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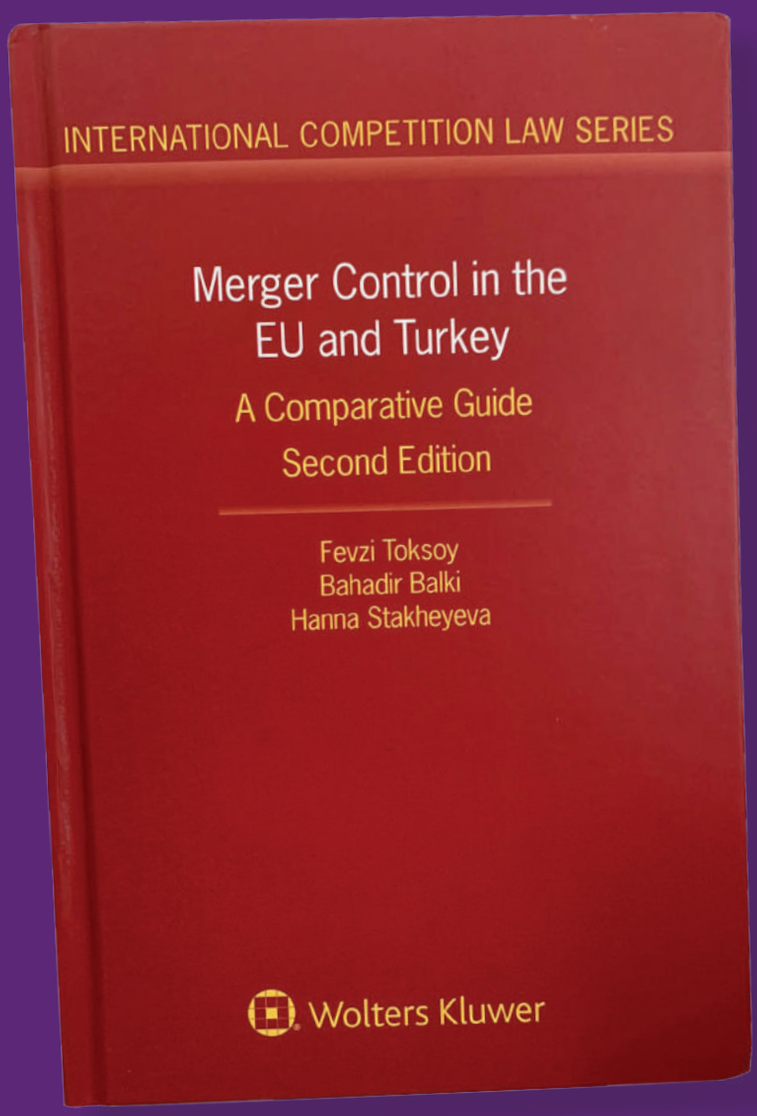
QUARTERLY BULLETIN

2nd Quarter 2022

ACTECON

The TCA's Final Report on the E-Marketplaces Sector Inquiry

We are pleased to present the second edition of our book "Merger Control in the EU and Turkey: A Comparative Guide".



Turkey is an important jurisdiction at the global merger control scale, considering the number of notifications related to multijurisdictional mergers submitted to the Turkish Competition Authority every year. Since 2003, ACTECON has delicately handled transactions that require multijurisdictional filings along with Turkey and resolved with sometimes swift clearance decisions and sometimes lengthy negotiations with the Turkish Competition Authority in harmony with the parties' counsels and professionals together.

This book is a reflection of all those efforts. It compares substantive, procedural and jurisdictional issues and draws parallels on their regulation in the two jurisdictions. Since the Turkish merger control regime has been following the EU footprints, each chapter provides an overview of the respective issues in the EU and Turkey, projecting a clear understanding of the main similarities and differences in the two regimes.

We hope this second updated edition of the book, which covers the 2020-2021 amendments to the Turkish merger control (including the case law of the Turkish Competition Authority and the courts concerning each issue, with most of the Turkish decisions available in English for the first time) would be a useful reference point for practitioners as well as anyone interested in merger control.

Fevzi Toksoy, PhD
Managing Partner

Bahadir Balki, LL.M.
Managing Partner

Dear reader,

We are happy to report that the second edition of our book on Merger Control in the EU and Turkey has been published. It considers the legislative changes that occurred in 2020-2021, including the reform of the Turkish Competition Law which introduced the significant impediment to effective competition test into the Turkish concentration control. A notable feature is an in-depth analysis of applicable case law on the issue, with most of the Turkish decisions available in English for the first time.

As regards the landmark cases of the second quarter of 2022, we draw your attention to the Trendyol interim measure decision of the Turkish Competition Authority ("**TCA**"). It is in relation to Trendyol, an e-commerce platform based in Turkey, which was partially annulled by the Turkish court, and is very important for various reasons. First, it shows that the courts are ready to make an effective evaluation of the interim measure decisions of the which are powerful tools that should be carefully utilized. Second, while doing so the court does not refrain from going into details of the case and from requesting further information in that regard. And finally, this decision makes it clear that the interim measures should not be extended to periods going beyond the final decision. A Special Focus article of this issue provides more analysis of the decision.

In the EU the second quarter of 2022 is associated with the adoption of the new Vertical Block Exemption Regulation ("**VBER**"), which has introduced some important changes in relation to supply and distribution systems, including the approach of the European Commission ("**EC**") towards the active sales restrictions, online sales, "codification" of Coty judgement, etc. There were numerous speculations around the resale price maintenance ("**RPM**") under the new VBER. As we understand from the text of it, RPM remains a hardcore restriction and is expected to be treated aggressively by the Competition Authorities in the EU. For sure businesses will need to (re)consider their commercial arrangements in light of the new VBER.

A landmark development at the international trade side is related to two disputes involving the EU and Turkey at the WTO. The first one, the EU–Safeguard Measures on Steel (Turkey) case resulted in the Panel recommending the EU bring its measures into conformity with its obligations; while the second dispute, the Turkey–Pharmaceutical Products (EU) case, is to be reviewed by the Arbitrator in accordance with the Agreed Procedures for Arbitration reached between the EU and Turkey. Here the Panel upheld the EU's arguments and recommended Turkey bring its measures into conformity with its obligations under the GATT 1994.

Finally, as regards the data protection landmark development of the second quarter of 2022, we cannot but mention the adoption of the Data Governance Act ("**DGA**"), which will be applicable as of September 2023, and aims to promote the availability of data and build a trustworthy environment to facilitate the use of relevant data for research and the creation of innovative new services and products.

Sincerely,

ISSN 2687-3702

Published by
© ACTECON, 2022
Çamlıca Köşkü Tekkeci Sk.
No:3-5 Arnavutköy Beşiktaş
34345 Tel: 90 212 211 50 11

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Type of Publication
Periodical

Graphic Design
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In this issue:

Regulation on Fines Revised

*An amendment to the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices, and Decisions Limiting Competition, and Abuse of Dominant Position ("**Regulation**") was published in the Official Gazette on 15 June 2022.*

Before the amendment, Article 3(1)(f) of the Regulation read: "Annual gross revenue: net sales in the uniform chart of accounts, or if this cannot be calculated, the revenue closest to the net sales, which is to be determined by the Board." With the latest amendment, the following phrase has been added to the end of the clause:
"(In case it is determined that the undertakings, for whatever reason, have accounted for their (main) operating income under the account items that are not taken into account in the calculation of net sales, such as ordinary income or profits from other activities, the said amounts are also taken into account when determining the annual gross income)."
It is understood that the relevant amendment aims to provide a uniform approach on the determination of annual gross revenue considering the varying practices of undertakings.

Administrative Court Stayed Execution of Decision on Hindrance of On-Site Inspection

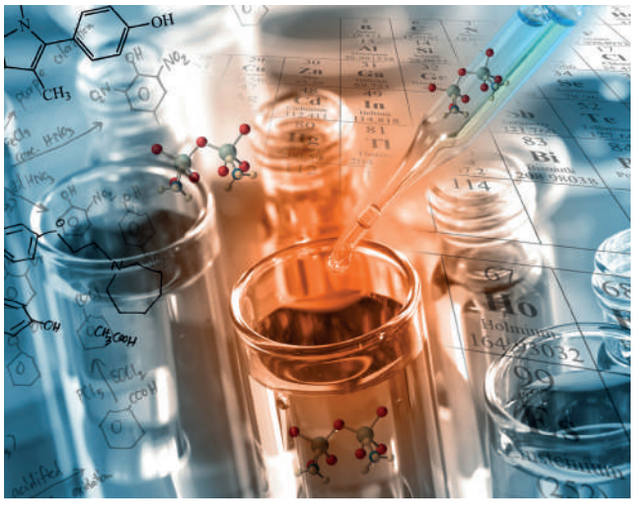
*Back on 9 April 2021, case handlers of the TCA carried out an on-site inspection within the scope of an ongoing investigation against certain undertakings including Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret A.Ş. ("**Sahibinden**"). After determining that correspondence within WhatsApp groups had been deleted after the initiation of the on-site inspection, the TCA imposed an administrative fine on Sahibinden amounting to 0.5% of its annual turnover for the financial year 2020 on the grounds of the hindrance of the on-site inspection.*

On 13 June 2022, the Ankara 2nd Administrative Court's decision, dated 15 April 2022 and numbered E. 2022/254 regarding Sahibinden's request for a stay of execution and annulment of the hindrance decision, was published on the TCA's website. With this, it is seen that the Court has stayed the execution of the hindrance decision as it was unlawful, and irrevocable damages were likely to occur.

The Court indicated that the hindrance decision was unlawful based on the grounds that the deleted messages were personal correspondence on a personal device and the relevant messages were still available on the devices of the other WhatsApp group participants.

