The Output®
QUARTERLY BULLETIN
1st Quarter 2022

ACTECON

Merger Control in Turkey: Thresholds Increased, Special Rules for Tech Companies Introduced

FOREWORD

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Dear reader,

The eyes of the whole world are riveted on the war in Ukraine. We share the pain of the Ukrainian people and condemn the decisions of the Russian government, which have led to an unprecedented loss of human lives, the biggest refugee crisis since World Word II (according to the UNHCR) and outrageous disrespect for human rights and international law. We stand up for peace!

The first quarter of 2022 has also brought the significant merger control changes in Turkey. Turkish Competition Authority ("TCA") amended its merger control legislation with the effect as of 4 May 2022. There is a substantial threshold increase as a response to the fluctuations in the Turkish Lira. Another important amendment regards an exception for concentrations involving "technology undertakings". The rationale behind this idea is being able to address the potential concerns associated with mergers targeting newly established and emerging technology undertakings. Different from the "transaction value test" adopted by its peers in the EU, Germany and Austria, the TCA has chosen a broader approach in tackling the relevant transactions. In that regard, one part of the turnover threshold test shall not be sought for transactions having as target technology undertakings, which either operate or conduct R&D activities in the Turkish market, or alternatively provide services to Turkish users. This aims at catching a greater number of transactions in the digital/high-tech markets with a view to preventing killer acquisitions.

This is yet to be seen how the "technology undertaking" exception will be applied in practice. Nevertheless, for practical reasons, it would be nice to have a piece of guidance clarifying the terms and principles (such as the description of financial technology services). The threshold amendment is expected to decrease the overall merger caseload of the TCA. On the other hand, we expect to see more merger caseload and an increased scrutiny in the technology markets.

Among other interesting topics covered in this issue are: (i) the Unilever's case fully upheld by the Turkish Court and particularly emphasising that the opportunity for examination of premises of the company during onsite inspections should be provided without a delay (whereas Unilever hindered the examination for a period of six hours and 45 minutes without a legally acceptable and valid justification); (ii) the TCA's M&A Report 2021 confirming that foreign investors continue to be interested in the Turkish market; (iii) the RPM case settled with the TCA and resulted with a 25% fine reduction eventually. There are also noteworthy news coming from jurisdictions outside of Turkey, i.e. Google, Apple, as well as Scania sagas.

In our Special focus section we summarize the TCA's view on the restrictions to (re)sell online in selective distribution systems.

Happy reading and peaceful sky!

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:

Merger Control in Turkey: Thresholds Increased, Special Rules for Tech Companies Introduced

*The Turkish merger control underwent significant changes with the adoption of the Communiqué Concerning the Mergers and Acquisitions Calling for the Authorization of the Competition Board (**"Communiqué No. 2010/4"**) in March 2022. The increased turnover thresholds for transactions that require the TCA approval, along with several other revisions, shall be effective as of 4 May 2022.*

Pursuant to the newly introduced amendments, a concentration shall be deemed notifiable in Turkey if:

- the aggregate Turkish turnover of the transaction parties exceeding TRY 750 million (approx. EUR 71.6 million or USD 84.4 million) and the Turkish turnover of at least two of the transaction parties each exceeding TRY 250 million (approx. EUR 23.9 million or USD 28.1 million), or
- the asset or business subject to acquisition in acquisition transactions, and at least one of the parties of the transaction in merger transactions, have a turnover in Turkey exceeding TRY 250 million (approx. EUR 23.9 million or USD 28.1 million) and the other party of the transactions has a global turnover exceeding TRY three billion (approx. EUR 286.5 million or USD 337.5 million).

Furthermore, in line with these newly introduced amendments, transactions regarding the acquisition of technology undertakings operating in the Turkish geographical market or having R&D activities or providing services to users in Turkey shall be subject to notification to the TCA regardless of the abovementioned TRY 250 million turnover thresholds. In this regard, technology entities are defined as undertakings or related assets operating in the fields of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals, and health technology under the relevant communiqué.

In addition, there are also amendments regarding the methods used for the calculation of the turnover of financial institutions. Further, another amendment concerns the submission of notification forms to the TCA via the e-Government portal. While the TCA had accepted the notification forms via the e-Government portal prior to the amendment as well, with this addition, the actual practice also was included in the written legislation.

Last, the provision in Article 13(2) of Communiqué No. 2010/4 that states "mergers and acquisitions lead to a significant impediment of competition by creating or strengthening a dominant position shall be prohibited" is amended as "mergers and acquisitions lead to a significant decrease in competition particularly by creating or strengthening a dominant position shall be prohibited." The purpose of the added word "particularly" is to emphasize that a concentration will not be permitted if it significantly restricts competition, even if it does not create a dominant position. This is in line with the relevant amendment to the Turkish Competition Law in 2020 when the SIEC test was introduced officially into the Turkish merger control. Therefore, this newly introduced amendment merely harmonizes the secondary legislation with the Competition Law.

Duru Bulgur Fined TRY 4.4 million for Resale Price Maintenance

*TCA concluded an investigation initiated to determine whether Article 4 of Law No.4054 on the Protection of Competition (**"Competition Law"**) was violated upon the allegation that Duru Bulgur had maintained the resale prices of retail chains in the Konya and Karaman regions.*

The TCA found that Duru Bulgur had violated Article 4 of the Competition Law by way of determining the resale prices of undertakings operating at the retail level. Accordingly, the TCA imposed on Duru Bulgur an administrative monetary fine of TRY 4,407,979.26 (approx. EUR 282,868.56) in consideration of the undertaking's gross revenue for 2020.

