The Output®

QUARTERLY BULLETIN

1st Quarter 2020

ACTECON

Transition Period: UK Treated as an EU Member by Turkey

EC's Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak

Turkish Dried Cherries Do Not Injure US Producers

Quo Vadis? COVID-19

Largest Online Platform's Excessive Pricing Fine Annulled Based on the Standard of Proof

COVID-19 Related Developments in Turkey

Do Announcements of Exam Scores Constitute a Breach of Data Protection?

Fevzi Toksoy, PhD
Managing Partner

Bahadir Balki, LL.M.
Managing Partner

Dear reader,

It's time for the next issue of the Quarterly Output. As usual, we have summarized here the most prominent from our perspective cases related to competition law, international trade and regulation for the first quarter of 2020. In these times of unprecedented health concerns and isolation from the COVID-19 pandemic, the ACTECON team are working home as they continue to support you with any Turkey-related matters and updates.

The first quarter of 2020 is characterised by a special attention to on-the-spot inspections in Turkey. Recent decisions by the Turkish Competition Authority (**"TCA"**) remind us that email correspondence constitutes important evidence in revealing/proving anti-competitive practices. Preventing case handlers from examining a personal email account that also has been used for business-related correspondences, as well as deleting some of those emails before their review by the competition authority, constitute serious violations of the Competition Law and are subject to fines.

Investigation into petroleum companies in Turkey showed the TCA's approach regarding resale price maintenance. Finally, the largest online platform's excessive pricing case is worth attention as it was reviewed by the Turkish administrative court. It sheds some light on the interpretation of the term "excessive." The TCA also decided on a standard essential patents and FRAND case (which is rare in Turkey).

As regards international trade news, numerous actions have been taken in response to the COVID-19 pandemic. Take, for instance, Turkey's export restrictions, as well as Turkey's ban on imports of animal products from China.

On the regulatory side, a 7.5% tax was introduced for digital services in Turkey. The digital services tax became effective as of March 2020 and concerns companies that provide services in the digital environment.

Stay home safe and healthy!

ISSN 2687-3702

Published by

Çamlıca Köşkü Francalacı Sk.
No:28 Arnavutköy Beşiktaş
34345 Tel: 90 212 211 50 11

Editor in Chief
Mahmut Reşat Eraksoy

Editor
Hanna Stakheyeva

Type of Publication
Periodical

Graphic Design
EKOLOGOS
Sürdürülebilirlik Yönetim ve
İletişim Hizmetleri Ltd. Şti.
Tel: +90 216 349 40 97- 98

In this issue:

COVID-19 Related Developments in Turkey regarding Competition Law

Within the scope the measures taken due to COVID-19 outbreak, the TCA experts have started to work on a rotational basis as well. However, no regulation has been introduced regarding how the processes carried out by the TCA will continue. The TCA is still functioning normally. Although document registration department is physically open, the documents and applications can also be submitted electronically by the companies.

Private E-mail Accounts Possibly Subject to the TCA Inspection

*On 17 March 2020 the TCA decided to impose an administrative fine on Kaynak Tekniği San. ve Tic. A.Ş. ("**Askaynak**") under Law No. 4054 on the Protection of Competition ("**Turkish Competition Law**")[1] for hindering an on-the-spot inspection by preventing access to the sales director's private Yahoo email account. The business-related correspondences were conducted via a Yahoo e-mail account, as found by the case handlers during another on-spot inspection within the competitor's premises.*

As part of the preliminary inquiry launched in September 2019, the TCA conducted the on-the-spot inspection at the premises of Askaynak in Kocaeli. Following an explanation concerning on-the-spot inspection procedures to Askaynak employees, the case handlers asked whether the Askaynak's sales director conducted his business-related correspondences solely through his corporate e-mail account or any other personal e-mail accounts. Further to the Askaynak sales director's confirmation that business-related correspondence was conducted solely through the corporate account via Microsoft Outlook, the case handlers showed an e-mail message collected during another on-spot inspection within a competitors' premises, namely Gedik Kaynak, sent from the Askaynak sales director's personal Yahoo e-mail account. The email read as follows:

> (...) Sir; (...) Madam,
>
> Hello. As you may notice, I am using my personal e-mail account. I kindly request that you reply through your personal accounts when responding to this e-mail. From now on, let's conduct our correspondence through these accounts only. Additionally, communication through our phones, too, seems unfavourable.
>
> Meeting, on the other hand, is a greater risk due to camera records and the testimonies of the employees...
> We must come up with a solution. Please tell your friends from data processing to erase this e-mail from the server. The developments in the automotive sector are alarming!
>
> I hope you agree with me.
> Best regards

The case handlers thereupon requested the password to the relevant Yahoo account. Although Askaynak's sales director claimed that he did not remember the password, the case handlers accessed it through "I forgot my password" option. After this point, Askaynak's sales director obstructed the case handlers' review of his Yahoo account by not allowing their access and indicated that the account contained personal correspondences. The case handlers warned the Askaynak team that this conduct would be assessed as hindering of an on-site inspection and would lead to the imposition of an administrative monetary fine. Nearly two hours later and after additional warnings that this conduct would be included in the on-site inspection report, Askaynak's sales director allowed the case handlers access to the account.

During the first access to the Yahoo account, the case handlers had noticed that there were 96 unread e-mails and only 73 after-sales directors had given permission for the review. Considering that deleted correspondences in the Yahoo account can be recovered, the case handlers were not able to access to deleted items. Although the sales director indicated that the deleted correspondences had been related to private and personal matters, the case handlers described this conduct in their on-site inspection report as hindering on-site inspection. Consequently, Askaynak was faced with an administrative fine amounting to five per thousand percent of its annual gross revenue of 2018.

The case serves as a practical example of and reminder that (i) it is the duty of all employees to disclose all matters related to the company's business activities upon the request of the competition authority; (ii) email correspondence constitutes important evidence in revealing/proving anticompetitive practice; and (iii) preventing case handlers from examining a personal email account that also has been used for business-related correspondences, as well as deleting some of those emails before their review by the competition authority, constitute serious violations of the Competition Law and subject to a fine.

