer and acceptance of the employee, and in compliance with the legislation.

(iv) Data Protection

Rules concerning the protection of data are stated in the Article 11 of the Regulation. Accordingly;

a. The employer shall inform the telecommuting employee of the company rules on the protection of data concerning the workplace and the work being done, the sharing of such data, as well as the relevant legislation and take the necessary precautions in order to protect such data.

b. The employer shall set out the definition and scope of the data to be protected, within the agreement.

c. The telecommuting employee must comply with the firm rules determined by the employer in order to protect the data.

(v) Precautions Regarding Occupational Health and Safety

Pursuant to Article 12 of the Regulation, the employer is under obligation to, taking the nature of the work conducted by telecommuting employee into consideration, inform the telecommuting employee of the precautions regarding the occupational health and safety, provide the employee with the necessary training, supervise their wellbeing and take the necessary occupational safety precautions with respect to the equipment provided.

(vi) Works Incompatible with Telecommuting

Article 13 of the Regulation prescribes two exceptions with respect to telecommuting:

a. Telecommuting shall not be allowed in works that involve working with hazardous chemicals and radioactive substances, processing these substances or working with the wastes of these substances, working processes that have a risk of exposure to biological factors;

b. Public institutions and organizations shall determine which of their units, projects, facilities or procured services that have strategic importance in terms of national security, and therefore would not be suitable for telecommuting.

(vii) Transition to Telecommuting

The Regulation also sets forth the rules and procedures regarding the transition from working at the workplace to telecommuting, and vice versa. As per Article 14(2) of the Regulation, a request for a transition to telecommuting or return to working at the workplace by the employee is subject to following:

a. The request shall be made in writing.

b. The request shall be considered by the employer in accordance with the established procedures of the enterprise.

c. While considering the request, the employer shall take into account the compatibility of nature of the work and employee with telecommuting as well as other criteria determined by the employer.

Article 14(3) provides that, in principle, the result of the employer`s consideration with respect to the request shall be notified to the employee within thirty days, in accordance with the procedure that the employee followed while making the request. It is noteworthy that requests for return to working at workplace shall be considered by the employer preemptively as per Article 14(5). In the event that the request is accepted, agreement shall be made in accordance with the Article 5 of the Regulation.

According to the Article 14(6), in cases where telecommuting will be exercised in whole or a part of the workplace due to a force majeur event stated in the legislation, it will not be necessary to seek the employee`s request or approval in order to transition to telecommuting.

III. Conclusion

With the provisions introduced in the Regulation, employers and employees will now be able to benefit from a specific legal framework regarding telecommuting. In addition, given that telecommuting/remote working is becoming a more conventional method for many businesses rather than the exception, it is expected that the judiciary will be able to resolve any relevant dispute

in a faster and clearer manner by virtue of the Regulation.

Litigation

The Court of Cassation Assembly of Civil Chambers Decision Introduces a "Presumption" of "Gross Fault" by Seller in Hidden Defects[38]

The Court of Cassation General Assembly reviewed a case where a consumer had requested reimbursement for his television that turned out to have a defective motherboard due to a manufacturing defect. The seller basically relied on Article 13 of the Law on Protection of Consumer No. 4077 and pleaded that no such claim can be brought in cases where the warranty period (which is two years as of purchase) has passed and argued that the claim is time-barred.

The first instance court decided that there is a hidden defect in this case, and thus no time-bar is applicable. Accordingly, the court ruled for the refund of the purchase price to the consumer. The relevant chamber of the Court of Cassation however reversed this decision on the grounds that it is not proven by the consumer that the defect in question is concealed from the consumer with gross fault or deceit (*the law dictates that the burden of proof in that regard rests on consumer*). However, the first instance court insisted on its initial decision and therefore the case was brought before the Court of Cassation Assembly.

The Court of Cassation Assembly, in its decision about the dispute, acknowledged that every product has a lifetime but also highlights that, in today's technology the manufacturers are expected to provide the kind of hardware that endure during the customary lifetime when manufacturing the essential parts of a durable consumer product. The Court of Cassation Assembly added that consumers act in reliance with such reasonable expectation and trust; otherwise, the consumers would not buy a product if they were aware that no liability can be attributed to the manufacturer of that product if it becomes non-functional due to a defect after the warranty expired.

After noting the above, the Court of Cassation Assembly reiterated the determination made in the proceedings about the defect in the television being a "hidden defect" that manifested itself with time, without any cause related to the consumer`s use. Based on this, the Court of Cassation Assembly concluded that under such circumstances it must be accepted that the manufacturing defect is hidden from the consumer with "gross fault."

Such conclusion of the Court of Cassation Assembly is quite significant because the relevant Chamber of the Court of Cassation had concluded that there is no evidence attesting that the defect in question was concealed from the consumer with gross fault or deceit. We see that the Court of Cassation Assembly might have considered the challenge in proving such gross fault or deceit of the manufacturer and accordingly adopted a pro-consumer approach in a case where at least it is proven that there is a hidden manufacturing defect and there is no consumer error that contributed to the malfunction. The fact that the product in question had become completely non-functional might have also steered the Court of Cassation Assembly into protecting the consumer in such a case.

[38] Court of Cassation Assembly of Civil Chambers, 2017/650 E., 2020/301 K. 12.03.2020

All in all, what can be derived from this decision of the Court of Cassation Assembly is that in cases where there is a high-end technological product that no longer functions, solely because of a manufacturing defect that the consumer cannot possibly detect (*i.e.*, the defect is hidden) and no fault can be attributed to the consumer in occurrence of the malfunction, it can be "presumed" that the manufacturing defect is concealed from the consumer with "gross fault." This decision, in a way, shifts the burden to the manufacturer side in such circumstances, to rebut the presumption.

Data Protection Law

Recent Decisions of the Turkish Data Protection Board

The Turkish Data Protection Board ("**Board**") has recently published quite a number of decisions. Among those, some are important for certain matters of public interest and may constitute precedents for future cases. We have summarized such decisions below, along with explanations as to their significance.