Court Annulled Infringement Decision against Chemical Products Undertaking

*On 8 June 2022 the Ankara 9th Administrative Court annulled the TCA's infringement decision dated 19 November 2020 rendered regarding Hicri Ercili Deniz Nakliyat Kimyevi Maddeler Sanayi ve Ticaret Limited Şirketi ("**Hicri Ercili**") that had imposed an administrative fine of TRY 11,214,051.26. Hicri Ercili, which operates in the field of chemical products used for chemical decontamination and disinfection process in water treatment facilities, was found to have acted in violation of Article 4 of the Competition Law through colluding despite the Case Team's opinion to the contrary.*



While the TCA had found that Hicri Ercili was colluding with AK-KİM Kimya Sanayi ve Ticaret A.Ş. ("**AK-KİM**") during an Ankara Municipality tender in 2018, the Court examined the offer costs and found that the conclusion that AK-KİM and Hicri Ercili had colluded could not be reached. The Court took into account that (i) the undertakings' pricing movements in the related period were based on reasonable economic justifications, and (ii) the findings shown as a basis for the claims were far from revealing any collusion. Indeed, in its assessment, the Court revealed that:

- The e-mail shown as a basis for violation, which was an internal correspondence made between employees of AK-KİM, did not belong to the relevant period of time in which the tender had taken place.
- No statement appeared in the e-mail that a price in the tender had been determined together by AK-KİM and Hicri Ercili.
- The meetings shown as a basis for violation had been held due to the commercial relationship (raw materials sales) between AK-KİM and Hicri Ercili.
- A demonstrable increase in costs had occurred during the periods when the relevant tender was made, and at this point, AK-KİM's behaviours (pricing) in the relevant period had reasonable economic justifications.
- The undertakings had bid in the tender differently and offered prices much lower than the cost amount that had been determined by municipalities.

Leniency Decision on Door-to-Door Transportation Services for the Health Sector

*The investigation against Biopharma Logistics Uluslararası Taşımacılık Sanayi ve Ticaret A.Ş. ("**Biopharma**"), Transorient Uluslararası Taşımacılık ve Ticaret A.Ş. ("**Transorient**") and Tunaset Biofarma Lojistik Hizmetleri A.Ş. ("**Tunaset**") on whether Article 4 of the Competition Law had been violated was concluded with the TCA's decision dated 26 May 2022.*

The investigation regarding the undertakings active in the qualified local and international door-to-door transportation services for the health sector based on the allegation that they had conducted agreements amongst themselves regarding customer allocation and established an indefinite non-compete obligation towards the allocated customers was discussed and finalized by the TCA. Within its decision, the TCA found that Transorient and Tunaset had violated Article 4 of the Competition Law and thus imposed administrative monetary fines of TRY 2,913,622.95 on Transorient and TRY 242,136.45 on Tunaset. On the other hand, pursuant to the Regulation on Active Cooperation for Detecting Cartels ("**Leniency Regulation**"), the TCA decided not to impose an administrative monetary fine on Biopharma.

Leniency and Settlement Procedures Applied Together

*Law of Turkey No. 4054 on Protection of Competition ("**Competition Law**"), amended on 16 June 2020, among others, included the introduction of the settlement procedure for the investigations carried out by the TCA. The first example of the settlement procedure was seen in the TCA decision dated 5 August 2021 and numbered 21-37/524-258, regarding the small household appliances market. On 25 May 2022, the TCA announced that for the first time, it had reviewed the leniency process and the settlement process, which only recently had entered Turkish competition law, together in one of its decisions.*

According to the announcement published on the TCA's official website, within the scope of the investigation concerning whether Beypazarı İçecek Pazarlama Dağıtım Ambalaj Turizm Petrol İnşaat Sanayi ve Ticaret AŞ ("**Beypazarı**") and Kınık Maden Suları A.Ş.'nin ("**Kınık**") had violated Article 4 of the Competition Law by way of exchanging information regarding current and future price information, price transition dates, and increased prices in the market for natural mineral water, Beypazarı and Kınık had submitted their settlement applications separately to the TCA. The TCA had reviewed and accepted the settlement applications with its decisions dated 14 April 2022 and numbered 22-17/283-128 and dated 18 May 2022 and numbered 22-23/379-158 and implemented a 25% reduction to the administrative fine to be imposed upon the parties. In addition, Beypazarı and Kınık also applied for active cooperation and received 30% and 35% reductions in their fines, respectively, within the scope of the Regulation on Active Cooperation for Detecting Cartels.

Pursuant to the reductions implemented within the scope of leniency and settlement procedures, an administrative monetary fine of TRY 9,848,395.48 was imposed upon Beypazarı and TRY 928,931.50 on Kınık.

No Reason to Initiate an Investigation against GİPA Due to Ne Bis in Idem

The TCA, within the scope of the preliminary investigation, dated 9 September 2021 and numbered 21-42/617-304 regarding allegations that GİPA *Dayanıklı Tük. Mam. Tic. A.Ş. ("**GİPA**") had violated the Competition Law by imposing an internet sales ban on authorized dealers and/or by determining the resale price, decided that there was no reason to initiate an investigation against* GİPA *considering the legal principle ne bis in idem (not twice about the same thing).*

The allegation in the file was that the undertakings operating in the durable consumer goods sector and the distributors of these undertakings had violated Article 4 of the Competition Law by imposing an internet sales ban on authorized dealers and/or by determining the resale price.

As a result of the preliminary inquiry conducted, the TCA concluded that,

- according to the documents obtained, GİPA had acted as an intermediary in the maintenance of the resale prices of LG branded products that it distributed and the date of the oldest evidence obtained within the scope of the file was 11 January 2020, and the date of the most recent evidence was 23 November 2020.
- However, an administrative fine already had been imposed on GİPA within the scope of the settlement application, which had been submitted on the grounds that GİPA had violated Article 4 of the Competition Law by the maintenance of the resale prices of its dealers between 04 April 2017 and 25 August 2020.
- The dates of GİPA's previously penalized actions within the scope of settlement procedure and the actions identified in the current file largely overlapped, and GİPA's actions until 25 August 2020 had been fined previously.
- The violation period between 25 August 2020 and 23 November 2020 had not extended the violation period to be fined in a way that would affect the amount of the fine.

In this respect, it was stated that, regarding the documents obtained about GİPA, since (**i**) the events, (**ii**) the person and (**iii**) the protected legal interest were the same as in the previous investigation, opening a new investigation based on those documents was incompatible with the legal principle "ne bis in idem."

Philips Cleared of Abuse of Dominance Allegations

*The TCA concluded its investigation regarding the allegation that Türk Philips Ticaret A.Ş. ("**Philips**") had abused its dominance and violated the Competition Law by not providing the applicant with the password and activation required for the maintenance and repair of medical imaging devices. The TCA decided that although no violation by Philips had occurred, an opinion letter would be sent to the undertakings operating in the medical imaging and diagnostics market.*

The investigation was initiated upon the application by Foton Sağlık Çözümleri A.Ş. ("**FOTON**"), an undertaking operating in the technical services market of Philips brand medical imaging and diagnostic devices. In the decision, the claim that Philips had hindered Foton's activities in the market by systematically not providing the password and activation required for the maintenance and repair of medical imaging devices was examined.

In the decision, it was stated that defining the market on a brand basis would result in a conclusion that Philips had held a dominant position. However, without entering into the discussion of whether Philips had dominance in the service of Philips-branded medical imaging devices market, whether Philips' actions constituted abuse had been evaluated.The TCA emphasized that the maintenance-repair of Philips-branded medical imaging and diagnostic devices also could be carried out by Independent Service Providers ("**ISP**") other than Philips and that no correspondence or document could be detected showing that Philips had a strategy to exclude ISPs.

In the decision, the TCA stated that Philips met the password and dongle requests of Foton in the service market for medical imaging devices and provided engineer support when necessary. In addition, the TCA considered that it was reasonable to share device passwords only on a temporary basis, as was necessary for the protection of intellectual property rights.

In the light of these evaluations, the TCA decided that Philips had not abused its dominant position and therefore there was no room for imposing an administrative fine. The TCA also decided to send an opinion letter to the undertakings operating in the medical imaging and diagnostics market aimed to make the maintenance-repair market, which was considered an aftermarket of medical imaging and diagnostic devices, competitive and to prevent artificial barriers and impose certain obligations to the sector in order not to close the said market to ISPs.

TCA's Decision Statistics for First Half of 2022

The TCA published statistics on its decision for the first half of 2022. In total it has taken 211 decisions, 151 of which concerned mergers; 37 - the competition law infringements; one was on privatization; 7 – negative clearances, and 15 decisions of other categories.

The highest number of decisions are delivered by the TCA in relation to the merger control formalities. Out of 151 decisions (and one privatization case), 107 concerned takeovers, 42 – joint ventures, and 2 – mergers. 130 transactions were cleared, 2 were granted conditional approval, and 20 were considered as out of the TCA's scope.

As regards the 37 investigations concerning the alleged competition law infringements, 15 – were not confirmed, 7 resulted in sanctions, one was concluded with commitments, and 14 were settled. 27 of those cases were related to article 4 of the Turkish Competition law (anticompetitive agreements/ cartels), 6 concerned article 6 of the Turkish Competition Law (abuse of dominance), and 4 case were initiated under both articles.

As for the sector, the highest number of decisions (i.e. 26) were seen to be delivered in the petrochemicals market, IT (i.e. 19 decisions), and healthcare (18 decisions).
The total amount of fines imposed by the TCA during the period amounted to approx. USD 22 million (TRY 389. 443 million).

Abuse of Dominance in the Secondhand Books Market in Turkey Confirmed

The TCA finalized its investigation initiated against NadirKitap, a popular platform service in Turkey for the sale of secondhand books through its decision No. 22-15/273-122, dated 07 April 2022.[1]

On 28 January 2021, the TCA announced that it had initiated an investigation against NadirKitap on the grounds that NadirKitap had "abused its dominant position by means of complicating competitors' activities by not providing the data about member sellers who wanted to market their products through competing broker service providers."
Although the reasoned decision has yet to be published, the TCA announced a summary of the decision on its website on 12 April 2022 which concluded that:

- NadirKitap is dominant in the market for "platform services that intermediate the sales of secondhand books."
- NadirKitap abused its dominant position within the framework of Article 6 of the Turkish Competition Law by preventing access to and portability of book data uploaded to its website by sellers, without just cause.
- In order to end the said violation and establish effective competition in the market, in case requested by the sellers, NadirKitap should provide the sellers with the book inventory data in an accurate, understandable, secure, complete, free, and appropriate format.