1 Decision 19-46/793-346 dated 26.12.2019

Largest Online Platform's Excessive Pricing Fine Annulled Based on the Standard of Proof

*On 11 February 2020 the TCA held that Sahibinden Bilgi Teknolojileri Paz. ve Tic. A.Ş. ("**Sahibinden**") abused its dominant position in the market for online platform services for vehicle sales and real estate sales/ rental in violation of Article 6 of the Turkish Competition Law via excessive pricing. Accordingly, the TCA imposed an administrative monetary fine on Sahibinden of TRY 10,680,425.98 (approximately EUR 1,681,956, based on the year-end average exchange rate of 2019). The TCA's decision was annulled by the Ankara 6th Administrative Court ("**Administrative Court**").*

In its decision, the Administrative Court stressed that clear and precise evidence without any doubt is required for imposing sanctions due to excessive pricing. In this regard, it considered whether the TCA's decision met the standards of proof for determining an excessive pricing violation. Accordingly, it was highlighted that:

- the abuse of dominant position via excessive pricing is limited and exceptional in competition law,
- only intervention on price increases is not considered a competition violation unless it is proven that it harms the competition and thus consumer welfare, and
- the determinations and evaluations must be clear, precise and should not give rise to doubt.

In this regard, the Administrative Court concluded that the TCA's decision had been established based on observation, without any concrete and indisputable evidence, and therefore considered it unlawful. Accordingly, the Administrative Court decided to annul the TCA's decision.

Petroleum Companies Face Record TRY 1,5 Billion Fine

The TCA investigated the activities of BP Petrolleri A.Ş., OPET Petrolcülük A.Ş., Petrol Ofisi A.Ş., Shell & Turcas Petrol A.Ş. and Güzel Enerji Akaryakıt A.Ş. (previously Total Oil Türkiye A.Ş.) and on 12 March 2020 decided that four of the five undertakings under investigation violated Article 4 of the Turkish Competition Law by means of determining the resale price for their dealers. As a result of the investigation, the TCA issued a total fine of TRY 1,5 billion (around EUR 198 million). The total amount of the fine is the highest in the TCA's enforcement history. The fine overtook the previous highest fine amounting to TRY 1.1 billion issued against 12 banks back in 2013.

Considering all the evidence, information, and documents collected, the Report prepared, the Additional Opinion, written defense, and explanations given during the oral hearing, the TCA decided unanimously that

- BP Petrolleri A.Ş - Petrol Ofisi A.Ş. - Shell & Turcas Petrol A.Ş. - OPET Petrolcülük A.Ş., had violated Article 4 (the equivalent of Article 101 of the TFEU) of the Turkish Competition Law by means of determining the resale price for their dealers;
- The administrative fines amounting to 1%, by discretion, of their annual gross income accrued at the end of the financial year 2018 and determined by the Board would be imposed on the mentioned companies; the following fines shall be imposed
  - TRY 213.563.152,66 (around EUR 28,2 million) to BP Petrolleri A.Ş
  - TRY 507.129.085,76 (around EUR 67,1 million) to Petrol Ofisi A.Ş.
  - TRY 348.154.458,54 (around EUR 46 million) to Shell & Turcas Petrol A.Ş.
  - TRY 433.932.124,60 (around EUR 57,4 million) to OPET Petrolcülük A.Ş., and
- Güzel Enerji Akaryakıt A.Ş. had not been found in violation of Article 4 of the Turkish Competition Law and would receive no. fine.

Judicial review for the decision before the Ankara Administrative Courts shall be possible within 60 days as of the notification of the reasoned decision.

Hindering On-the-spot Inspection via Providing Limited Access to Emails

*In March 2020 the TCA published its reasoned decision concerning the fine levied against Groupe SEB İstanbul Ev Aletleri Ticaret A.Ş. ("**Groupe SEB**") for hindering the on-the-spot inspection under the Turkish Competition Law. The company was found to have provided only limited access to emails and hence breached the Turkish Competition Law.*

In 2019, the TCA conducted a preliminary inquiry into Groupe SEB to assess whether it had violated Article 4 of the Turkish Competition Law by means of determining resale prices at the final sales points and sharing commercial information regarding Türk Philips Ticaret A.Ş., as part of Groupe SEB.

During the on-the-spot inspection, the examination could not be made on the computers of some employees since they had left the office despite the warning not to leave the premises after the examination begun. Only remote access was provided to their e-mails. Furthermore, remote access could not be provided for the e-mails of Groupe SEB's former general manager, who was currently working at Groupe SEB's headquarters in France as a senior executive responsible for Turkey.

Ultimately, the TCA decided to impose an administrative monetary fine of a five per one thousand percent of Groupe SEB's annual gross revenue for 2018.

TCA M&A Overview Report 2019

*The Mergers and Acquisitions Overview Report 2019 ("**Report**") was published on the official website of the TCA on 8 January 2020. The Report provides brief information on the Turkish merger control system, comparing previous years to 2019 and determining the position of Turkish and foreign companies in the market.*

As in most jurisdictions, Turkish Competition Law mandates pre-notification to the TCA of M&A transactions that involve a change of control on a lasting basis if the turnover thresholds stated in Article 7 of Communiqué No.2010/4 are met. A total of 208 M&A transactions were notified to the TCA in 2019. An interesting statistic concerns the number of transactions notified without any Turkish nexus (i.e., transactions that do not create any affected markets in Turkey): 73 out of 208 (35% of all transactions). In addition, 20 of the notified transactions were not subject to authorization.

Origin of transaction parties

According to the categorization in terms of the origin of the transaction parties, 38 of the transactions were realized solely between Turkish companies in 2019, just as in 2018. However, there was a slight decrease in the number of foreign-to-foreign transactions notified to the TCA in 2019 when compared to that of 2018, 115 in 2019 compared to 121 in 2018. Transactions between Turkish and foreign companies numbered 51 in 2019, compared to 45 in 2018.