Decision Regarding Factors to Be Considered In Determining the Parties' Roles as Data Processor and Data Controller, and Allocation of the Duty to Inform[39]

This decision is significant because it sets out illustrative criteria for allocating and identifying the roles of data processor and data controller in any given data processing activity. In the decision, the Board clarified that while the duty to inform rests with the data controller as a general rule, the data controller may authorize third parties to fulfill this duty, and as such, the data processor may be authorized to fulfill the data controller's duty to inform. The Board stated that the parties can make an agreement to circumscribe the extent of such duty, and allocate obligations thereunder.

The Board noted however if such authorization is given by the data controller to the data processor, the data processor's authority is limited to the authority given by the data controller. The Board also held that data controller will be held jointly liable with such party in case of any breach.

Those who carry out and determine (most of) the following criteria will be considered as data controllers:

-The collection of personal data and the collection method,

-The types of personal data to be collected,

-Which individuals' personal data will be collected,

-Deciding on the processing of personal data and who will process it,

-Deciding on the basic elements of the processing (which personal data will be collected, for what purposes the collected data will be used and how it will be processed, how long the data will be retained, what the data retention policy will be, who will be authorized to access the data, who will be the recipients, etc. can be shown as examples)

-Whether the collected data will be shared, and if so, with whom,

-Being able to make decisions at a high level in the processing of personal data without taking any orders or instructions,

-Dealing directly with the data subjects,

[39] *See* https://kvkk.gov.tr/Icerik/6874/2020-71 (Last accessed on April 7, 2021)

-Appointment of a data processor to carry out data processing on their behalf,

-Taking advantage of the processing activity.

Data controller may appoint a data processor who is authorized with the following through a data processing agreement:

-Which IT systems or other methods will be used for collection of personal data,

-Which method will be used to retain the personal data,

-Details of the security measures that can be implemented for protection of personal data,

-Which method will be used to transfer the data,

-Method for correctly operating personal data retention periods,

-Methods for deletion, destruction, or anonymization of personal data.

Those who carry out most of the following criteria are to be considered as data processors:

-Taking instructions from another,

-Not having the authority to make decisions in collection of personal data from individuals,

-Not having the authority to decide how the data can be disclosed or who can access such data,

-Not having the authority to decide on the data retention process,

-Not having liability for the consequences of data processing,

-Whether there are any decision-making mechanisms regarding data processing within the scope of authorities granted by the data controller under legally binding agreements, such as those executed with a data controller.

Decision Regarding the Right to be Forgotten[40]

The complainant`s case referred to a news item regarding an alleged misconduct in the recruitment of their relative to the University where the complainant was employed. This particular recruitment comprising an exam and interview process had been the subject of an internal investigation where no irregularity was discovered. Thereafter, the complainant requested that the news regarding the investigation be removed from the relevant search engine. The complaint came before the Data Protection Board upon the relevant search engine deciding not to take action.

In its decision, which is one of the few Board decisions regarding the right to be forgotten, the Board analyzed the complainant's claims in accordance with the right to be forgotten standards set forth in its decision with number 2020/481,[41] and held that the search engine's decision of not taking action was in accordance with Law No. 6698 on Personal Data Protection ("**DPL**").

In its assessment the Board noted that, (i) the information provided by the complainant regarding the foregoing incident were accurate and that the complainant was still working at the same

[40] *See* https://kvkk.gov.tr/Icerik/6871/2020-927 (Last accessed on April 7, 2021)
[41] *See* https://www.kvkk.gov.tr/Icerik/6776/2020-481 (Last accessed on April 7, 2021)

public university, (ii) the news contents did not include special categories of personal data, (iii) the incidents dated back to 2020 therefore are considered current, (iv) the contents did not pose any risk for the complainant and could be considered within the scope of journalism activities, (v) while conceivably the contents could cause prejudice against the complainant, that is not provable, (vi) there is no legal obligation in publishing of the contents, (vii) the individuals themselves did not publish the contents, and (viii) the contents do not relate to a criminal offence. In light of the foregoing, the Board concluded that the search engine's decision not to remove the contents was in accordance with the relevant criteria published by the Board's decision numbered 2020/481, and that there was no need to take action regarding the complaint, in terms of the DPL.

Decision on Making Explicit Consent a Precondition for Providing Services

In this case, the complainant argued that setting explicit consent as a precondition for the renewal of his healthcare insurance policy was in violation of the DPL.

The Board rejected the complainant's claims. In its decision, the Board held that renewal of a healthcare insurance policy consisted of processing of special categories of data, therefore explicit consent was required per Article 6/3 of the DPL. The decision is noteworthy, because although explicit consent cannot be asked as a precondition for service, this decision may indicate that, where the health data (or any special categories of data) is mandatory to provide the relevant service, explicit consent may be requested from the data subject, as a precondition.

Decision Regarding Collection of Employees' Fingerprints for Supervising Employee Shifts[42]

The Board conducted an investigation upon a civil servant's complaint regarding a public institution's implementation of fingerprinting method for supervising employee shifts. The public institution, in its defense, stated that fingerprints became mere templates and were neither matched with any other identified data, nor copied elsewhere.

In the decision, the Board held in favor of the civil servant, and ruled that the fingerprinting method was in violation of the general principles set forth under Article 4 of the DPL, namely, the requirement that the personal data collected be proportional and related to the purpose for which it is collected. The Board noted that the availability and feasibility of less invasive methods for accomplishing the end result *i.e.,* tracking the employee shifts, was a deciding factor in considering whether the proportionality requirement was met.

Decision Regarding Destruction of Special Categories of Personal Data[43]

The complainant claimed that negligent deterioration and subsequent destruction of blood, serum and tissue samples obtained for scientific research constitutes a violation of obligations regarding data security in accordance with the Article 12 of the DPL.

[42] *See* https://kvkk.gov.tr/Icerik/6872/2020-915 (Last accessed on April 7, 2021)
[43] *See* https://www.kvkk.gov.tr/Icerik/6876/2019-316 (Last accessed on April 7, 2021)

In its defense, the data controller hospital argued that the samples had deteriorated and became unusable, and they had been destructed according to the procedures in place.