In the light of these evaluations, the TCA decided to impose an administrative fine of TRY 346,765.63 (EUR 21,864.13) on NadirKitap.

[1] The announcement is available only in Turkish at: https://www.rekabet.gov.tr/Dosya/geneldosya/nadirkitapnihaikarar-pdf

The TCA's Final Report on the E-Marketplaces Sector Inquiry

*In April 2022 the TCA published the E-Marketplace Platforms Sector Review Final Report (**Sector Report**) following a sector inquiry initiated in June 2020. The Sector Report mostly targets the need for further work on the legal framework/secondary legislation for the powerful digital platforms, their MFN and exclusivity practices, as well as excessive data collection and privacy concerns.*

The Sector Report states that e-marketplaces represent only one side of the targeted digital actors. A legislative work aimed at identifying digital platforms with significant market power and determining the obligations and behaviours to be avoided by the platforms as a precursor is currently underway within the TCA and is planned to be concluded soon.

The Sector Report indicates that it would be appropriate to review the relevant secondary legislation to clarify the framework for the MFN and exclusivity practices of digital platforms. It also concludes that an area in which the secondary legislation needs to be strengthened is the exploitative practices of the platforms.

Regarding excessive data collection and privacy concerns, the Sector Report states that actions have been taken for data merging and processing within the scope of the current legislative work. In addition, in terms of the concern about information asymmetry and manipulation, the Sector Report considers that the obligation to ensure platform transparency brought by the legislation study largely will constitute a solution.

In addition to these issues, the Sector Report signals that an additional secondary legislation study could be conducted within the TCA to clarify the determination of undertakings with significant market power and the obligations expected to be brought to these undertakings and the application conditions of the upcoming legislation.

[1] The announcement is available at: https://www.rekabet.gov.tr/en/Guncel/investigation-concerning-nadirkitap-bili-190701a82465eb11812a00505694b4c6
[2] The full text of the Sector Report can be accessed from this link (in Turkish).

General Court Annulled the EC's Qualcomm Decision

*On 15 June 2022 the General Court of the EU ("**GC**") annulled the decision of the European Commission ("**EC**") which found that US chipmaker Qualcomm had abused its dominant position and fined Qualcomm EUR 997m. The GC emphasized that the decision was lacking in precision both in procedural aspects of the probe and assessment of anticompetitive effects*

It was concluded that the EC's decision, which had fined Qualcomm EUR 997m for financially rewarding Apple on the condition it would buy Long Term Evolution ("**LTE**") baseband chipsets solely from Qualcomm, thereby preventing rival chipmakers, and particularly the competitor Intel, from competing in the market, should be annulled due to the fact that the EC had breached Qualcomm's rights of defence by failing to give the company access to the content of discussions with third parties and for not allowing Qualcomm to adapt its defence to a change in the statement of objections ("**SO**").

The court ruled the following:

- Qualcomm should have had access to the third party's interviews

The GC ruled that the EC had not forwarded to Qualcomm any information concerning the existence or content of the meetings and conference calls it held with third parties, some of them being Qualcomm's competitors and customers thus infringing its right of defence.

The GC added that the notes sent to Qualcomm by the EC had been incomplete and finalised after the decision had been adopted, which had prevented Qualcomm from providing its own observations and defences.

- The changes in the SO affected Qualcomm's defence

It was discovered that the SO sent by the EC had contained an abuse of dominant position in the market of UMTS chipsets and in the market of LTE chipsets used in Apple devices. However, it was observed that the 2018 decision referred solely to abuse on the market for LTE chipsets, indicating that the scope of the SO had been widened.

In addition, Qualcomm in its reply to the SO, had submitted an economic analysis that showed that competitors similar to Qualcomm could have competed both with LTE and UMTS chipsets against Apple. However, the EC in its decision had revised the analysis which concerned both the LTE and UMTS chipsets markets, which was no longer relevant to the abuse, which only concerned the market for LTE chipsets. This behaviour was considered by the GC as an infringement of Qualcomm's right of defence since Qualcomm had faced a situation in which the scope of the SO had changed, especially for the analysis of the relevant markets.

- Apple had no alternative for a large part of its requirements

Qualcomm alleged that the EC had been mistaken when assessing that the payments could have had anticompetitive effects.

The GC decided the EC had not taken into account all the circumstances of the case and that during this period there had been no alternative to Qualcomm's LTE chipsets for a very large part of Apple's requirements. The GC specified that the fact that Apple having acquired LTE chipsets from Qualcomm and not from its competitors in the absence of alternatives could fall within competition on the merits and not within anticompetitive foreclosure resulting from the payments.

Finally, the GC added that the EC had not been consistent when describing the devices or the concerned periods, which shows that the relevant evidence had been taken into consideration incorrectly. As for the facts, the GC stated that there were serious doubts that Intel's chipsets fully satisfied Apple's technical requirements instead of Qualcomm products, which again showed that the case had not been handled properly by the EC. Thus, it was decided that the decision that the payments had created an abuse of a dominant position was unlawful since the EC had made an incorrect analysis when it had not taken into account all the evidence, circumstances, and effects of the payments.

Major Supermarkets Fined for Hub-and-Spoke Infringement in Portugal

On 8 June 2022 the Portuguese Competition Authority fined major supermarkets and their common supplier for hub-and-spoke infringement between 2007 and 2017.

Major supermarket chains such as Auchan, E. Leclerc, Modelo Continente, and Pingo Doce and their common supplier Unilever have been fined for a hub-and-spoke infringement by the Portuguese competition authority.

The authority emphasized that the distribution companies set the retail prices in their supermarkets between 2007 and 2017 for several groups of products such as food, home care, and personal care areas such as detergents, deodorants, ice cream, sauces, and tea without directly communicating with each other since they were communicating through their common supplier. Therefore, the Authority imposed the following fines on the undertakings, resulting in a total fine of EUR 132m:

- Auchan – EUR 16,190,000
- E. Leclerc – EUR 2,890,000
- Modelo Contiente – EUR 50,780,000
- Pingo Doce – EUR 35,650,000
- Unilever – EUR 26,550,000

For similar infringements, between December 2020 and March 2022, the Authority sanctioned within its five decisions, Modelo Contiente, Pingo Doce, Auchan, E. Leclerc, Intermarché, and Lidl, beverage suppliers Sociedade Central de Cervejas, supplier Bimbo Donuts, and several managers.

The EC's New Vertical Block Exemption Regulation

*Based on a comprehensive assessment and revision of the 2010 rules, the EC adopted the new Vertical Block Exemption Regulation ("**VBER**") on 10 May 2022, along with the new Vertical Guidelines. The revised VBER and Vertical Guidelines are in force as of 1 June 2022.*

The revised VBER and Vertical Guidelines are aimed at providing a contemporary guide for enterprises to enable them to adapt their daily business to the market conditions of the digitalized era, which has been reformed drastically by the rise of online sales and e-commerce and ensure a more harmonised application of the vertical rules across the EU.

In accordance with the needs of the said digitalized era, the main changes adapted by the revised VBER were crystallized on adjusting the borders of the safe harbour, according to which certain agreements enjoy the block exemption pursuant to the Article 101(1) of the Treaty on the Functioning of the European Union ("**TFEU**").

In this regard, the EC aimed to eliminate false positives and false negatives defined under the VBER to adjust the borders of the safe harbour. The EC stated that (i) false positives concern vertical agreements and restrictions that are covered by the safe harbour of the block exemption but for which it cannot be assumed with sufficient certainty that they were generally on balance efficiency-enhancing and, thus, fulfil the conditions of the exception provided by Article 101(3) of the TFEU whereas (ii) false negatives refer to vertical agreements and restrictions which are not covered by the block exemption but for which it can be assumed with sufficient certainty that they generally fulfil the conditions of the said article.

Consequentially, the EC decided to:

- consider (i) dual distribution and parity obligations as false positives and (ii) active sales restrictions and restrictions of online sales as false negatives;
- narrow the scope of the safe harbour by excluding certain aspects of dual distribution and certain types of parity obligations from the block exemption under the VBER;
- enlarge the scope of the safe harbour by including certain restrictions of a buyer's ability to actively approach individual customers and certain online sales practices such as to impose different criteria for online and offline sales in selective distribution systems.

Furthermore, the revised VBER rules have been clarified and simplified to enable those who need to be consulted by it in their daily business. The VBER rules also have been modified, in relation to the assessment of online restrictions, vertical agreements in the platform economy and agreements that promote sustainability goals.

Anti-Circumvention Investigations into Artificial Leather and Textile Fabrics Concluded

*In June 2022 the Turkish Ministry of Trade ("**Ministry**") concluded two anti-circumvention investigations concerning the imports of (**i**) certain finished/unfinished artificial leather[4] originating in/exported from Malaysia and Jordan, and (**ii**) textile fabrics with polyurethane[5] originating in/exported from Malaysia and Greece through the Communiqués numbered 2022/15 and 2022/16 on the Prevention of Unfair Competition in Imports, respectively.*

Circumvention is a change in the pattern of trade between a third country and Turkey or the country subject to measures and Turkey or individual companies in the country subject to measures and Turkey, stemming from a practice, process or work for which there is an insufficient due cause or economic justification other than the avoidance of the anti-dumping duty in force, and that the remedial effects of the duty are being undermined or nullified. The most common forms of circumvention are third-country shipments, minor modifications on the concerned products, and assembly operations with limited added value.

Communiqué No. 2022/15 on the Prevention of Unfair Competition in Imports

Initially, an anti-dumping duty of 1.9 USD/kg on the imports of certain finished/unfinished artificial leather originating in China was imposed on 18 April 2009. Through the subsequent expiry review investigation concluded in 2015, the concerned anti-dumping duty remained unchanged. On 4 September 2021, the Ministry ex officio initiated the concerned anti-circumvention investigation to determine whether the anti-dumping duty of 1.9 USD/kg for the imports of finished/unfinished artificial leather originating in China had been circumvented through the imports originating in/exported from Malaysia and Jordan. It was concluded that the companies in Malaysia and Jordan had circumvented the anti-dumping duty in force due to a practice, process, or work for which there was insufficient due cause or economic justification other than the avoidance of the anti-dumping duty in force. In this respect, the anti-dumping duty in force applicable to the imports of certain finished/unfinished artificial leather originating in China was extended to imports of aforementioned products originating in/exported from Malaysia and Jordan.