Value of transactions

According to the Report, the value of the transactions between Turkish companies declined a considerable extent (by 41%) from 2018 to 2019. Indeed, the value decreased from TRY 10.6 billion (approx. EUR 1.87 billion) in 2018 to TRY 6.2 billion (approx. EUR 1 billion) in 2019. However, the value of foreign-to-foreign transactions increased from TRY 2.8 trillion (approx. EUR 494 billion) in 2018 to TRY 2.9 trillion (approx. EUR 456 billion) in 2018. Similarly, the value of the Turkish-to-foreign transactions increased from TRY 19 billion (approx. EUR 3.35 billion) in 2018 to 20 billion (approx. EUR 3.1 billion) in 2019.

Foreign investors

In 2019, the number of foreign concerns that invested in Turkish companies increased, from 36 in 2018 to 46 in 2019. The ranking of foreign investors in terms of transactions in 2019 demonstrates that Japan led, with seven transactions, followed by France, with five. In 2018, however, Italy led with four transactions, whereas Japan did not invest in Turkish companies. In acquisition transactions in which Turkish companies were acquired, foreign investment amounted to approximately TRY 36.2 billion (approx. EUR 5.7 billion) in 2019, while in 2018 this figure amounted to TRY 14.9 billion (approx. EUR 2.63 billion). It should be noted that the amount of the foreign investment realized in 2019 was the highest in the previous five years.

Markets

In 2019, excluding privatizations, most of the M&A transactions were realized in "the production, transmission and distribution of electricity markets." As for 2018, "the production and distribution of electricity, gas, steam and ventilating systems market" was the leading market in terms of the number of transactions realized. The highest transaction value in Turkey in 2019 was realized in the field of "the activities of the monetary intermediary institutions." The transaction value in the said area constituted 36.1% of the total value of all transactions in 2019 (excluding privatizations).

Procedurals

As mentioned above, 208 M&A transactions were notified to the TCA in 2019. Only two of the notified transactions were taken into the second phase by the TCA in 2019: the acquisition of the sole control of Marport Liman İşletmeleri Sanayi ve Ticaret A.Ş. by Terminal Investment Limited Sàr and that of the sole control of Embracon (a business of Whirlpool Corporation) by Nidec Corporation. Moreover, three transactions were approved conditionally in 2019, as in 2018.

The Report provides a clear picture of the merger control regime in Turkey and determines the place of Turkish companies in the market. Foreign investors continue to be interested in the Turkish market, considering the increased value of Turkish-to-foreign transactions in 2019.

Lower Limit Adjusted for Administrative Fines under Turkish Competition Law

The TCA adjusted the lower limit of the administrative fines for competition law infringement regulated by Article 16(1) of the Turkish Competition Law. The minimum level of fine was increased by 22.58% as compared to 2019.

Article 16(1) of the Turkish Competition Law governs administrative fines to be imposed in cases of

(i) providing false or misleading information in exemption, negative clearance, and authorization applications for mergers and acquisitions;
(ii) mergers and acquisitions that are subject to authorization realized without authorization;
(iii) providing false, incomplete, or misleading information in the implementation of Articles 14 ("the Board may request any information it deems necessary from all public institutions and organizations, undertakings and associations of undertakings") and 15 (requesting information in in the course of examinations at the premises of undertakings and associations of undertakings) of the Turkish Competition Law; and
(iv) hindering or complicating on-the-spot inspections.

The fines are set at one in 1,000 of the annual gross revenues of concerned undertakings for the first three violations

and five in 1,000 of annual gross revenues for the last one. The said provision defines a lower limit for competition law violation fines.

On 31 December 2019, the TCA published Communiqué No. 2020/1, Regarding the Lower Limit of the Administrative Fine Envisaged in Article 16 of Law No. 4054, On the Protection of Competition. The Communiqué explains that the lower limit of the fine is adjusted according to the reappraisal rate for 2019, amounting to 22.58%, an amount determined by the Tax Communiqué. The new lower limit is set at TRY 31,903 (approx. EUR 5,000). It will be in effect until 31 December 2020, starting from 1 January 2020.

Standard Essential Patents and FRAND: The Koninklijke Philips N.V. and Türk Philips A.Ş. Case

The TCA investigated Koninklijke Philips N.V. and decided that it had violated Turkish Competition Law by not complying with its commitment to the relevant standard setting organization that it would license its essential patents related to subtitle technology on FRAND terms.

Considering all the evidence, information, and documents collected, the report prepared, the Additional Opinion, written defense, and the explanations made during the oral hearing, the TCA decided that:

- Koninklijke Philips N.V. was dominant in the market for digital subtitles for digital video broadcasting during the period examined,
- Koninklijke Philips N.V. abused its dominance and hence violated Article 6 of the Turkish Competition Law,
- An administrative fine shall be imposed on Koninklijke Philips N.V. amounting to 0.75% of the annual gross income accrued at the end of the financial year 2018, and
- Türk Philips Ticaret A.Ş. did not violate the Turkish Competition Law.

Judicial review for the decision before Ankara Administrative Courts shall be possible within 60 days as of the notification of the reasoned decision.

EC's Temporary Framework for State Aid Measures to Support the Economy in the Current COVID-19 Outbreak

*On 19 March 2020 the European Commission ("**EC**") adopted a Temporary Framework[1] to enable Member States to use the "full flexibility foreseen under State aid rules to support the economy in the context of the COVID-19 outbreak" and to support the economy in general. It will be in force until the end of December 2020. It complements other possibilities already available to Member States to mitigate the impact of the COVID-19 outbreak, in line with EU State aid rules.*

State aid rules enable Member States to take quick and effective action to support citizens and businesses, in particular SMEs, faced with economic difficulties. State aid is generally prohibited under the Treaty on the Functioning of the EU ("**TFEU**") unless it is justified by reasons of general economic development under Article 107(3)(b) of the TFEU. Such government interventions are deemed particularly necessary for a well-functioning and equitable economy in the current COVID-19 outbreak. The Temporary Framework provides for five types of aid:

(i) Direct grants, selective tax advantages, and advance payments. Those cover grant schemes up to EUR 800,000 to a company to address its urgent liquidity needs;

(ii) State guarantees for loans taken by companies from banks. State guarantees may be provided to ensure banks keep providing loans to the customers who need them;

(iii) Public loans with favourable interest rates to companies to them cover immediate working capital and investment needs;

(iv) Safeguards for banks that channel State aid to support businesses/ SMEs. Such aid is considered as direct aid to the banks' customers, not to the banks themselves;

(v) Short-term export credit insurance to be provided by the state where needed to demonstrate that certain countries are not-marketable risks, thereby enabling short-term export credit insurance to be provided by the State where needed.