The Board decided that the collection of blood, serum and tissue samples with barcodes make it possible to match these samples with the patients, which constitutes a personal data processing activity. However, the Board further stated that, this processing activity falls outside of the scope of DPL as is pursued on a scientific purpose, which is regulated under the Article 28 of DPL as one of the exceptions.

Decision Regarding the Transfer of Data in Publicly Available Trade Registry Records[44]

The Board discussed the issue of whether the sharing of personal data with government entities and agencies upon their request is considered "processing of personal data" as per the DPL.

The Board held that since trade registry records contain shareholders` or merchants' name, addresses or other relevant information, the registration activity carried out by the registry is a personal data processing activity. Therefore, the Board reasoned that even though everyone can access and examine the trade registry, processing of the said personal data is not exempted from the data protection legislation. The Board also noted that sharing of personal data held by the trade registries with public institutions and organizations must be carried out in compliance the Article 8 of DPL.

Furthermore, the Board cited Article 44 of the Population Services Law No. 5490, ("**PSL**") and underlined that since PSL is a specific regulation with respect to the sharing of these data, requesting the identity and address data from the trade registries (instead of the Population and Citizenship Department) would be in violation of the PSL. It appears that by identity and address data, the Board refers to full identity (including ID number) and full address (not limited to city and county) information since the Board also notes that the Trade Registry Gazette masks the ID numbers and redacts the residency information of real persons by only including city and county.

In conclusion, the Board stated that, (i) the registration activity carried out by the trade registry is a personal data processing activity, (ii) public accessibility of trade registry records will not make the personal data processing exempt from DPL, (iii) sharing of any data from the registry to public institutions and organizations must be carried out within the scope of Article 8 of DPL regarding transfer of personal data, (iv) the processing of public personal data should be in line with the purpose of public access, (v) the requested personal data must be obtained from those authorities that are authorized by their specific regulations and (vi) in all processing activities, the obligation to take all technical and administrative measures related to data security and the principle of "being relevant, limited and proportionate to the purposes for which they are processed" in Article 4 of DPL, must be particularly taken into consideration.

[44] *See* https://kvkk.gov.tr/Icerik/6895/2020-307 (Last accessed on April 7, 2021)

Decision Regarding an Employee Obtaining Personal Data Belonging to the Employer's Customer[45]

The decision is regarding an employee who, while working in the data controller airline company, obtains the personal data of the data subject customer from the company records, which is in violation of the DPL.

In its defense, data controller responded to the data subject's request by stating that; (i) the employee who obtained the personal data is authorized to access passenger information as required by his/her duty, and the necessary sanctions are imposed as a result of the examination as to information access log records of the employee, (ii) the content of the conversations between the two individuals that are the subject of the complaint could not be determined, (iii) as a result of the evaluations, additional measures have been taken to prevent the viewing of the personal data of the data subject for security purposes by adding extra controls, and the personal data of the data subject are stored with statutory technical and organizational measures in place.

The Board has decided that the necessary technical and organizational measures for providing an appropriate level of security as per Article 12 of DPL, have not been fulfilled due to the fact that there is no restriction on access to personal data by the data controller and the training provided to employees is insufficient, thus, imposed an administrative fine in the amount of 100,000 Turkish Liras to the data controller company.

The important point in this decision is that the data controller has provided trainings to employees, yet, the Board has still found it insufficient as the trainings before the incident were infrequent. Moreover, although the data controller has been keeping log records of events, the Board has found it insufficient as the log records should make it available to observe unusual activities and it is imperative to identify unlawful access and processing of personal data through analysis of those records.

Decision Regarding Unlawful Publication of Data Subjects' Personal Data Through Online Journals[46]

According to the complaint, the data controller had published news that were claimed to be groundless and false, upon which, the data subject had sent an official warning to the data controller, through the notary, for retraction of the subject news item. Following this warning however, the newspaper data controller had published a full copy of the notice letter, including the personal details of the notifying party, as another news item.

The Board indicated that in case a publication violates a person`s honor and dignity or promotes false news about them, then Article 14 of the Press Law makes it mandatory for the editorial manager to publish any retraction or response letter (which does not breach the safeguarded interests of third parties or have any criminal element in content) as is, in the same fonts without making any edits and additions, latest within three days in daily publications, or in the next edition the three days from receipt in case of other publications; however, the data controller still has the obligation to comply with the principles under the DPL including "being relevant, limited and proportionate to the

[45] *See* https://kvkk.gov.tr/Icerik/6886/2020-124 (Last accessed on April 7, 2021)

[46] *See* https://kvkk.gov.tr/Icerik/6888/2020-145 (Last accessed on April 7, 2021)

purposes for which the personal data are processed" as per Article 4.

The Board has concluded that publishing the relevant warning letter by the data controller is in accordance with DPL, as per the provision of "It is necessary for compliance with a legal obligation to which the data controller is subject to" in the clause (ç) of paragraph 2 of Article 5 of DPL. However, the publication of the personal data section of the letter, despite being removed from the website later on, violated the principles under Article 4.

Therefore, the Board decided that as per the provision of sub-clause (b) of the first paragraph of Article 18 of DPL, the data controller had not taken all the necessary technical and organizational measures and failed to fulfil the obligation stipulated in sub-clause (a) of paragraph (1) of Article 12 of DPL, and to impose an administrative fine of 55,000 Turkish Liras on the data controller in accordance with DPL.

This decision is significant due to the conflict of the mandatory rules under the DPL and the Press Law; since the Press Law required broadcasting of the retraction letter as is. However, the Board evaluated the necessity of compliance with the principles of the DPL. This decision demonstrates that the Board considers DPL as a framework and expects application of DPL principles in other fields of law, whenever possible.

Decision Regarding the Use of Data Subject's Credit Card Information by the Data Controller Car Rental Agency without Permission[47]

The decision was issued upon a complaint received by the DPA, where the complainant's credit card was used without his consent by data controller car rental company.