Communiqué No. 2022/16 on the Prevention of Unfair Competition in Imports

On 2 December 2016, the Ministry imposed an anti-dumping duty of 2.2 USD/kg on the imports of textile fabrics with polyurethan originating in China. Upon the ex officio preliminary examination conducted by the Ministry regarding the circumvention of the anti-dumping duty in force applicable to the imports of textile fabrics with polyurethane through the imports originating in/exported from Malaysia and Greece, an anti-circumvention investigation was initiated on 26 March 2021. As a result of the investigation, the Ministry determined that the concerned firms in Malaysia and Greece had circumvented the anti-dumping duty in force, except a Malaysian company, namely Innotech Textile (M) Sdn. Bhd. In this respect, the applicable anti-dumping duty of 2.2 USD/kg on the imports of textile fabrics with polyurethan originating in China was extended to the imports originating in/exported from Malaysia and Greece.

[4] Classified under the CN Code 5603.14 and the CN Code 3921.13.

[5] Classified under the CN Code 5903.20.

Dumping Investigation on the Imports of Digital Printing Films Terminated: No Injury

On 10 June 2022 the Ministry concluded a dumping investigation concerning the imports of "digital printing films" originating in Germany through Communiqué No. 2022/18 on the Prevention of Unfair Competition in Imports.

The concerned investigation was initiated on 27 May 2021 upon a complaint lodged by a domestic producer claiming that the imports of digital printing films originating in Germany had been dumped and thereby caused injury and/or threat thereof to the relevant Turkish domestic industry.

Since the economic indicators provided by a complainant in its complaint constitutes the basis of injury allegations that result in the initiation of trade remedy investigations, to verify information provided by them the Ministry conducts verification visits at the premises of domestic producers. In this regard, as a consequence of the verification of the economic indicators of the complainant, the Ministry saw that there had been no injury or threat thereof before the domestic industry that would justify the imposition of anti-dumping measures and accordingly, no dumping margin calculation was made with respect to the exporters/producers located in Germany.

Additionally, in evaluating the allegation from the complainant that the imports of digital printing films originating in Germany had caused price effects (i.e., price undercutting and price underselling), the Ministry observed that there had been neither price undercutting nor price underselling since (i) the concerned imports had been realized with unit prices that were 2-6% higher than the prices of the complainant and (ii) the complainant had reported high profitability during the period of investigation. Examination of the complainant's economic indicators revealed that although a decrease in the production of the complainant had occurred, this mainly had been caused by a decrease in export sales. Moreover, it was seen that the complainant's end-of-period stocks had decreased, stock circulation rate had increased and, in line with the growth in profitability, cash flow and returns in investments had increased significantly. In a holistic evaluation of the complainant's economic indicators, the Ministry observed that the complainant had not faced either material injury or threat of material injury and decided to terminate the investigation without imposing any anti-dumping duties on the imports of digital printing films originating in Germany.

The Outcome of the Expiry Review Investigation into the Imports of Stoppers and Lids

The Ministry concluded its expiry review investigation concerning anti-dumping duties on imports of "Stoppers, lids and other closures," originating in China, Indonesia, and Hong Kong through Communiqué No. 2022/13 on the Prevention of Unfair Competition in Imports

The original investigation that constituted the basis of the expiry review investigation regarding imports of stoppers, lids, and other closures originating in China was concluded on 20 December 2003 through Communiqué No. 2003/22 on the Prevention of Unfair Competition in Imports. This investigation resulted in the imposition of anti-dumping measures of 0.91 USD/kg. The latest expiry review investigation, dated 21 May 2015, was concluded with the decision to continue the anti-dumping measures for stoppers, lids, and other closures originating in China, Indonesia, and Hong Kong, ranging from 0.14 USD/kg to 0.91 USD/kg. With the present expiry review investigation at hand, the Ministry concluded that dumping and damage are likely to continue or reoccur if the existing measures were repealed. Therefore, it was decided to continue the anti-dumping measures of 0.52 USD/kg for the products originating in China.

Anti-Dumping Duties on Imports of Chillers Originating in China to Remain in Force

On 14 June 2022 the Ministry concluded its expiry review investigation concerning anti-dumping duties on the imports of "chillers"[7] originating in China through Communiqué No. 2022/17 on the Prevention of Unfair Competition in Imports.

The original investigation that constituted the basis of the expiry review investigation regarding imports of chillers originating in China was concluded on 17 July 2016 through Communiqué No. 2016/16 on the Prevention of Unfair Competition in Imports. In the original investigation, the Ministry established that the imports of chillers originating in China had been dumped and caused injury to the domestic industry. Consequently, the Ministry imposed anti-dumping duties of 36.63% for a producer who had cooperated with the Ministry, and 49.64% for all other producers/exporters located in China.

Within the present expiry review investigation, which had been initiated as a result of a complaint from a domestic producer, the Ministry evaluated whether the expiry of the concerned anti-dumping measures would be likely to result in a continuation or recurrence of dumping and injury. The Ministry did not calculate a new dumping margin; instead, the Ministry examined the export capability of the concerned country, export unit prices, and the dumping margins calculated in the original investigation since the Ministry deemed that those margins indicated the behaviour of Chinese exporters in the absence of anti-dumping duties. Accordingly, the Ministry found that the continuation of dumping was likely to occur in an environment where the concerned duties were not in place.

In evaluating the likelihood of injury, import trends in absolute and relative terms, the unit prices of imports, price effects of the imports, and economic indicators of the domestic industry were taken into account. Import trends showed that imports originating in China had increased in both absolute and relative terms and their unit prices had caused significant price undercutting and price underselling (ranging from 1180% to 1280% and 1100% to 1300%, respectively). On the other hand, the economic indicators of the complainant such as efficiency and return of investments had deteriorated whereas the capacity utilization rate, domestic sales, employment, and wages of the complainant had increased during the period of investigation. As a result of the above evaluations, the Ministry emphasized that dumping and injury were likely to occur if the existing anti-dumping measures were repealed and thus decided to continue the applicable anti-dumping duties (36.63% and 49.64) on the imports of chillers originating in China for five years without any changes.

[6] Classified under the CN Codes 3919.90.80.30.11 00.
[7] Classified under the CN Code 8418.69 and defined as "refrigerating or freezing equipment".

WTO Panel Reports on Turkey's Disputes with the EU: Steel Safeguards and Pharmaceuticals

There have been some developments in relation to two disputes involving the EU and Turkey at the WTO.

The first one, the EU–Safeguard Measures on Steel (Turkey) case was initiated on 13 March 2020 upon Turkey's challenge to the EU's provisional and definitive safeguard measures on imports of certain steel products and the investigation that had led to the imposition of those measures. The Panel recommended the EU bring its measures into conformity with its obligations on 29 April 2022. The recommendations were adopted by the EU on 31 May 2022.

Turkey asserted that the concerned measures, as well as the investigation process, were inconsistent with the WTO rules in the GATT 1994 and the Agreement on Safeguards. More specifically, Turkey put forward that the EU had failed to make reasoned and adequate findings with respect to its determinations relating to (i) like products, (ii) the unforeseen developments and how those unforeseen developments resulted in increased imports, (iii) the products concerned threatening to cause serious injury to domestic producers, (iv) the increase in imports of the products concerned, in absolute or relative terms, (v) the existence of a threat of serious injury to the domestic industry, and (vi) the finding of a causal link between the increase in imports and the threat of serious injury to the domestic industry.

While both the EU and Turkey claim victory over the concerned Panel report, it should be noted that the Panel found that the concerned definitive safeguards were inconsistent only with respect to the EU's failure (i) to establish that the increase in imports had taken place "as a result of" the unforeseen developments, (ii) to identify in its published reports the obligations whose effect resulted in the increase in imports and (iii) to base its finding of serious injury on facts as required by the Agreement on Safeguards. As a result, the Panel recommended the EU bring its measures into conformity with its obligations on 29 April 2022. The recommendations were adopted by the EU on 31 May 2022. As regards the second dispute, the Turkey–Pharmaceutical Products (EU) dispute, which was initiated on 2 April 2019 upon the complaint of the EU, here the EU claimed that various Turkish measures concerning the production, importation, and marketing of pharmaceutical products amounted to (i) localisation requirements, (ii) technology transfer requirements, (iii) an import ban on localised products, and (iv) prioritization measures. Accordingly, the EU asserted that the concerned measures were inconsistent with various provisions of the GATT 1994, Agreement on Trade-Related Investment Measures, Agreement on Subsidies and Countervailing Measures, and the Agreement on Trade-Related Aspects of Intellectual Property Rights. In its report, the Panel upheld the EU's arguments and recommended Turkey bring its measures into conformity with its obligations under the GATT 1994. On 28 April 2022, Turkey decided to appeal the Panel report before the Arbitrator in accordance with the Agreed Procedures for Arbitration reached between the EU and Turkey.

[8]*Classified under CN code 7010.20.00.00.00*

Anti-Dumping Duties on Imports of Dental Fittings Originating in South Korea

*Through Communiqué No. 2022/12 on the Prevention of Unfair Competition in Imports, the Ministry concluded its dumping investigation on the imports of "dental fittings" originating in South Korea ("**Korea**") and imposed anti-dumping duties ranging from 10-25%.*

The concerned dumping investigation was initiated on 12 May 2021 upon a complaint lodged by domestic dental fittings producers who alleged that the imports of the concerned product had been dumped and thereby caused injury to the Turkish domestic industry. The investigation was concluded on 14 April 2022 through Communiqué No. 2022/12 on the Prevention of Unfair Competition in Imports. Due to the large number of cooperating producers/exporters, the Ministry employed the sampling methodology and the top three companies that export to Turkey the most were taken into the sampling.