The Temporary Framework sets out the compatibility conditions the EC will apply in principle to the aid granted by Member States under Article 107(3)(b) of the TFEU. Member States must show that the State aid measures notified to the EC under this Framework are necessary, appropriate, and proportionate to remedy a serious disturbance in the economy of the Member State concerned and that all the conditions of this Framework are fully respected.

The Temporary Framework complements other possibilities already available to Member States to mitigate the socio-economic impact of the COVID-19 outbreak, in line with EU State aid rules. For example, under communication on a coordinated economic response to the COVID-19 outbreak, Member States can make generally applicable changes in favour of businesses that fall outside of State Aid rules (e.g., deferring taxes, subsidizing short-time work, granting compensation to companies for damage suffered due to the COVID-19 outbreak, particularly in the sectors of transport, tourism, hospitality, and retail, or granting financial support directly to consumers, for example, for cancelled services or tickets that are not reimbursed by the operators concerned).

1 https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf

Illegal Discrimination of Customers in Spanish Hotel Group's Agreements with Tour Operators

On 21 February the EC closed its 2017 antitrust investigation that sanctioned the Spanish hotel group Meliá EUR 6,678,000 for restrictive clauses in its hotel accommodation agreements with tour operators leading to discrimination of consumers based on their place of residence/nationality. The clauses prevented tour operator from freely offering hotels everywhere in Europe, and hence different deals were offered to different customers depending on their nationality. The clauses are against the Single Market and antitrust rules, i.e., Article 101 of the TFEU.

The investigation was launched following complaints from consumers. Contracts were valid only for the reservations of consumers who were resident in specified countries. Consumers were not able to see the full hotel availability or book hotel rooms at the best prices with tour operators in other Member States, which deprived them of the possibility of more choices and better deals.

Due to the intensive cooperation of Melia with the EC in the process of investigation, the EC granted a 30% reduction in fine to Melia.

In addition to the fine, any person affected by the anticompetitive behaviour of Melia may submit action for damages to the national courts of the EU member states. The EC's decision serves as binding proof of the illegal behaviour that took place.

Facilitating Natural Gas Exports from Romania via Transgaz's "Article 9" Commitment Decision

*On 6 March 2020 the EC closed its formal 2017 investigation into Societatea Națională de Transport Gaze Naturale Transgaz S.A. ("**Transgaz**") with **"Article 9 Decision"** – without any infringement decision but binding this state-controlled natural gas transmission system operator in Romania with commitments to make available to the market significant capacities for natural gas exports from Romania to neighboring Member States, in particular Hungary and Bulgaria.*

Transgaz is one of the EU's largest natural gas producers. The EC had concerns whether Transgaz was abusing its dominance and restricting exports of natural gas from Romania via interconnection tariffs for gas exports, delaying construction of infrastructure for gas exports, as well as using unfounded technical excuses for restricting exports.

Without waiting for the outcome of the investigation, Transgaz offered commitments to address the EC's concerns. Such option is envisaged under Article 9 of the EU's Antitrust Regulation ("**Regulation 1/2003**"). The proceedings may be concluded by accepting the commitments that address the competition law concerns. No decision of infringement of competition law is necessary in such a case.

Following certain amendments to the proposed commitments in the light of the market test outcome, the final commitments as approved by the EC increase export capacities to (i) Hungary, covering around 1/6 of Hungary's consumption, and to (ii) Bulgaria, covering approx. ½ of Bulgaria and Greece's total consumption. The company will refrain from using any means of hindering exports of gas. The commitments will remain force until 31 December 2026. A trustee will monitor the compliance with the commitments. The breach of such commitments could lead to a fine of up to 10% of the company's worldwide turnover and no proof of an infringement of the EU competition law is required in such case.

Restricting Sales of Film Merchandise Products: The NBCUniversal's case

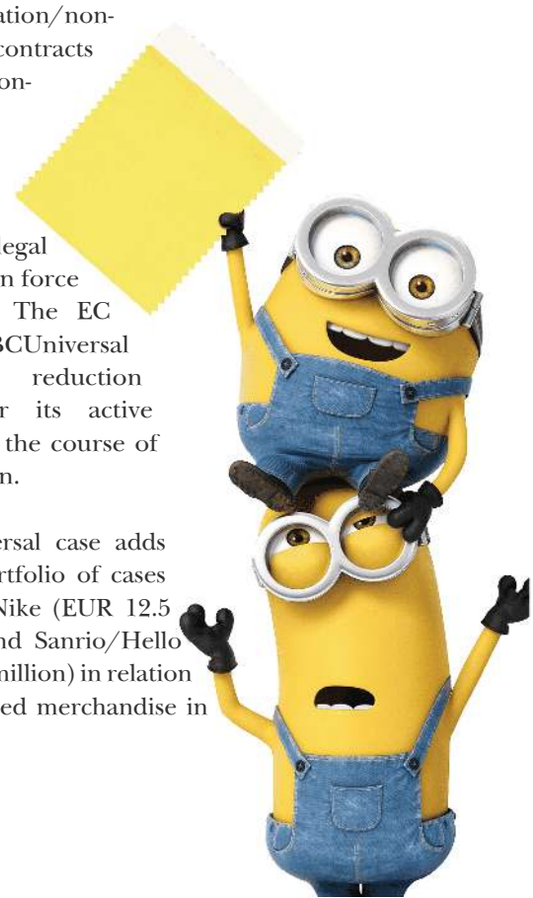
*On 30 January 2020 the Comcast Corporation, including NBCUniversal LLC, ("**NBCUniversal**"), was found to be restricting traders from selling licensed merchandise (i.e., products bearing the logo/images of Minions, Jurassic World, and other characters from the films) within the EEA to territories and customers beyond those allocated to them. The EC imposed a EUR 14,327,000 fine on the undertaking concerned for violating EU competition rules.*

Licensed merchandise products are protected by intellectual property rights, i.e., copyright/ trademarks and their usage are subject to licensing agreements. The licensing and distribution practices of NBCUniversal were subject to the EC's scrutiny from June 2017 and were found to be in breach of Article 101 of the TFEU via:

- imposing direct measures restricting out-of-territory sales by licensees, i.e., clauses prohibiting such sales, notification obligation, limitations to the languages used in products, as well as obligation to pay revenues to NBCUniversal generated from the out-of-territory sales;
- imposing direct measures restricting online sales;
- requiring licensees to pass on these sales restrictions to their customers; and
- encouraging compliance with the sales restrictions by carrying out audits and termination/non-renewal of contracts in case of non-compliance with the restrictions.