Data controller indicated in its defense that, according the terms of the rental agreement, data controller has the right to use any of the credit cards provided by customer in previous rental agreements, if the credit card provided for that transaction cannot be charged. The data controller based the processing on the grounds of Article 5/2/c "Processing of personal data of the parties of a contract is deemed necessary, provided that it is directly related to the establishment or performance of the contract" and Article 5/2/f "Processing of data is deemed necessary for the legitimate interests pursued by the data controller, provided that this processing shall not violate the fundamental rights and freedoms of the data subject" of the DPL.

The Board stated that unfair terms in consumer agreements are invalid according to the Regulation on Unfair Conditions in Consumer Contracts, and in this case the clause allowing the agency to collect payment from another credit card that was provided in previous rental agreements constitutes an unfair term and will be considered as invalid. The Board indicated that since the processing activity is based on an unfair term in the rental agreement and the situation had an adverse result beyond the person's reasonable expectation, this processing activity

[47] *See* https://kvkk.gov.tr/Icerik/6889/2020-166 (Last accessed on April 7, 2021)

violates the principles of "lawfulness and fairness" and "being relevant, limited and proportionate to the purposes for which they are processed."

The Board decided that, the data controller's processing activities cannot be based on any of the processing condition in Article 5, that they violate the principles in Article 4 and breach Article 12 of DPL for not fulfilling its obligations regarding data security and therefore, imposed a fine of 75,000 Turkish Liras to the data controller.

The decision is significant as the Board made an assessment within the scope of another field of law and legislation (*i.e.*, consumer law and secondary legislation) and such assessment constitutes an essential part of its decision.

Decision Regarding Data Controller Employer Failing to Provide the Data Subject Former Employee a Copy of their Personnel File on Request[48]

The data subject complainant was a former employee who requested his employer to provide a copy of his personnel file; and applied to the DPA when he received no response.

The cargo company, as data controller, stated in its defense that; (i) the employee requested a copy of his defense statement, letter of resignation which is allegedly forced to be signed by the employee, and the other letter of resignation submitted by the employee to the employee's personnel file, (ii) the request of the documents submitted to the personnel file by the employee is not a right regulated under the Article 11 of the DPL, nor is it applicable for requesting document copies, (iii) the requested copy documents are not processed "completely or partially automatically or by non-automatic means provided that they are part of any data recording system" as regulated by DPL, (iv) the employee does not actually intend to use his "right of access to information," but to obtain evidence for his claims regarding the payment of his statutory severance and notice payments and other employment receivables, and (v) no one can be compelled to testify or give evidence to incriminate himself, and therefore, the company exercises its right to remain silent, as per Article 38/5 of the Constitution of the Republic of Turkey ("**Turkish Constitution**").

The Board in its decision evaluated that (i) the defense statement and the letters of resignation contain personal information which makes the relevant person definite or identifiable, thus the documents are accepted as personal data, (ii) according to Article 20/3 of the Turkish Constitution, the person has the right to be informed and access the information, and according to Article/11(b) of DPL, the data subjects have the right to request information if their personal data is processed, (iii) the right to remain silent is a fundamental human right that is applicable to real persons.

The Board, considering that the data controller had not responded to the request within 30 days on the grounds that the request concerned the receipt of copies of certain documents, which is not a right within the scope of DPL, hence cannot be met within the scope of Article 11 of DPL, decided to instruct the data controller within the scope of paragraph (5) of Article 15 of DPL to submit the copy of the requested documents containing the personal data of the data subject, and to show the utmost attention and care to

[48] *See* https://kvkk.gov.tr/Icerik/6916/2020-435 (Last accessed on April 7, 2021)

respond to the applications made by relevant persons within the legal period.

This decision is important in several points: (i) The Board has acknowledged the right of access even when it is not specifically indicated as a right under the DPL, on the grounds that it is identified as a right under the Constitution, (ii) the Board appears to acknowledge the grounds of the data controller and even though the request does not appear to be strictly complying with data subject request requirements in the legislation, the Board still decided that it should be met. However, considering all this, the Board appears to have decided to instruct the data controller instead of imposing an administrative fine. This demonstrates that the Board does not expect a strict compliance of procedural requirements under the Communiqué on the Principles and Procedures for the Request to Data Controller for data subject requests to be considered applicable.

Decision Regarding Removal Request of a News Article from a Newspaper's Website[49]

The decision is about the request of removal for a news article on a newspaper's website. The attorney for the data subject requested the DPA to decide for the ceasing of the unlawful behaviour of the parties who breached personal and sensitive personal data, and imposition of administrative fines to the relevant institutions as per the DPL, the ceasing of the processing and the transfer of data abroad, and the submission of a criminal complaint to the Public Prosecutor's Office about the relevant institutions.

In its defense, the newspaper as the data controller, argued that the subparagraph (c) of the "Exceptions" titled Article 28/1 of DPL clearly regulates that the processing of personal data within the scope of "freedom of expression," and provides a legal ground for "compliance with laws." The newspaper stated that receiving and providing news are considered as a part of the freedom of expression and are directly protected by the Constitution of the Republic of Turkey, and thus the article subject to the complaint should be evaluated within the scope of freedom of expression. Further, the newspaper stated that each removal request is evaluated within the scope of public interest, and the incident subject to the complaint was investigated by an impartial court, and ultimately the verdict of conviction was announced to public, therefore there is no disclosure of confidential information by the parties, and all the information mentioned in the news is finalized with the decision of the judicial authorities. The newspaper also emphasized that if the content is removed on the grounds that a certain time has passed, eventually the archives of the media organizations would completely dissolve, also erasing any social memory which is important for public order. The newspaper further pointed out the option of obtaining a court decision for banning access tothe contents within the scope of DPL No. 5651.

The Board emphasized the importance of determination on which right should be given supremacy by evaluating them within the scope of the following criteria a) public interest and benefit, b) factual and up-to-date information, c) balance between essence and form.