Specific to the investigation at hand, in favour of exporting companies in the investigation, the 5% test (by which the Ministry assesses whether the quantity of the domestic sales of the concerned product is representative for the purpose of normal value calculation, i.e., whether the sales of like products in the Korean market constitute 5% or more of their sales to Turkey on the basis of quantity) was found to be too high for each sub-product type. The rate in this test was applied as 1%, since the product type has too many sub-types and similar sub-types have close costs and sales prices.

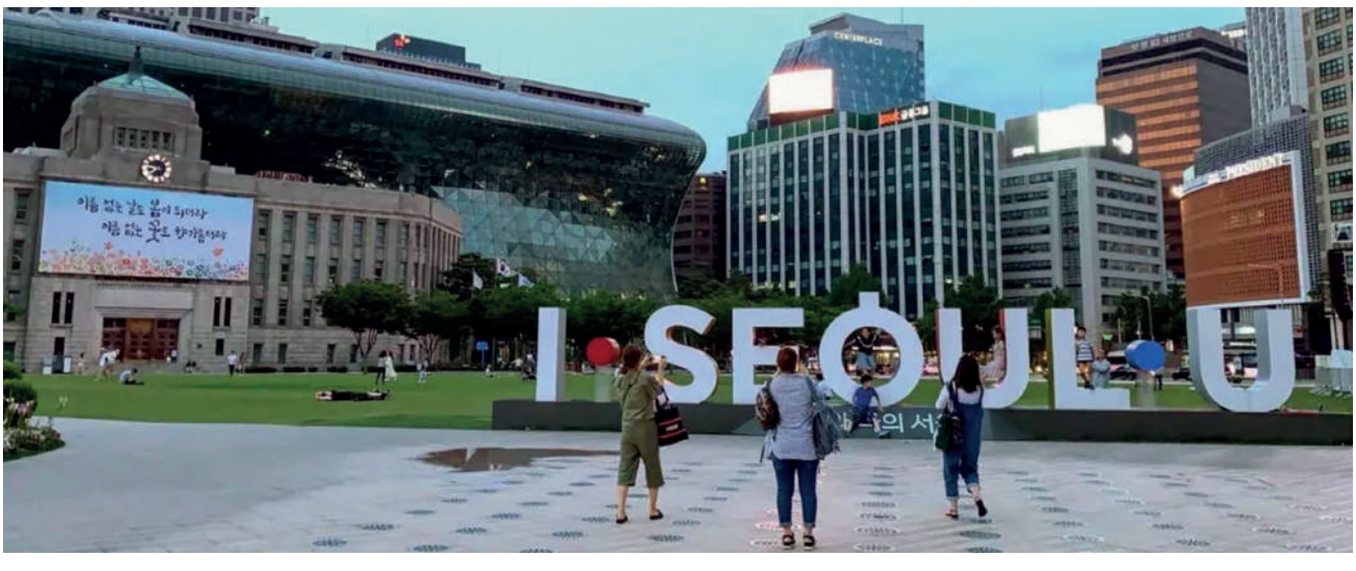
Additionally, a Korean company requested that the Ministry use the constructed values calculated from the sale prices of its importer firm in Turkey, not its own sale prices to Turkey when determining the export price. The Ministry rejected this request on the grounds that the construction of export price was an exceptional method and that the investigating authorities could apply it only under certain conditions. In this regard, the Ministry examined the provisions in the partnership agreement of the relevant importer company. It was observed that the majority of the company's shares were owned by real persons residing in Turkey, not the exporter firm residing in Korea and that the chairman of the board of directors of the company could only be one of these persons. It was further surmised that these persons constituted the majority of the members of the board of directors and the decisions of the board of directors could be taken only with the initiative of the majority. Therefore, the Ministry determined that the company had the opportunity to make decisions and manage independently from the exporting company.

Accordingly, the Ministry calculated dumping margins ranging from 10.8% to 34.4% of the CIF value of the concerned product. For non-sampled cooperating exporters/producers, the dumping margin of 28% was calculated by taking the weighted average of the dumping margins of the sampled companies. On the other hand, the dumping margin calculated for non-cooperating companies was 66.7% of the CIF price.

With respect to the injury and causal link allegations, the Ministry observed that (i) there had been an increase of 93% on the basis of quantity between the years 2018-2020 of the imports of the concerned product originating in Korea while the unit prices thereof decreased, (ii) imports from Korea also had increased in relative terms (i.e., in terms of its market share in Turkey), (iii) imports from two sampled companies had caused price undercutting and price depression while one sampled company had not caused any price undercutting or depression, and (iii) as a result of a holistic evaluation of the economic indicators of the domestic industry, it was found that no negative developments in the market share, capacity utilization rate, worker productivity, or return on investments and stock data of the domestic industry had occurred.

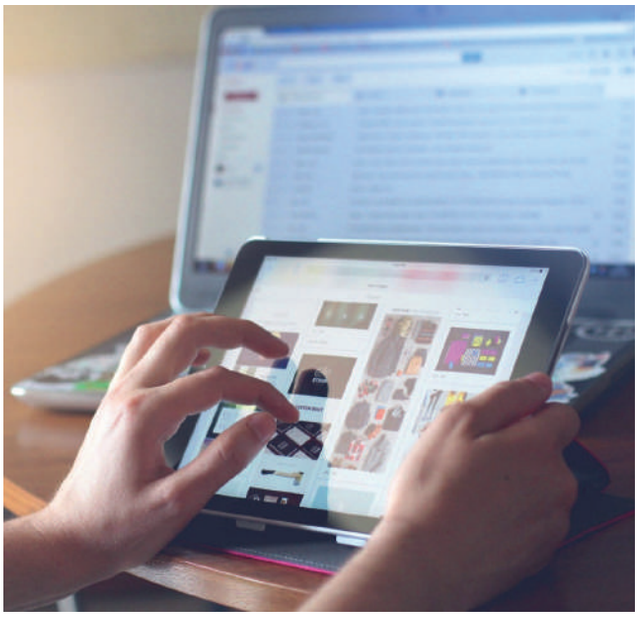
After establishing dumping and material injury to the domestic industry, within the framework of the public interest principle, the Ministry applied the lesser duty rule and decided to impose anti-dumping duties lower than the calculated dumping margins. Accordingly, the Ministry imposed anti-dumping duties as (i) 10% for a cooperating company with 10.5% dumping margin, (ii) 15% for cooperated producers/exporters (both sampled and non-sampled) and (iii) 25% for other producers/exporters located in Korea.

[9]Classified under CN Code 9021.29.00.00.00.



The Turkish Guidelines on Cookie Practices Published

*The Turkish Data Protection Authority ("**DPA**") published the Guidelines on Cookie Practices ("**Guidelines**") on its official website on 20 June 2022.*



The Guidelines concern cookies used in the processing of personal data and initially provide information for various cookie types in consideration of their duration (session cookies and persistent cookies), the purpose of use (necessary cookies, functionality cookies, performance-analytics cookies and advertising/marketing cookies), and parties (first-party and third-party cookies).

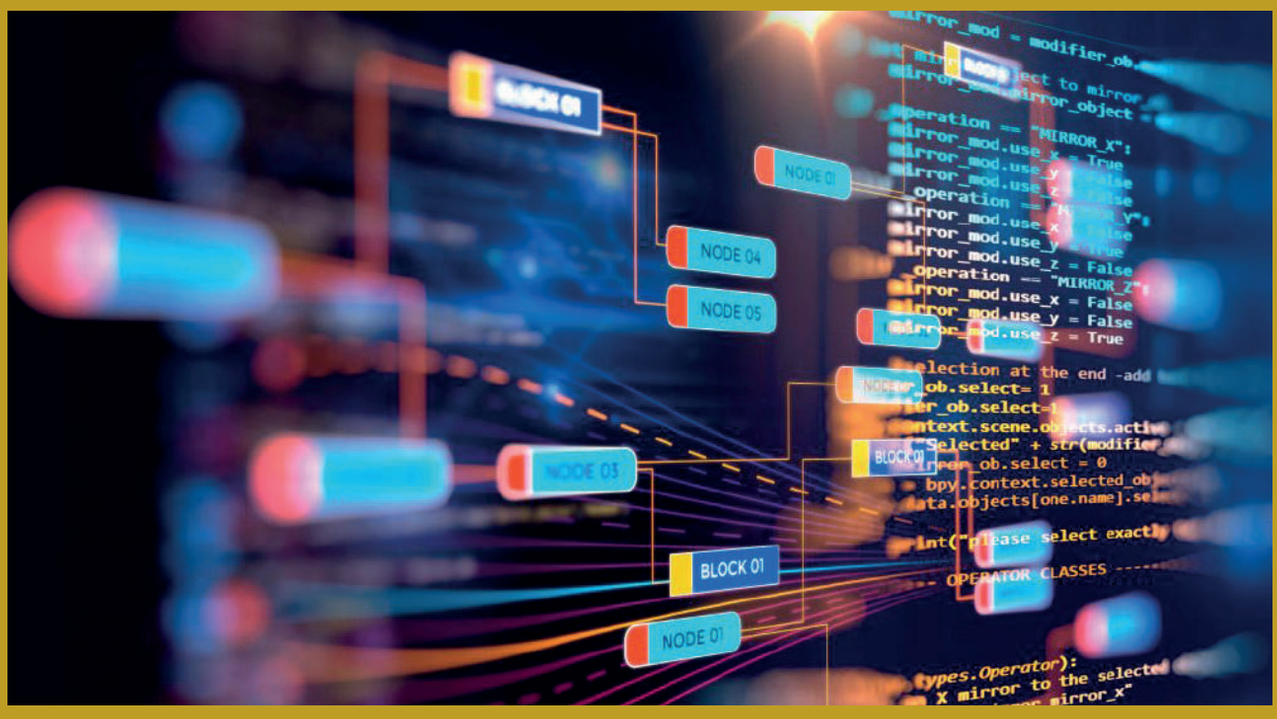
The Guidelines provide an explanation of cookies in terms of personal data processing. In this regard, the concept of consent is explained in light of certain use cases. In addition, in consideration of the differing practices, the DPA shed light on the obligation to inform regarding the use of cookies and evaluated a DPA decision in which the issues regarding consent and obligation to inform are evaluated in detail accordingly.