The above illegal practices were in force for 6.5 years. The EC granted NBCUniversal a 30% fine reduction in return for its active cooperation in the course of the investigation.

The NBCUniversal case adds to the EC's portfolio of cases together with Nike (EUR 12.5 million fine) and Sanrio/Hello Kitty (EUR 6.2 million) in relation to selling licensed merchandise in the EEA.



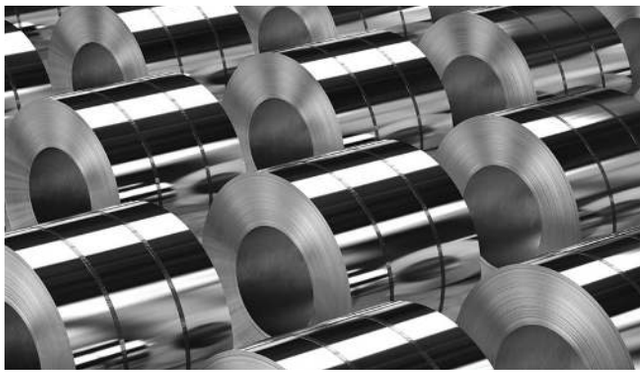
COVID-19 Related Developments in Turkey regarding International Trade

Turkey witnessed its first COVID-19 case on 11 March 2020. Henceforth, Turkey has been taking measures in order to combat the spread of COVID-19 such as curfews for people younger than the age of 20 and older than 65, abandoning international flights, restrictions on exports of certain medical products, closing border gates for vehicles and passengers, and applying mandatory quarantine of 14 days for people coming from abroad. The recent measures also involve Turkish truck drivers who come back to Turkey from abroad undergo quarantine for 14 days. The Ministry of Trade implemented a new application called as "contactless trade" which involves exchanging drivers, trailers and containers in the buffer zone at the Kapıkule border gate. As for the trade remedy measures, unlike the European Union, the Turkish Ministry of Trade has not yet issued any guidelines as to how COVID-19 will have an impact on the implementation of such measures or on the conduct of any trade remedy investigations. Therefore, the time limits and procedures with respect to trade defence investigations are being implemented as usual although all of the verification visits will be suspended and all of the hearings will most probably be postponed.

The EU's Steel Safeguard Measure: Turkey Cast the First Stone at the WTO

*On 19 March 2020, Turkey triggered a consultation process with the European Union ("**EU**") at the World Trade Organization ("**WTO**"), claiming that the EU safeguard measures in the form of tariff-rate quotas and additional duties and the underlying investigation are inconsistent with a number of provisions of the Agreement on Safeguards and the GATT 1994.*

A safeguard investigation was initiated by the EC in March 2018 and provisional measures imposed in July 2018. In February 2019, the EC decided to apply a definitive safeguard measure on 26 different steel product categories through June 2021. Safeguard measures are defined as "*emergency*" actions with respect to the recent increase in imports that have caused or threaten to cause serious injury to the importing country's domestic industry. Turkey claimed that the initiation process of the investigation and the imposition of the safeguard measures were inconsistent with the Agreement on Safeguards and the GATT 1994. Moreover, Turkey also 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, (**vi**) finding of a causal link between the increase



in imports and the threat of serious injury to the domestic industry. Finally, Turkey posited that the EU had failed to progressively liberalize the application of the safeguard measure.

In the context of the consultation process, parties to a dispute have the opportunity to discuss the matter and to find a satisfactory solution without proceeding further with litigation. If after 60 days of the initiation of the consultation the dispute is still not resolved, the complainant may request adjudication by a panel. The panel then reviews the factual and legal aspects of the case and submits a report containing its conclusions as to whether the claims of the complainant are well-founded and whether the measures or actions being challenged are inconsistent with the WTO rules.

Turkey's COVID-19-Related Export Restrictions

*Throughout March 2020, the Ministry of Trade ("**Ministry**") promulgated two different communiqués to control exports of medical equipment in order to maintain sufficient supply and prevent shortages of such products. In this context, exports of personal protective equipment such as face masks, protective glasses and medical gloves, and disinfectants such as colognes, ethyl alcohol and hydrogen peroxide, and sanitizers were made subject to the authorization of the Pharmaceuticals and Medical Devices Administration of Turkey and the Directorate General of Imports, respectively.*

The first case of infection from COVID-19 in Turkey was detected on 11 March 2020. A week before, on 4 March 2020, the Ministry had provided, through Communiqué no. 2020/4 Amending Communiqué no. 96/31 on Products Whose Exportation is Prohibited and Subject to Permit, that the exportation of personal protective equipment was subject to the Pharmaceuticals and Medical Devices Administration's authorization. The following products thus were subject to export control: (**i**) protective masks with gas, dust, and radioactive dust filters, (**ii**) tubes (protective workwear), (**iii**) liquid-proof aprons (aprons used to protect from chemicals), (**iv**) protective glasses, (**v**) medical masks, and (**vi**) medical and surgical gloves.

On 18 March 2020, the Ministry went further and took another export measure relating to products used in the fight against the epidemic. Through Communiqué No. 2020/5 Amending Communiqué no. 2006/7 on Products Whose Exportation is Subject to Registration, the exportation of (**i**) ethyl alcohol, (**ii**) cologne, (**iii**) sanitizers, (**iv**) hydrogen peroxide, and (**v**) melt-blown fabrics (used in the production of medical face masks) were subjected to the authorization of the Directorate General for Exports.