[49] *See* https://kvkk.gov.tr/Icerik/6915/2020-414 (Last accessed on April 7, 2021)

While evaluating whether the content is considered to be within the public interest, the Board found it appropriate to evaluate whether the news serves the unnecessary curiosity of the people or the protection of high moral and legal values and in this sense, stated that there is a public interest in the explanation of the events that arouse social interest, encourage the public to think and debate, and serve to enlighten a certain problem and show solutions to it. The Board provided an example on the matter: it is considered that there is a public interest in publicizing and criticizing illegal practices, bribery and corruption, on the other hand, stated that a narrower interpretation of restrictions on freedom of the press would be appropriate in terms of reporting on politicians and public officials within the scope of public interest and benefit criteria.

The Board concluded that although the news subject to the complaint is about a citizen who is not publicly recognised, there is mutual public interest and benefit disseminating the news since it is about the perpetrators of human trafficking, which can be considered in the same vein as the disclosure of illegal practices, bribery and public corruption to the public.

While evaluating whether the content includes factual information, the Board noted that of being factual did not mean the exact nature of events, but how the events had played out at the time the news were published. The evaluation on news being up-to-date should be based on the principle of having the public interest on the dates when the specific event is announced. Since the right to inform cannot be applicable for publishing an event that has expired and no longer has public interest in its disclosure, the personal right should prevail in such cases. In order to be deemed lawful, a news item which brings up a past event, should be of public interest.

The Board concluded that the incident subject to the news has been proven by the decision of a court, and furthermore, within the scope of evaluating the criterion of the news being up-to-date, it has decided that the relevant news remains current at this date and therefore that the public interest in receiving this news continues.

While evaluating the balance between essence and form, the Board found it appropriate that the language, wording, and pictures used in the news should have the necessary coverage as required by the way the news is provided, and there should not be unnecessary, irrelevant and unfavourable statements and comments in the news.

The Board concluded that, in the news subject to the complaint, in terms of the balance criterion between form and essence, the language, expression and pictures used were within the range by the way the news is provided; and unnecessary, irrelevant and unfavourable statements and evaluations had not been included in the news report.

Consequently, the Board concluded that there is already a public interest in the publication of the data pertaining to data subject and the subject of the news in question, and that freedom of expression prevails over personal rights in case of conflicting rights. Therefore, the news report was found to be within the scope of the exemption under Article 28/1(c) of DPL.

Decision Regarding the Request of the Data Subject for the Removal of Special Categories of Personal Data, Such as Records of Criminal Conviction and Security Measures from the Employee's Personal File[50]

The Board stated in its decision that, the relevant security clearance document that the complainant wanted removed dated back to 2013 and at that time Law No. 4045 on Security Investigations, Reinstatement of the Rights of Public Personnel Dismissed from and Not Allowed to Public Service, and Amendments to the Martial Law No. 1402 had been in force. Furthermore, the Board concluded that criminal record which is considered to be sufficient while investigating whether the employee meets the requirements of Law No. 657 on Civil Servants was not included in the response of the data subject and its attachments, thus it is understood that the relevant court orders were provided without provision of the criminal record and this provision was within the knowledge and/or consent of the data subject. Most importantly, the Board stated that the implementation by the data controller took place before the effective date of DPL and cannot be deemed to be contrary to the legislation in force at the time of the implementation.

In conclusion, the Board indicated that the personal data subject to the complaint is within special categories of personal data and the data subject does not have the explicit consent with regards to the inclusion of the relevant court orders in his/her/their personal file; however, since it is concluded that the "legality" factor regarding the processing of personal data in terms of DPL should be considered as the "material law" expressed in the doctrine, according to the opinion received from Office of Civil Employeesand per Communiqué on Civil Servantswith Serial No. 2, it has been decided that in terms of legislation, it is not necessary to remove the said court orders from the personal file.

Decision on the Failure to Submit Transcripts of Call Center Records of a Data Subject by an Airline Company as the Data Controller[51]

The data subject requested the transcript of voice recordings in accordance with the paragraph (d) of the Article 3 of DPL and his/her/their request was rejected by the data controller on the grounds that the submission of the relevant voice recordings is only possible if they are requested by legal authorities as per company procedures.

The data controller stated in its defense that, in accordance with the Board's decision of January 14, 2020 with number 2020/13, they have contacted the data subject again and shared the transcript of voice recordings by applying the necessary masking measures and furthermore, the relevant departments were informed to handle similar lawful requests with this approach.

In its decision, the Board referred to Article 11 of the DPL which also stipulates that everyone has the right to apply to the data controller to request relevant information if personal data related to him/her/them have been processed and noted that this right includes right to access. However, the Board underlined that this right does not mean direct access to the data filing system/medium where the personal data is processed, the delivery of

[50] *See* https://kvkk.gov.tr/Icerik/6912/2020-396 (Last accessed on April 7, 2021)

[51] *See* https://kvkk.gov.tr/Icerik/6932/2020-504 (Last accessed on April 7, 2021)

this filing medium itself to the data subject or the acquisition of the data itself; but meant enabling the processed personal data to be reasonably accessed by the data subject to the extent that technical/physical means allow considering the obligations of the data controller regarding data security. Therefore, the Board concluded that no action needs to be taken with respect to the relevant data controller.

This decision confirms the Board's approach that right of access is a data subject right (even though it is not specifically included in the DPL) and it is also important as it includes the Board's opinion as to the scope of the right of access.

Turkish Data Protection Authority DPA Started Deciding on Undertaking Letters for Cross-Border Transfer of Personal Data[52]

Turkish Data Protection Authority recently published two (2) recent announcements[53] regarding the approval of undertaking letters which were drafted for cross-border transfer of personal data. These 2 decisions marked the first approvals of the Turkish Data Protection Authority for cross-border data transfers.

ELIG Gurkaynak has been assisting clients on all aspects of Turkish data protection law matters, including undertaking letters. A result of the drafting and negotiation processes with the Turkish Data Protection Authority, ELIG Gurkaynak obtained a successful outcome in terms of an undertaking letter submitted to the Turkish Data Protection Authority which was approved by Turkish Data Protection Authority following an evaluation period of 3 years. ELIG Gurkaynak assisted in all stages of the drafting, negotiation and approval stages, by evaluating the matter both from legal and business perspectives throughout the undertaking letter procedure, which is subject to a thorough and scrutinized evaluation by Turkish Data Protection Authority, and obtained a successful result through the approval of Turkish Data Protection Authority.