Data Governance Act Published

*The Data Governance Act ("**DGA**") was published in the Official Journal of the European Union on 3 June 2022 and will be applicable as of September 2023. The* DGA *initially aims to promote the availability of data and build a trustworthy environment to facilitate the use of relevant data for research and the creation of innovative new services and products.*

The DGA mainly sets forth a mechanism for the reuse and transfer of public-sector data including trade secrets, personal data, and data protected by intellectual property rights with private companies. It also introduced certain concepts such as "data altruism," meaning the voluntary sharing of data on the basis of consent; "data intermediation services," a service for data sharing with data users; and "personal data spaces," which corresponds to new technology for the storage and management of personal data allowing the data processing without the data being transmitted to third parties.

Moreover, the European Data Innovation Board also was introduced as a supervisory body advising and assisting the European Commission with the data-driven innovation subject to DGA, including the interoperability of data intermediation services, and facilitating the development of data spaces.



The EDPB Guidelines on the Calculation of Administrative Fines under the GDPR

*The European Data Protection Board ("**EDPB**") has adopted Guidelines 04/2022 on the Calculation of Administrative Fines under the General Data Protection Regulation ("**GDPR**") to harmonise the methodology that supervisory authorities use when calculating the amount of fine pursuant to the relevant provisions of the GDPR.*

In the Guidelines, in reference to the principles provided under the Article 83 of the GDPR regarding the supervisory authority subject to while calculating the administrative fine to be implemented are effectiveness, proportionality, dissuasiveness, considering the seriousness of the infringement or character of the perpetrator and the rule that the final fine shall not exceed the maximum amounts provided for in Articles 83 of the GDPR, the EDPB has developed a five-step methodology for determining administrative fines for infringements of the GDPR in light of the beforementioned principles:

- First, to determine if a fine can be imposed on all or merely some of the infringements, the supervisory authorities must consider if the case at issue includes one or more instances of sanctionable conduct which resulted in one or more infringements.
- Second, it is necessary to determine the initial point for future calculations of the amount of fine. The authorities must take into account the nature, gravity, duration, intentional or negligent character of the infringement and classify the categories of personal data affected and the seriousness of the infringement.
- Third, the authorities must consider the aggravating and mitigating circumstances related to past or present behaviour of the controller/processor and increase or decrease the fine accordingly.
- The fourth step for the authorities is determining the relevant legal maximums for the different infringements and ensuring that the relevant fine range determined pursuant to the GDPR is not exceeded.
- Lastly, the authority must diagnose whether the final amount of fine meets the requirements of effectiveness, dissuasiveness, and proportionality. At this point, the EDPB states that the amount of fine still can be adjusted referring to these principles without exceeding the range indicated in the fourth step.

Information Commissioner's Office Fined Facial Recognition Database Company

*In May 2022 the UK's independent data protection authority, the Information Commissioner's Office ("**ICO**"), has fined Clearview AI Inc. ("**Clearview**")* GBP *7,552,800 for using images of people in the UK and elsewhere collected from the web and social media to create a global online database that could be used for facial recognition.*

Clearview is a service that allows customers to upload an image of a person to an application and provides these images in consideration photos provided by other customers with similar characteristics. Clearview has created a data base with more than 20 billion images. Accordingly, the ICO concluded that Clearview was in violation of UK data protection legislation based on the following grounds:

- failing to use the information of people in the UK in a way that is fair and transparent, given that individuals are not made aware or would not reasonably expect their personal data to be used in this way;
- failing to have a lawful reason for collecting people's information;
- failing to have a process in place to stop the data from being retained indefinitely;
- failing to meet the higher data protection standards required for biometric data, which is a special category of data;
- asking for additional personal information, including photos, when asked by members of the public if they are on their database, which ultimately may have acted as a disincentive to individuals who wish to object to their data being collected and used.

In light of the foregoing, along with the administrative monetary fine, the ICO also ordered Clearview to cease obtaining and using the personal data of UK residents publicly available on the internet and to delete the data of UK residents from its systems.

Tracking Work Shifts through Fingerprint Recording System Violates Right to Privacy

In March 2022 the Constitutional Court of Turkey had the final say in a case related to tracking work shifts through a fingerprint recording system. It ruled that such tracking without the consent of the individual concerned constitutes an infringement of the right to request the protection of personal data within the scope of the right to privacy respect.[10]

The applicant, a public servant at Söke Municipality, stated that the Municipality had started to track work shifts via a fingerprint system and his fingerprint had been recorded. He argued that since fingerprints are considered personal data that enables the physical identification of the individual, it falls within the scope of the right to privacy.

Upon the rejection of the application by the Municipality, the applicant started the judicial review process for the annulment of the administrative conduct. Although the Municipality claimed that administrative bodies are entitled to adopt evolving technologies to stimulate the efficiency of their staff, the Court of First Instance decided to annul the conduct subject to the lawsuit. In its reasoned decision, the Court stated that because the implementation of time tracking through the fingerprint scanning system, which was within the scope of obtaining personal data from the personnel was within the scope of the principle of privacy, even in the public area, and as such implementation had no legal basis, the conduct of the Municipality was found to be illegal.

However, the Court's decision was overturned by the Regional Administrative Court on the grounds that the usage of technology to facilitate the execution of public service effectively would favour the public interest and since the administration was entitled to ensure the attendance of the employees, the time tracking system did not violate the privacy principle.

Eventually, the case was brought before the Constitutional Court of Turkey in February 2018. The high court emphasized that to implement the personnel tracking system with the method of recording biometric data, the explicit consent of the person should be obtained in cases not regulated by the laws. The high court said that as the applicant had not consented to the processing of sensitive personal data and the processing and use of biometric data in the control of the employee's compliance with work shifts are not supported separately and explicitly by the existing legislation, the intervention subject to this application did not meet the legality condition.

Thus, it was decided on 10 March 2022 that due to the fact that personal data had been processed by the administration without a legal basis, the applicant's right to request the protection of personal data within the scope of the right to the respect of privacy had been violated.

[10] *The Constitutional Court's Decision dated 10 March.2022 and application numbered 2018/11988.*

The Court's Fact Check: The First-Degree Court Quashes and Affirms in Part the Comprehensive Interim Measures Decision Brought Against Trendyol

by Erdem Aktekin

Until recently, an interim measure decision of the TCA was something hard to come by. However, with the growing prominence of digital markets and the equally strong response from the competition authorities, that situation has changed as well. The latest experience shows that the TCA is more determined to actively use this tool to efficiently respond to conducts in these fast-evolving markets.

Among those decisions, the Trendyol Interim Measures Decision[1] (or **Trendyol Decision**) clearly was the one that attracted the most interest and debate. So, it was very exciting to get informed that on 25 May 2022, the administrative court has reversed in part and affirmed in part this decision via a detailed analysis of each interim measure ("**Court's Decision**").

As mentioned, the ongoing investigation case on Trendyol, an e-marketplace owned by the Alibaba, and the Trendyol Decision attracted a lot of interest both from practitioners and from market players since they are the first sightings of the shadows casted over by the rumoured DMA-like legislations. Back in September last year, via its announcement on Trendyol Decision, the Authority has also made clear that the underlying investigation is about whether Trendyol infringed the Competition Law by favouring its brands over the ones sold by other sellers through its website, by using the data that it obtained through its marketplace operations in favour of its own products and by discriminating among the sellers using the platform.

Based on its provisional findings, to limit the effects of these conducts, the TCA has adopted the Trendyol Decision, a decision comprised of three interim measures to counter the three identified conducts and of other four measures to ensure effective compliance. In its own words the TCA announced the interim measures as: "In this context, it has been decided that Trendyol refrains from all behaviours aimed at favouring its own products, discriminating between sellers, sharing and using data obtained from marketplace activities in favour of its own brands, including interventions made through algorithms and coding, and should take all necessary technical, administrative and organizational measures to ensure the auditability of these measures".[2]

Since the aim of this article is to analyse the Court's very extensive review of the interim measures brought by the Trendyol Decision within the scope of the Article 9/4, it is beneficial to recall the exact scope of the interim measures, according to which Trendyol shall;

- within the scope of its marketplace activity, put an end to all kinds of conducts, behaviours and practices, regarding products and services offered under its own economic entity, including interventions made through algorithms and coding, which provides an advantage against its competitors, and avoid these conducts in the continuation of the investigation process.
- stop the sharing and use of all kinds of data obtained and produced from its marketplace activity, for products and services offered under its own economic entity, and avoid these conducts in the continuation of the investigation process,
- put an end to all kinds of conducts, behaviours and practices, including interventions made through algorithms and coding, which may discriminate among sellers operating in the marketplace, and avoid these behaviours in the continuation of the investigation process,

- take all necessary technical, administrative and organizational measures to ensure the auditability of the above-mentioned interim measures,
- keep the parametric and structural changes made on all algorithm models used for the purposes of product search, seller listing, seller score calculation, etc. at least 8 (eight) years, with old versions and undeniable accuracy,
- keep the source codes of all software specially developed for use within the company with old versions and undeniable accuracy, for at least 8 (eight) years,
- keep user access and authorization records and manager audit records for all software used within the scope of the execution of business processes within the company for at least 8 (eight) years, with undeniable accuracy.

Against this list of interim measures, Trendyol took the case to the first-degree administrative court. According to the Court's Decision, Trendyol in its essence argued that:

- the obligations listed under the umbrella of interim measures are not in compliance with the rules of Competition Law,
- the possibility of serious and irreparable damages until the final decision is made cannot be demonstrated [by the Trendyol Decision] concretely with legally valid information and documents,
- the decision being established on abstract justification is not in line with the principle of the rule of law,
- the evidence collected by the unauthorized authorities and illegally, cannot be a basis for the decision of interim measures, and

- a significant part of the documents belongs to a period where the companies were not in a dominant position in the market.

As a first step of its reasoning, the Court puts forward the three conducts identified by the TCA as the basis for the first three interim measures. According to the TCA's own documents these are:

- Intervening in the algorithm in a way that would provide an advantage to the products it offered for sale in its role as a retailer and providing the next day delivery opportunity only for its own products,
- Using the data of the sellers active in the marketplace in the preparation of the marketing/design strategy that will provide an advantage to its own retail activity, and
- Discriminating between vendors selling in the marketplace, through interventions in the algorithm and the lack of transparency for sponsored products.