Transition Period: UK Treated as an EU Member by Turkey

*Upon the United Kingdom's ("**UK**") departure from the European Union ("EU") on 1 February 2020, the Presidency of the Republic of Turkey announced Circular No 2020/1 on the Transition Period Concerning the United Kingdom's Departure from the European Union ("**Circular**"), informing the public about the UK's departure from the EU and urging all public institutions to treat the UK as an EU member state until the end of the transition period, which is expected to last until 31 December 2020.*

According to the Circular, the main purpose of the transition period is to ensure legal continuity and certainty subsequent to Brexit until a new legal instrument that governs the relationships between the UK and the EU comes into force. According to the Withdrawal Agreement entered into between the EU and the UK, even though the UK will not be a member of the EU, it will still be bound by EU law and will thus remain under the obligations stemming from EU law, which includes trade agreements made between the EU and third countries. Accordingly, during the transition period, the current legal situation deriving from bilateral and multilateral agreements between Turkey and the EU will still be applicable to transactions, operations, and relationship between Turkey and UK. The UK will be treated as an EU member state throughout the transition period.

Within the scope of the Circular, the Ministry of Trade made an announcement concerning Turkey's future relationship with the UK subsequent to Brexit. This statement reaffirmed that during the transition period, the UK will be treated as an EU member state in terms of trade, thereby maintaining its position as a member of the Customs Union. It is also stated that the EU will negotiate a trade agreement with the UK that will shape the future of the relationship between the UK and the EU. Concurrent with the trade negotiations between the EU and the UK, Turkey will negotiate a bilateral trade agreement with the UK. The negotiations with the UK are expected to be conducted through the Trade Working Group set up by the two countries.

Turkey's Ban on Imports of Animal Products from China during COVID19 Outbreak

On 3 February 2020, the Ministry of Trade announced that a working group within customs authorities had been set up in order to protect the employees of the customs authorities from being contaminated by COVID-19. Additionally, according to the press conference held by the Ministry of Health on 7 February 2020, imports of all kinds of living and non-living animal products from China will be temporarily suspended to combat the spread of the disease.

The Ministry of Trade has established a working group within customs authorities concerning the issue of the recently spreading virus in China. One of the Ministry of Health's memorandums stresses that the COVID-19 cannot live more than a few hours on dry surfaces. Accordingly, the Ministry of Trade noted that no particular problem is expected regarding cargo shipments and emphasized that no preventive measures have been taken by other countries. However, a working group has been set up with the Ministry of Health as a precaution in order to protect the health of the employees of customs authorities in the context of cargo shipments from China. This working group will deal with the provision of necessary equipment to customs authorities and the necessary protective measures in case of contamination.

Furthermore, according to the letter sent by the Ministry of Food, Agriculture, and Livestock to customs authorities on 7 February 2020, imports of all kinds of animal products originating in China shall be suspended in order to prevent the spread of the disease. The products whose importation has been suspended include poultry, seafood, mollusks, animal fats, and similar products.

Turkish Dried Cherries Do Not Injure US Producers

*On 14 January 2020, the United States International Trade Commission ("**USITC**") determined that imports of dried tart cherries originating in Turkey did not materially injure or do not threaten to materially injure the U.S. dried cherry producing industry.*

The conduct of anti-dumping and anti-subsidy investigations in the U.S. is split between two authorities. While the Department of Commerce ("**DoC**") conducts the dumping/subsidy analysis, the USITC is in charge of determining whether a domestic industry has been injured. Indeed, according to the Tariff Act (1930), the USITC and the DoC play separate but dependent roles during the course of trade remedy investigations.

In that context, the DoC preliminarily established on 23 September 2019 (**i**) a dumping margin ranging between 541.29% and 648.35%, and (**ii**) a subsidy margin of 204.93%. On the other hand, the USITC found on 14 January 2020 that the relevant domestic industry had not been materially injured or is not threatened with material injury or that the establishment of an industry is not materially retarded. Consequently, the investigation was terminated and no additional duties (whether anti-dumping or anti-subsidy) have been imposed on imports of dried cherry from Turkey. Those imports' value is estimated to amount to USD 1.2 million in 2018.

COVID-19 Related Developments in Turkey regarding Data Protection

On 23 March and 27 March 2020, the Turkish Data Protection Authority ("Turkish DPA") announced through its website (www.kvkk.gov.tr) that all the deadlines regarding complaints, notices and data breach notifications stipulated under the Personal Data Protection Law No. 6698 and relevant legislation shall be effective during the pandemic. However, it is mentioned that the extraordinary circumstances caused by the pandemic will be taken into account by the Turkish DPA in assessing the binding deadlines of the data controllers.

Therefore, the data controllers must follow the deadlines carefully with regards to their obligations to the Turkish DPA and the data subjects.

Do Announcements of Exam Scores Constitute a Breach of Data Protection?

*Within the scope of its decision No 2019/389 dated 26 December 2019, the Turkish DPA evaluated whether the announcement of the assessment scores of candidates during the appointment process for the positions of academics and research assistants via its website is in compliance with the Personal Data Protection Law of Turkey No. 6698 ("**Law**"). It is understood that the concerned evaluation had been conducted upon the receipt of a request for an opinion made by a higher education institution in Turkey.*

In this regard, the DPA first stated that the concerned announcement should remain on the website for the duration foreseen in the concerned legislation and if the concerned legislation does not foresee duration, then the announcement should stay on the website only for the duration necessary for the purpose of data processing activities. In addition, the DPA established that there is no need for third parties to know all the personal data contained in the announcement. Considering the foregoing, the DPA decided that

- a system should be established that is accessible via an authentication process, through which only the relevant applicants will be able to see the assessment scores;
- in order to prevent third parties from identifying the people to whom the assessment scores belong, personal data such as name-surname and national identification number should be masked with appropriate methods as a reflection of the data minimization principle; and
- the relevant persons should be informed as to how their personal data is being processed within the scope of the concerned application by the higher education institutions in accordance with Article 10 of the Law.