To date, Turkish Data Protection Authority published only 2 announcements for the approval of undertaking letters. We might expect this development to encourage or pave the way for other prominent companies to enter into the undertaking procedure, as there were not any precedents in which Turkish Data Protection Authority approved undertaking letters before this development.

Internet Law

Constitutional Court Sets Precedents on Social Media Posts

The Turkish Constitutional Court recently handed down certain decisions related to social media posts which touch on different aspects of the rights and freedoms guaranteed under the Turkish Constitution (*Decisions numbered 2018/12551 and 2020/13412 published on the Official Gazette of February 23, 2021 and decision*

[52] This article was also published on Mondaq on May 5, 2021. https://www.mondaq.com/turkey/data-protection/1064854/turkish-data-protection-authority-dpa-started-deciding-on-undertaking-letters-for-cross-border-transfer-of-personal-data

[53] Please see the Turkish versions of the announcements at https://www.kvkk.gov.tr/Icerik/6867/TAAHHUTNAME-BASVURUSU-HAKKINDA-DUYURU and https://www.kvkk.gov.tr/Icerik/6898/TAAHHUTNAME-BASVURUSU-HAKKINDA-DUYURU. (Last accessed April 20, 2021).

numbered 2017/31971 published on the Official Gazette of February 25, 2021).

(i) Decision numbered 2018/12551

This decision concerns the applicant's claims on violation of his freedom of expression due to a judicial fine imposed for criticizing a politic figure through a comment posted on Facebook. According to the decision, the plaintiff, who was an active political figure at the time of the applicant's comment, posted a text on his Facebook page in tribute to the Republic of Turkey's seventh president, Kenan Evren at the anniversary of his death. The applicant commented on this post by criticizing the plaintiff. Eventually, the applicant was subjected to a judicial fine imposed by Ankara 35th Criminal Court of First Instance on February 7, 2018, due to the complaint filed by the plaintiff who claimed that the comment posted by the applicant was defamatory.

The applicant claimed in his individual application that there was no expression in his comment which might be deemed to be defamatory, the applicant criticized the plaintiff's post as the plaintiff was a candidate member of parliament from the region where the applicant resides and imposing a judicial fine due to his comment violates his freedom of expression and the right to a fair trial. Accordingly, the applicant filed an application before the Constitutional Court on April 19, 2018.

The Constitutional Court first determined that the applicant's claims should be reviewed within the scope of freedom of expression as per Article 26 of the Constitution. In this regard, the Constitutional Court stated that the decision of Ankara 35th Criminal Court of First Instance had interfered with the applicant's freedom of expression and proceeded to evaluate whether this interference has resulted in violation of the applicant's freedom of expression by taking into account the criteria laid out under Article 13 of the Constitution (legality, legitimate reason, accordance with the requirements of a democratic society, and proportionality). The Constitutional Court further stated that the applicant's statements contained cynical yet non-defamatory expressions including his thoughts on the plaintiff's political views being flawed. The Constitutional Court underlined that although the wording of the comment might sound inappropriate, the freedom of expression covers even hurtful, shocking and disturbing expressions, by also stating that since the plaintiff is a political figure, the limits of criticism should be expected to be broader.

According to the decision, Ankara 35th Criminal Court of First Instance failed to take into consideration the circumstances surrounding the relevant period, context of the expression and the plaintiff's social status in its evaluation of the case and did not attempt to create a balance between the freedom of expression and the plaintiff's reputation and dignity.

Consequently, the Constitutional Court found Ankara 35th Criminal Court of First Instance's rationale to be insufficient for interference with the applicant's freedom of expression and concluded that freedom of expression protected under Article 26 of the Constitution has been violated.

(ii) Decision numbered 2020/13412

The case concerns the applicant's claims on the violation of personal liberty and security due to the detention measure imposed with regard to certain posts shared on his social media. Apparently, as a result

of an investigation initiated against the applicant, the applicant was arrested on the grounds of provoking a certain part of the public against another, and insulting their religious values through his posts shared on social media and had been held in detention during the proceedings, as well. The applicant filed an objection against the decision on continuation of detention and eventually filed an individual application before Constitutional Court.

In its evaluation, the Constitutional Court did not take into consideration the posts which allegedly insulted religious values since they were not the basis of detention. As to the other posts that allegedly provoked a certain part of the public against another and which were the basis of detention, the Constitutional Court referred to the jurisprudence of the Court of Cassation on the crime of "Provoking the Public to Hatred and Hostility, or Degrading the Public" (Court of Cassation *18th Criminal Chamber E.2018/3616, K.2019/598)*.

The Constitutional Court further stated that the investigating authorities did not indicate what the imminent danger was in these posts and the investigation documents did not include how the posts of the applicant created a specific danger and therefore, there was no strong indication that the arrest had been necessary.

In conclusion, the Constitutional Court decided that the claim of unlawful arrest is admissible and found that the applicant`s personal liberty and security protected under Article 19 of the Turkish Constitution had been violated.

(iii) Decision numbered 2017/31971

This decision is regarding an applicant's claims on the violation of his constitutional rights due to termination of his employment contract on the grounds that certain social media posts of the applicant damaged the trust relationship between the employee and the employer. According to the decision, the applicant had been working at a municipality since 2004. Following the coup attempt of July 15, 2016 (which is claimed to be made by the Gulen Terrorist Organization - FETO), a report was drawn up about the applicant by the Directorate of Science and Technology of Sehitkamil Municipality. According to the report, the applicant, with his social media posts, made groundless accusations against the state regarding its actions and anti-terrorism activities, which were incompatible with the ethics and good faith, impugned the dignity of the state, and abused the trust of the employer, since the applicant was working in a public institution. The Municipality, as the employer, terminated the applicant`s employment contract on the same day based on the abovementioned reasons and in accordance with the Article 25/2 of the Law No. 4857. Subsequently, the name of the applicant was included under Attachment 4 of the Decree No. 677 on Taking Certain Measures in the State of Emergency, which listed the public officials who were dismissed from public service. The applicant filed a lawsuit demanding reinstatement to work and determination of the termination as unfair dismissal. His request was rejected and accordingly, he filed an individual application before the Constitutional Court.