In its decision the Court holds a two-step analysis for evaluating the interim measures. First, by examining the available evidence in the case file, the Court looks whether the conditions in Article 9/4 are satisfied. As a reminder, pursuant to Article 9/4 of the Competition Law, "where serious and irreparable harm is likely to occur before the final decision, the Board may take interim measures in order to maintain the situation before the infringement, without exceeding the scope of the final decision". In the second stage, the Court then analysis whether the drafted interim measures properly address the relevant concerns. Also, at this point the Court notes that the "infringement" in the text of the article refers to a "plausible existence of an infringement" since if the adoption of the former interpretation would not be in line with the reasoning of the Competition Law.

As mentioned, first, the Court goes on to analyse each of the evidence that is used to justify the first three interim measures aimed individually at each of the investigated conducts. The decision shows that while doing so the Court had requested additional information about the documents from Trendyol, presumably to be able to assess fully the background of the conducts. As will be examined in detail, in its analysis the Court uses this and other information:

- to check the validity of the evidence to see if they support a strong plausible existence of a violation, an "abuse" of dominance, that will justify the application of interim measures[3],
- to check whether serious and irreparable harm is likely to occur before the final decision, mostly blended together with the first condition[4], and
- to check whether the conduct can be objectively justified.[5]

First Interim Measure

Regarding the first interim measure targeting the first conduct, the Court examines 14 documents, which are mostly screenshots of work orders made to software engineers that look to be requesting certain changes in the algorithm in favour of platform's own brands.

For the first seven documents, the Court finds that these belong to year 2017, a period for which we understand that there is not a dominance finding made by the TCA against Trendyol. Depending on this finding, the court decides that these documents cannot be used as a basis for an interim measure within the scope of the current investigation. At this point, it should be pointed out that the Court's Decision does not check whether the conducts identified in these documents also carried over to the periods under investigation where the TCA finds Trendyol as dominant.

For Document-8 which the TCA argues as showing Trendyol removing "seller-scores" for its own activities and thus favouring itself against other sellers. However, the Court sides with Trendyol which brings the explanation that since Trendyol has multiple ways of selling products (its own products, reselling products of others and through its warehouses) a single score would not be feasible. The Court uses this explanation to argue that Trendyol and the sellers are not in "equal status" and thus the conduct cannot be categorized as an abuse. This part of the decision seems to argue that for self-preferencing to be considered as an abuse, the dominant undertaking and the sellers should be assessed to see whether they are on equal status just like it would be in a downstream discrimination case.

Similarly for Document-9, the Court, in essence, using the information supplied by Trendyol, concludes that the company did not favour its own operations while offering delivery services to the sellers. Lastly, the Court examines Documents 10-13 which are argued by the TCA as showing that Trendyol has altered the search algorithm to make sure that its brands come on top in searches. Against the argument brought by the Trendyol which asserts that the conduct has been put in place because of the complaints received from consumers complaining about not finding Trendyol brands, the Court requests these complaints to be submitted to the file. This approach of the Court suggests that the Court is open to let Trendyol justify the adjustments made to the algorithm. However, since three complaints submitted by Trendyol, belong to dates after the conduct, the Court concludes that the Documents 10-13 "give rise to strong suspicion that [Trendyol] interferes with the algorithm in a way that will provide an advantage to the products offered for sale as a retailer by not including the named brands in the normal sorting filter and by carrying them to the higher ranks with computer coding". Similarly for Document-14, which shows that Trendyol removed the follower count of its own brands, the Court concludes that "It is strongly suspected that Trendyol interferes with the algorithm in a way that will take advantage of the products offered for sale in its role as a retailer, by not undermining the credibility of Trendyol brands with few followers and by favouring its own products." Accordingly, the Court affirms the fulfilment of Article 9/4 conditions for the first conduct based on these final documents.

Second Interim Measure

As for the second conduct, by surveying the Documents 15 through 20, the Court observes that the documents under consideration are correspondences between Trendyol employees which show that the sales data of competing brands are accessed and used within the company via tables and analysis tools. Although Trendyol has argued that the data is accessible by other

sellers, the Court rejected this argument given the lack of proof. Therefore, the Court has concluded that the required conditions by the Article 9/4 are also fulfilled for the second conduct.

Third Interim Measure

Finally, and surely most interestingly since the Court annuls the interim measure brought against this third category of conduct, the Court examines the Documents 21 and 22[6]. According to the Trendyol Decision, these two documents, which are intra-company correspondences, show that Trendyol can alter the search results to rank some sellers higher. The Court inquired about the documents, and from the response it received, concluded that the correspondences are made just to identify "errors" in the system and the sellers are not ranked higher than they should be.

However, after this initial point, the analysis of the Court makes a significant shift from its analysis under the first two conducts. As shown, under its examination of the first two conducts, the Court is more interested in whether the evidence supports the conducts put forward by the TCA rather than whether the conducts in themselves could be regarded as an abuse of dominance. This is interesting since the abuses identified by the first two conducts are very novel in nature not just for Turkey but for the world. Accordingly, for the third conduct as well, it is expected that the Court just concludes on the lack of existence of the conduct to annul the third interim measure.

However, for the discrimination allegations, the Court goes onto observe that the TCA did not analyse whether the sellers are of equal status or whether this situation is serious enough to amount to an infringement of the Competition Law. Furthermore, the Court argues that it would be pro-competitive to treat new sellers more favourably since the support given to new sellers would increase the competition in the market. It is highly surprising to witness that while on one hand the Court does not go into detail to analyse more novel conducts such as self-preferencing and use of sellers' data to see whether they amount to abuses of dominance and while on the other argues that the TCA should have made a more detailed analysis, about a more familiar conduct such as discrimination.

Lastly and more importantly, the Court makes the following observation:

It is not legally possible to apply a measure by making an evaluation in the form of a final decision, it is only possible with a final decision to decide whether the plaintiff discriminates between the sellers or not, and if discriminates, whether this situation is an abuse of dominant position can only be revealed with the final decision, it is clear that it cannot be determined that the dominant position is abused by the plaintiff via discriminating between the sellers and that a situation on the contrary will result in the use of the interim measure as the main punishment tool by exceeding the purpose of the interim measure, and this situation will not be compatible with the principle of the rule of law.

It is very hard to interpret from the Court's Decision exactly how the approach of TCA changes between conducts 3 and 1-2 so that the Court opposes to the third interim measure on the grounds that if the TCA's approach is accepted it would amount to a determination of violation and thus a replacement of the final decision. In all three conducts, the TCA puts forward the existence of a conduct that would possibly be considered as an abuse of dominance. In the first two, the Court only checks the evidence to see whether they support the existence of the conduct while on the third one it goes on to argue that ordering an interim measure would mean a conclusion on the existence of a violation. Accordingly, the Court's approach that it brought to the third conduct seems disjointed from the rest of its decision. As a result of these assessments, the Court upholds the first two interim measures while annulling the third one. In the second part, the Court examines whether the interim measures brought are relevant to the identified conducts. However, since the interim measures are drafted in a way that literally request stopping the alleged "conducts", the Court affirms the two measures corresponding to the first two conducts.

Regarding the measures brought in for effective compliance, the Court unsurprisingly annuls the periods set for measures 5-8 which extend beyond the final decision for a total period of 8 years. Since the objective of the interim measures is to preserve the competitive conditions from getting worse, there is no doubt that they should last until the final decision where the TCA will have the discretion to order the measures it seem necessary, anyway.

As a final comment, we believe that the decision of the Court is very important for various reasons. First, it shows that the Courts are ready to make an effective evaluation of the interim measure decisions which are powerful tools that should be carefully utilized. Second, while doing so the Court does not refrain from going into details of the case and from requesting further information in that regard. And finally, this decision makes it clear that the interim measures should not be extended to periods going beyond the final decision.

[1] The TCA's decision dated 30.09.2021 and numbered 21-46/669-334.

[2] Annoucement by the TCA, "Interim Measures Decision on DSM Grup Danışmanlık İletişim ve Satış Ticaret A.Ş. (Trendyol), 30.09.2021, avaliable at (in Turkish): https://www.rekabet.gov.tr/tr/Guncel/dsm-grup-danismanlik-iletisim-ve-satis-t-75fd73730d22ec118144005056b1ce21.

[3] Court's Decision, pages 6-11.

[4] Ibid.

[5] Although the Court does not explicitly refer to this, it especially hints while analysing the Document-8, Documents 10-13 and Documents 20-21.

[6] While the Court only considers these two documents as evidence to the third conduct, it can be seen from the Trendyol Decision that the TCA also mentions Documents 10-11 and the video of an internal training which shows that the employees are trained to favour brands that purchase advertising services. However, the Court does not analyse this evidence to assess whether they would have supported the conclusion reached by the TCA.

Administrative Court Ruled the TCA's Decision Fining Sahibinden.com for Hindrance of On-site Inspection was Unlawful

by Caner K. Çeşit, Cansen Erensoy

Introduction

The Turkish Competition Authority is authorized to examine all data and documents on electronic platforms and information systems during the on-site inspections pursuant to the amendment dated 16.06.2020 on Article 15 of the Turkish Competition Law. Subsequently, the TCA published the Guidelines on the Examination of Digital Data during On-Site Inspections on 09.10.2020.