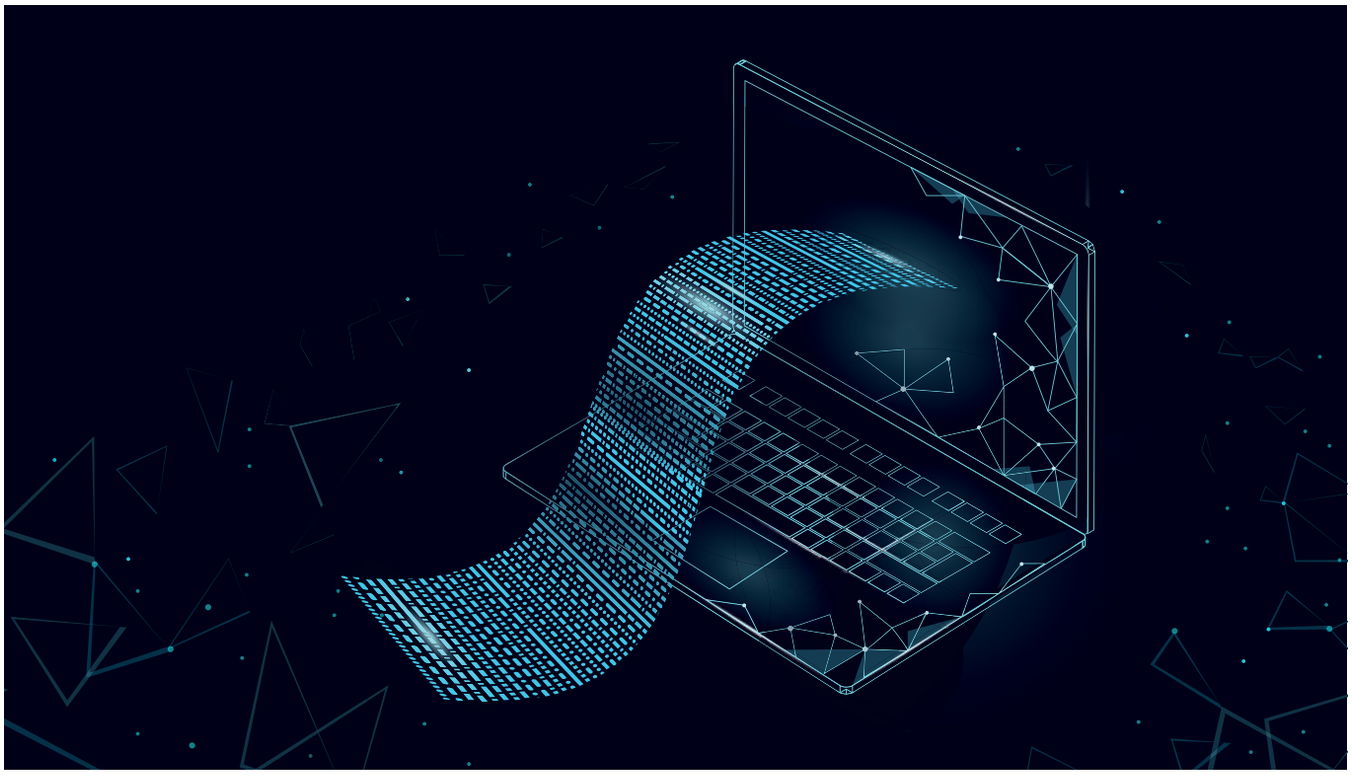
Unlawful Process and Disclosure of Sensitive Personal Information

A newspaper (name not disclosed) was fined TRY 125,000 by the DPA on the grounds that it had processed and disclosed sensitive personal data with third parties by releasing an article about the data subject without consent (summary decision No. 2019/372, dated 09.12.2019). The decision is of particular importance as it deals, although briefly, with the conflict between the freedom of expression and the right to privacy.

The newspaper published an article regarding the data subject's ongoing cancer treatment. Although the details as to what the intention of the newspaper could have been in spreading this information, it is understood that the data subject was not aware of his condition and learned from the concerned article that he was being treated for cancer. Apparently, the family was keeping the information from the data subject with a view maintaining his morale. However, after the article was published, the data subject started to receive get-well calls from friends, which negatively affected his mental well-being. The data subject reportedly become withdrawn, refused treatment, and started to receive professional psychological support.

The DPA concluded that as there was no public interest in publishing the said article, there was no real conflict between freedom of expression and right to privacy. In that regard, the DPA concluded that personal rights, for the case at hand, outweighed the freedom of press and imposed an administrative fine in the amount of TRY 125,000.

A 7.5% Tax is Introduced for Digital Services in Turkey



*The Law on Digital Service Tax and the Amendment of Certain Laws and the Statutory Decree No. 375 ("**Law No. 7194**") introduces rules concerning the Digital Services Tax ("**DST**"). As a newly introduced tax, the DST became effective starting from March 2020 and concerns companies that provide services in the digital environment.*

As per Law No. 7194, companies that provide the following services (referred to as "digital services" hereinafter) in Turkey will incur the DST:

- all types of advertising services that are being provided in digital environment (services concerning advertising control and performance measurement, transmission, and management of user data and technical services concerning advertising are included);
- sales of audio, visual, and digital content (including such items as computer programs, applications, music, video, games, and in-game apps) in the digital environment and the services provided in the digital environment that enable users to listen, play, record on or use in the electronic devices such content; and
- services of provision or operation of digital environments that enable users to interact with each other (including services concerning sales or facilitation of sales between the users of a good or service).

Pursuant to Law No. 7194, the above services are deemed to be provided in Turkey if:

- the services are utilized by the users in Turkey,
- such services are offered to the users in Turkey,
- such services are valuated in Turkey (i.e., the payment for the services are made in Turkey or if the payment is made outside Turkey, the referral should be made to the payer's bank account in Turkey or the payment should be spared from payer's profit).

Article 3 of Law No. 7194 also stipulates that the DST applies to all companies that provide digital services in Turkey, even if they undertake provision of such services in Turkey via a business office or a permanent representative. Additionally, Law No. 7194 indicates that the Ministry of Treasury and Finance may hold liable taxpayers who do not have a place of residence, workplace, or legal head office or principle place of business.