According to the decision, the applicant argued that his social media posts, which were the basis for the termination of the employment contract, did not constitute a crime and they were merely consisted of "liking" the posts of others, and therefore,

his constitutional rights were violated. However, the Constitutional Court noted that the applicant did not evaluate the content of his social media posts within the application form and did not attach any information or document regarding these posts.

The Constitutional Court concluded that the applicant could not substantiate his claims that the findings of the administration and courts were incorrect, and also the applicant did not make any explanations as to the nature of his social media posts, but merely stated that these expressions did not constitute a crime. The Constitutional Court, by asserting that the remit of the Constitutional Court is limited to the reasons put forward in the application form, concluded that the applicant had not provided adequate evidence as to which of his constitutional rights were violated with sufficient reasoning nor shown the grounds of his allegations of rights violation.

Consequently, the Constitutional Court decided that the applicant could not justify his allegations since he did not provide evidence regarding the alleged violation and did not give explanations as to which of the rights within the scope of the individual application was violated, and therefore the application was inadmissible due to the obvious lack of legal basis.

Telecommunications Law

Reconciliation with Information Communications and Technologies Authority

The Regulation on Reconciliation Procedures and Principles on Receivables and Debts of Information Communications and Technologies Authority ("**Regulation**") was published on the Official Gazette dated March 26, 2021, and entered into force on the same day.[54]

I. Scope of the Regulation

The Regulation sets out the reconciliation procedures and principles with respect to debts and receivables of the Information Communications and Technologies Authority ("**ICTA**"), including but not limited to receivables and administrative fines arising out of various statutes, namely the Law on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts ("**Law No. 5651**"), the Electronic Communication Law, the Electronic Signature Law, the Law on Postal Services and the Turkish Commercial Code.

The Regulation specifies the rules for the authorities and duties of the reconciliation commission, which consists of five (5) members authorized to represent ICTA in reconciliation meetings.

As per the Provisional Article 1 of the Regulation, the reconciliation applications for ICTA receivables which have become due between December 5, 2017 (effective date of Article 5/14 of the Law No. 2813) and March 26, 2021 and remain totally or partially unpaid, should be made at the latest within three (3) months and the process completed within eight (8) months by ICTA. The Regulation does not explicitly indicate the beginning date of this "3 month" period, however, this beginning date will likely be interpreted as the publication date of the Regulation, which is March 26, 2021. Therefore, the last day for the reconciliation application

[54] *See* https://www.resmigazete.gov.tr/eskiler/2021/03/20210326-2.htm (Last accessed on April 28, 2021).

for these due receivables would be June 25, 2021.

II. Principles

Regulation sets forth the following principles to be applied to the reconciliation processes.

-Consideration and protection of public interest,

-Resolution of disputes with reconciliation prior to and during the legal action and execution processes,

-Resolution of disputes in a fair manner,

-Providing relevant parties equal opportunity to apply for reconciliation, without discrimination,

-Save for when required otherwise due to objective reasons, resolution of similar reconciliation requests with same criteria, in a fair and quick manner,

-Protection of confidentiality of parties' data during every phase of reconciliation.

Depending on the dispute, the authority to render the final decision on the reconciliation process would be the regional manager, the President or the Information Communications and Technologies Board ("**ICTB**").

III. Reconciliation for Judicial Disputes

Reconciliation

As per Article 5 of the Regulation, ICTA may invite the counter party to reconciliation prior to and during legal action and execution phases, or accept their requests of reconciliation.

The reconciliation shall cover those agreements indicated in the reconciliation minutes, and reconciliation might be made on the entire dispute or only certain parts of it.

If deemed to be in the public interest for legal or factual reasons, ICTA may partially or completely waive the principal receivable and its derivatives; or agree on postponement, installment or deduction of the payments.

Procedure

ICTA might invite the parties to reconciliation upon the approval of the President of ICTB. The subject of the dispute will be clearly indicated in the invitation. Save for events of force majeure or just reasons that may be acceptable by the authority, the invitation should be responded within thirty (30) days, otherwise the invitation would be deemed rejected. Upon request, an additional thirty (30) days might be granted for response. On the other hand, the relevant party might also invite ICTA for reconciliation by indicating the subject of the dispute. If it is deemed appropriate by the authorized authority, the invitation should be responded to within thirty (30) days.

If the invitation is accepted, a response which indicates the acceptance of the invite should be sent to ICTA. This response should include the identity and contact information of the persons who are authorized to participate in the reconciliation meetings and decide on resolution of the dispute, along with their authorization documents and signature circular/declarations.

Upon the acceptance of the invitation, a reconciliation commission will be set up in ICTA. A reconciliation meeting will be organized with the counterparty representatives, in line with the date and program to be determined by ICTA. If the dispute is not resolved in the first meeting,

additional meetings may be organized, bearing in mind principles of procedural (judicial) economy.

Following the meetings, the minutes regarding the outcome of the reconciliation meeting, and the report to be drafted by the reconciliation commission shall be submitted to the relevant authority. The reconciliation process is completed upon the execution/signing of the authority`s reconciliation decision, by the parties` authorized representatives and the President of ICTB.

For judicial disputes, the reconciliation process should be concluded latest within one hundred and twenty (120) days. This term might be extended up to one hundred and eighty (180) days with parties' agreement.

IV. Reconciliation for Administrative Disputes

Reconciliation

As per Article 7 of the Regulation, reconciliation requests can be made with respect to administrative fines which were not paid in whole or in part. Reconciliation might cover the entirety or a certain part of the dispute. If deemed to be in the public interest for legal or factual reasons, ICTA may partially or completely waive the principal receivable and its derivatives; or agree on postponement, installment or deduction of the payments.