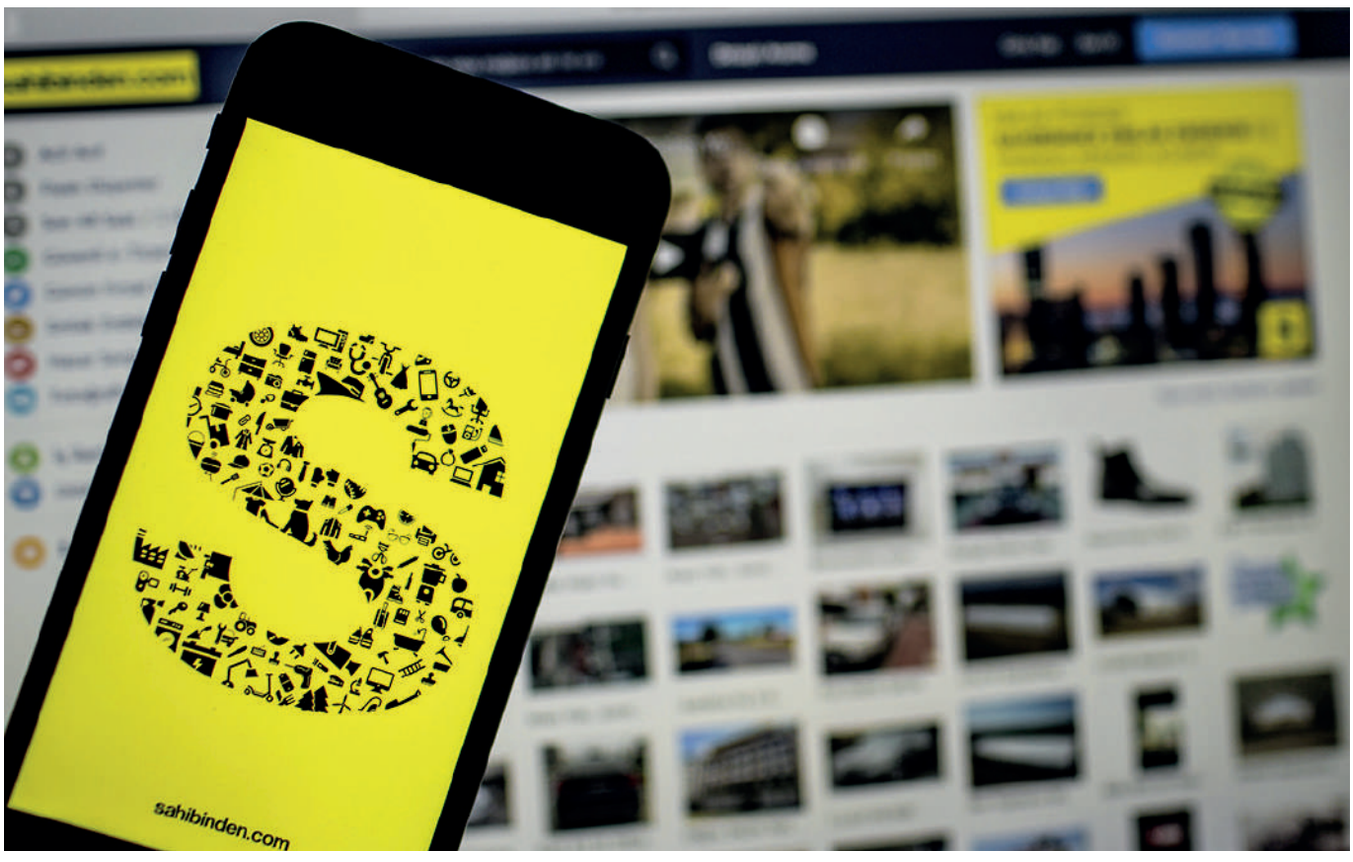
In line with the relevant changes in legislation, the scope of on-site inspections conducted by the TCA's case handlers has reached another level. The TCA has started to inspect mobile devices, including personal devices (mobile phones, tablets, etc.) if they contain digital data belonging to the undertaking. In this context, it is observed through the published decisions that the TCA recently adopted a strict approach with regard to on-site inspection processes. In case any data is deleted during the on-site inspection, the TCA may decide to impose administrative monetary fines by stating that these practices cause hindrance or complication to the on-site inspection regardless of whether the relevant data relates to personal use.

The undertakings concerned have started raising various allegations to the TCA including privacy concerns and claiming that the deletion of the data related to personal use should not be regarded as a hindrance or complication to the on-site inspection. Moreover, the deleted data can be reached by the TCA by other means of ways such as from the devices of other employees who are a participant in the relevant conversation, and thus, the on-site inspection is not hindered. However, the TCA has rejected these arguments and imposed administrative fines on the relevant undertakings whose employees deleted data during the on-site inspection in the Sahibinden.com case.

Overview of the TCA's Sahibinden.com Decision

A recent example of the prominent precedent decisions of the TCA on this issue is related to the on-site inspection carried out at the premises of Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret A.Ş. ("Sahibinden.com"), one of the largest marketplaces in Turkey which has great market power in the sale/rental of real estates and the sale of vehicles. With its decision dated 27.05.2021 and numbered 21-27/354-174, the TCA concluded that Sahibinden.com hindered the on-site inspection ("Sahibinden.com Decision").[1]

On 09.04.2021, the case handlers of the TCA have carried out an on-site inspection within the scope of an ongoing investigation against certain undertakings including Sahibinden.com. During the inspection of certain employees' mobile devices, the case handlers became suspicious that the



employees deleted the correspondences within two WhatsApp groups and the following default explanation "Messages and calls are end-to-end encrypted. No one outside of this chat, not even WhatsApp, can read or listen to them. Tap to learn more." appeared on the top of the relevant group chats.

As the case handlers reached the relevant group chats during the inspection of another employee's device, the case handlers found that the participants of a WhatsApp group exchanged messages between the period 12:10 and 12:24, after the arrival of the case handlers at the premises of Sahibinden.com at 09:51. On this point, the Sahibinden.com Decision also includes the TCA Information Technologies Department's opinion that the relevant messages were indeed deleted after the commencement of the on-site inspection in line with the log records evaluated.

Accordingly, based on the understanding that the correspondences within the relevant WhatsApp groups were deleted after the commencement of the on-site inspection, the TCA imposed an administrative monetary fine of TRY 4,807,073.00 on Sahibinden.com amounting to 0.5% of its annual turnover for the financial year 2020 on the grounds of the hindrance of the on-site inspection.

Sahibinden.com's Request for Stay of Execution before the Administrative Court

On 13.06.2022, the TCA published the Ankara 2nd Administrative Court's ("Court of First Instance") decision dated 15.04.2022 and numbered E. 2022/254 on Sahibinden.com's request for a stay of execution and annulment of the Sahibinden.com Decision mainly based on the grounds that the deleted messages were personal correspondence on the personal devices of the relevant employee and the relevant messages were still available on other WhatsApp group participants' devices.[2]

The Court of First Instance concluded that Sahibinden.com Decision is unlawful based on the following reasons:

- Sahibinden.com sent an internal e-mail message at 11:36 on the day of the on-site inspection informing its employees that no correspondences should be deleted and all requested documents should be provided to the case handlers.
- The case handlers reached the deleted correspondence while examining the phones of other Sahibinden.com employees.
- The device, on which the employee deleted data, was a personal phone.
- The deleted correspondence did not include any business-related content; thus, the deletion is not of a nature to constitute a basis for an administrative fine.

In light of the foregoing, the Court of First Instance has decided to stay the execution of the Sahibinden.com Decision. Subsequently, as also published on the TCA's web-site on the same date, the Ankara Regional Administrative Court rejected the TCA's annulment request for the Court of First Instance's stay of execution decision.[3]

Conclusion

In line with the TCA precedents, the TCA currently has a strict approach with regard to hindrance on on-site inspections. Indeed, it is understood from the precedents that the TCA does not distinguish whether the deleted data has private/personal content. Conversely, in case the Council of State follows the same approach as the Court of First Instance, the Court of First Instance's stay of execution decision has the potential to limit the TCA's broad interpretation when imposing administrative monetary fines for deletion of digital data without evaluating the content.

[1] https://www.rekabet.gov.tr/Karar?kararId=32d4b596-dda0-41ab-b949-ad6c3f041219

[2] https://www.rekabet.gov.tr/Safahat?safahatId=b195dfc5-3527-4233-9286-a05748ed3c81

[3] https://www.rekabet.gov.tr/Safahat?safahatId=6880b2f9-cddf-4cfe-a3c9-5f8d78dabf46

Events

Latest Competition Law Developments in the Insurance and Labour Markets

We welcomed summer with the beauty of Bosphorus and the recent competition law developments in insurance and labour markets. Our managing partner Bahadır Balkı was one of the participants who discussed these important issues facing in-house counsels on 10 June 2022.

Special "TEID Academy Meeting"

Special "TEID Academy Meeting" event for TEID Academy graduates and trainers was held on Wednesday, May 25 at the Istanbul Naval Museum. Our managing partner M. Fevzi Toksoy made one of the opening speeches. The meeting included Ethics and Compliance Management's Present and Future" discussion panel with distinguished participants. TEID also provided brief information about "Ethics and Compliance Management According to National and International Professional Standards" guidebook in the event.

ACTECON's latest publications (https://www.actecon.com)

Merger Control in the EU and Turkey, A Comparative Guide Second Edition

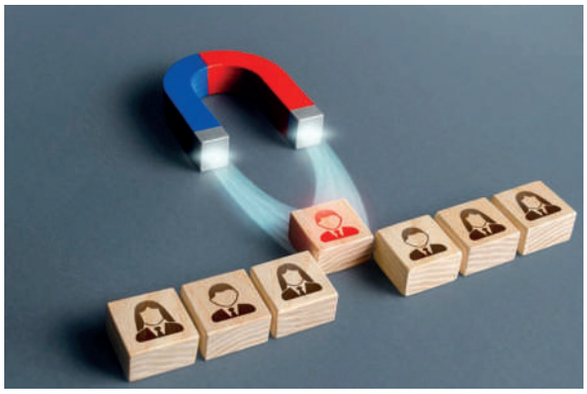
The Intellectual Property and Antitrust Review 2022 Turkey, The Law Reviews

Administrative Court Decided to Stay the Execution of Turkish Competition Authority's Decision of Administrative Monetary Fine for Hindrance of On-site Inspection (Sahibinden.com)

The Court's Fact Check: The First-Degree Court Quashes in Part and Affirms in Part the Comprehensive Interim Measures Decision Brought by the Turkish Competition Authority Against Trendyol

Attorney-Client Privilege from Competition Law Perspective: Comparison Between Turkish and French Legal Systems

The TCA's Stance on No-poaching Agreements: A Comparative Analysis



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