Law No. 7194 provides for an exemption from the DST for companies whose revenue is generated from its activities of digital services that do not exceed a certain threshold. The exemption is applicable for companies that generate revenue under TRY 20 million in Turkey in the preceding accounting period and also for the companies that generate revenue under EUR 750 million from their worldwide activities. It should be noted that the determination as to whether the thresholds for tax exemption has been exceeded or not will be made in consideration of the revenue generated by the group companies if the taxpayer is deemed to be in a consolidated group, in terms of financial accounting. Law No. 7194 also stipulates that lowering the thresholds for exemption to zero or raising the threshold threefold is at the discretion of the president of the Republic of Turkey.

As per Law No. 7194, the rate for DST is determined as 7.5%; however the president of the Republic of Turkey enjoys discretional power to lower the rate to 1% or to raise it to 15%.

Finally, Law No. 7194 requires tax offices to send a notification to digital service providers that do not comply with their obligations of tax declaration or payment, through relevant means of communication. If non-compliance continues 30 days following the notification, Law No. 7194 calls for the Ministry of Treasury and Finance to block access to the digital services being provided by the relevant taxpayer until the tax-related obligations are fully met.

FROM ACTECON

EVENTS

CAREER DAYS at BILGI UNIVERSITY

Our associate Mustafa Ayna who is a Bilgi University graduate, conducted a friendly conversation with Law Faculty students at Bilgi University, on Career Day events held in February 2020. Mustafa talked about ACTECON's practice areas and provided general information about the office. He also conveyed ACTECON's expectations from young counselors.

ARTIFICIAL INTELLIGENCE and ETHICS

Our associate Celal Duruhan Aydınlı made a presentation titled *Artificial Intelligence and Ethics* within the scope of Arkhe Artificial Intelligence Day activities on February 2020.

ACTECON's latest publications

The Output® Selected Essays 2019 **https://www.actecon.com/en/the-output**

The Role of Standard of Proof in Competition Law: Sahibinden.com **Decision https://www.actecon.com/en/news-articles**

Capacity to Sue of Consumers Whose Interests are Affected was Held under the Microscope of the Administrative Courts in Turkey **https://www.actecon.com/en/news-articles**

TCA's Preliminary Inquiry into Google's Shopping Unit Bidding Mechanism **https://www.actecon.com/en/news-articles**

TCA's Google Search (Shopping) Case: Fine was Imposed **https://www.actecon.com/en/news-articles**

TCA is Signalling a Strict Approach to the Prevention of Parallel Trade **https://www.actecon.com/en/news-articles**

ACTECON's latest publications

Highlights of the Turkish Competition Authority's M&A Overview Report 2019
https://www.actecon.com/en/news-articles

Dusseldorf Court's Decision Suspending the Bundeskartellamt's Facebook Ruling: A Guideline For Examining Alleged Exploitative Abuses
https://www.actecon.com/en/news-articles

The Beginning of the New Challenge: Merger Control in Digital Economy
https://www.actecon.com/en/news-articles

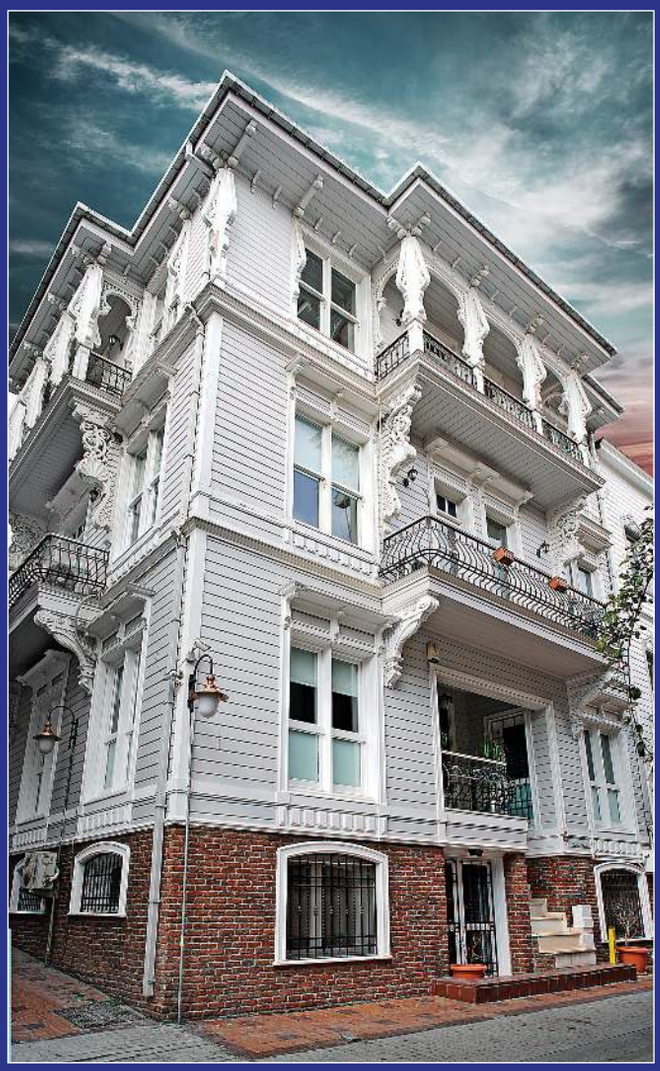
A Modernized Robinson List: Turkey Introduces Its Commercial Electronic Message Management System
https://www.actecon.com/en/news-articles

ACM has Imposed a Fine of 1.84 million Euros for Deleting WhatsApp Chat Conversations During a Dawn Raid
https://www.actecon.com/en/news-articles

ACTECON

Çamlıca Köşkü - Francalacı Sokak No: 28 Arnavutköy - Beşiktaş 34345 İstanbul - Turkey
+90 (212) 211 50 11
+90 (212) 211 32 22
info@actecon.com www.actecon.com



ACTECON is a corporately-governed firm combining competition law, international trade remedies and regulatory affairs. We offer effective strategies from law & economics perspective, ensuring that strategic business objectives, practices, and economic activities comply with competition law, international trade rules and regulations.