Procedure

ICTA may invite the relevant party to reconciliation upon the approval of the President of ICTB. The subject of the dispute will be clearly indicated in the invite. Save for events of force majeure or just reasons that may be acceptable by the authority, the invitation should be responded within seven (7) days, and otherwise the invitation would be deemed rejected. On the other hand, the relevant party may also invite ICTA for reconciliation by indicating the subject of the dispute. The invitation should be responded within seven (7) days.

If the invitation is accepted, a response which indicates the acceptance of the invite should be sent to ICTA. This response should include the identity and contact information of the persons who are authorized to participate in the reconciliation meetings and decide on resolution of the dispute, along with their authorization documents and signature circular/declaration.

Upon the acceptance of the invitation, a reconciliation commission will be set up in ICTA. A reconciliation meeting will be organized with the counterparty representatives, in line with the date and program to be determined by ICTA. If the dispute is not resolved in the first meeting, additional meetings may be organized, bearing in mind principles of procedural (judicial) economy.

Following the meetings, the minutes regarding the outcome of the reconciliation meeting, and the report to be drafted by the reconciliation commission shall be submitted to the relevant authority. The reconciliation process is completed upon the execution/signing of the authority`s reconciliation decision, by the parties` authorized representatives and the President of ICTB.

Reconciliation process should be concluded latest within thirty (30) days. This term might be extended up to forty five (45) days for the cases where ICTB's decision is required.

Besides the foregoing, the Regulation also sets forth the procedure to form the reconciliation commission, its authorities, and the main principles of the reconciliation meetings. According to Article 12 of the Regulation, if a lawsuit is initiated regarding a matter of dispute that was discussed during the reconciliation meeting, the reconciliation application, reconciliation invitation, opinions of the parties, documents which are prepared only for reconciliation cannot be submitted as evidence in such lawsuit. The person(s) who attended the reconciliation meetings cannot be called as witnesses in such lawsuit. Having said this, as per Article 14, the matters settled through the reconciliation process and set out in the reconciliation decision are final; they cannot be made subject to a complaint or appeal.

White Collar Irregularities

An Introduction to Internal Investigations: Key Points to Consider and Pitfalls to Avoid

With the discernable changes in the corporate culture within the last decade, internal investigations have gained more and more significance since they provide indispensable and multipurpose tools to companies. Even in countries such as Turkey where there are no existing mechanisms of self-disclosure, internal investigations have become vital in detecting, remedying, and preventing irregularities within companies. To take it one step further, one could clearly argue that the importance of investigations in detecting and addressing wrongdoings might surpass the importance of its use in shielding a company from liability, as the former is clearly more beneficial and sustainable for companies in the long run. While an effective internal investigation might enable a company to identify its potential exposure and take decisions to mitigate potential damages, it also enables it to prevent the continuation of any irregularities and provides the necessary resources and information for taking remedial or disciplinary action against the wrongdoings.

When a serious allegation is made, more often than not companies rush into an investigation, as the matter at hand would usually be highly time-sensitive. However, this quick reaction could often pave the way for skipping crucial steps, missing important details and potentially causing harm in the process. In this regard, an established structure and investigation procedure plays a very important role for an investigation to provide successful and fruitful results. With a strong and consistently applied investigation process in place, companies can respond to allegations in a sufficient and timely manner, avoid any pitfalls which might harm the company, and also strengthen the company's compliance controls as a whole.

For this reason, companies could greatly benefit from developing an effective investigation plan even before an allegation is raised, which should outline the process, cover the steps that might be missed, and ensure that the investigation stays on track. Ultimately, an effective investigation could include the following steps.

- The scope of the investigation should be determined and defined in detail to set the framework in terms of the subjects or issues and allegations which will be investigated, as well as the subjects or issues that will stay outside the scope of the investigation.

- A team should be put together for conducting the investigation. Their oversight, roles and responsibilities must be determined, and the teams or individuals who will be responsible for each type of investigation or performance of each task must be established.

- The timeline of the investigation should be developed and scheduled, which should cover the dates to conduct the investigation, list the tasks and their deadlines.

- The goals, available information sources and all potential information sources/points should be identified, which should also cover the subjects of the investigation and how to collect the necessary and useful information.

- Within the investigation, the need for outside counsel must also be assessed, since the subject matter (allegations) of each investigation may vary and while in-house counsel might suffice in some investigations, the assistance of outside counsel might prove crucial in certain cases.

- The risks of the investigation should be outlined. While designing the investigation framework, the relevant teams must also develop a comprehensive list of facts to identify the company's risk profile and assess the company's potential exposure.

- At the outset of any investigation, if necessary, the company should immediately take the required action to eliminate any risk of an ongoing misconduct which might cause further damage to the company.

After establishing an effective investigation plan, companies should keep in mind certain key points in an internal investigation. One important aspect in investigations is the independence of the investigation. An investigation must be conducted independently, whether conducted by the in-house counsels or outside counsels, in a manner that precludes collusion with the business and other units of the company, especially the ones that are linked to or subjects of the allegations which will be investigated. Another important point is that the investigation must proceed without any doubts or pressure from other units or persons as this would severely interfere and affect the outcome of the investigation. Similarly, an investigation must always stay objective and approach the allegations and matters from an objective standpoint. The purpose of the investigation should never be to prove that a wrongdoing has occurred or not occurred, but rather, to establish the facts to the extent that is available to the investigators. Lastly, as the efficiency of an investigation depends on the information uncovered during the investigation, the investigation team must have access to all the relevant resources and use all available and reasonable sources of information. The team's inability to access and use all available information would clearly hinder the efficiency of the investigation.

As a last point, the investigation team and the company in general, must always proceed by keeping in mind the critical importance of maintaining confidentiality. Confidentiality not only ensures the integrity of the investigation, but it can also prevent retaliatory actions against whistleblowers, tampering with evidence or collusion of potential witnesses before they are interviewed, as well as protect the privacy of the employees involved in the investigation.

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