The TCA's general approach to the resale price maintenance practices is that setting fixed or minimum prices are considered as a restriction by object. The Council of State's Henkel Decision, the recent precedents demonstrate that the TCA follows the zero-tolerance policy towards resale price maintenance practices.

TCA was Right in Fining Unilever for Hindering On-site Inspection

*10 February 2022, the Ankara Regional Administrative Court 8th Administrative Law Chamber (**"Regional Court"**) annulled the decision of the Ankara 6th Administrative Court (**"Local Court"**) and held that the TCA decision fining Unilever Sanayi ve Ticaret Türk A.Ş. (**"Unilever"**) for hindering an on-site inspection was lawful.*

With a TCA decision (No 19-38/584-250) in 2019, an administrative fine amounting to TRY 29,609,872,46 (approx. EUR 2.9 million)[1] was imposed on Unilever for hindering the TCA's on-site inspection. Subsequently, the Local Court annulled the TCA's decision in July 2021. The TCA further appealed the Local Court's decision to the Regional Court. It examined the appeal and annulled the judgement of the Local Court, stating that the TCA's decision had been lawful. In summary, the rationale of the judgement of the Regional Court was that,

- an excuse that there is a need to obtain permission from the executives working abroad for an inspection to be carried out within the Turkish organizational structure of the company is not legally acceptable, considering that the scope of the on-site inspection is Unilever's organization in Turkey;
- obtaining permission from directors abroad is a matter for the determination and distribution of duties, authorities, and responsibilities in Unilever's own internal functioning, and Unilever, which operates under the legal system in Turkey, should know how to carry out its work within this responsibility by acting prudently and predictably;
- Unilever's failure to identify the authorized and responsible unit for obtaining the relevant permissions for its activities in Turkey does not relieve it of its responsibility; and
- in this context, while the opportunity for examination should be provided without delay, the examination was hindered by Unilever for a period of six hours and 45 minutes without a legally acceptable and valid justification.

In addition, the Regional Court emphasized the importance of the factor of time by referring to the decision of the 13th Chamber of the Council of State, dated 22 March 2016 and numbered E:2011/2660, K:2016/775, which states that even a 40-minute delay constitutes hinderance or complication of an on-site inspection.

1 The figures in EUR in this article are calculated at the average buying rate of exchange of the Central Bank of Turkey. For 2020, this rate was EUR 1 = TRY 8.03 for 2021, this rate was EUR 1 = TRY 10.47.

Expired Statute of Limitations, Lack of Effect, and More in Concluded Investigation into Audi, BMW, et al.

*On 2 February 2022 the TCA decided not to impose any administrative monetary fine on Audi AG (**"Audi"**), Bayerische Motoren Werke AG (**"BMW"**), Daimler AG (**"Daimler"**), Dr. Ing. h.c. F. Porsche AG (**"Porsche"**), and Volkswagen AG (**"Volkswagen"**) further to the investigation carried out to determine whether Article 4 of the Competition Law had been violated.*

Further to the investigation carried out into Audi, BMW, Daimler, Porsche, and Volkswagen on the allegations that the carmakers had violated Article 4 of the Competition Law through coordinating the development and production of components, product features including exhaust filters and emission standards, innovation, environment and security-related technologies, certifications, standards, and the timing of entry of the foregoing into the market in the market, the TCA concluded that:

- The 8-year statute of limitations stipulated in the third paragraph of Article 20 of the Misdemeanour Law had expired in terms of the agreement regarding the Automatic Cruise Control ("ACC") systems;
- Agreements regarding convertibles, Otto Particle Filter ("OPF") and Selective Catalytic Reduction ("SCR") systems did not have an effect on the Turkish markets within the scope of Article 2 of the Competition Law, that met the criteria of "direct, significant and reasonably foreseeable/ aimed:" and.
- Other collaborations within the scope of the file did not violate Article 4 of the Competition Law.

In light of the foregoing, the TCA concluded unanimously that it was not necessary to impose administrative fines on the relevant undertakings pursuant to Article 16 of the Competition Law.

Paid Television Broadcasting Giant Digiturk Fined

*On 20 January 2022 the TCA fined Krea İçerik Hizmetleri ve Prodüksiyon A.Ş. (**"Digiturk"**) with its decision, dated 13 January 2022 and numbered 22-03/48-19, within the scope of the investigation initiated upon the allegation that (i) Digiturk had violated Article 4 and 6 of the Law No. 4054 on Protection of Competition with its pricing behaviour regarding commercial packages containing Turkish Super League and First League competitions and its dealership system, (ii) and the undertakings that supply these commercial packages as Digiturk dealers had violated the aforementioned articles via pricing and market allocation practices.*

The TCA investigation concluded that Digiturk had a dominant position in the paid television broadcasting market of the Turkish Super League and First League matches in the 2018-2019 and 2019-2020 seasons. In this regard, Digiturk violated Article 4 of the Competition Law due to the prohibition of its resellers from making active and passive sales outside the regions allocated to them during those seasons. Accordingly, an administrative fine of TRY 7,068,133.04 (EUR 880,215) was imposed on Digiturk.

The decision also stated that each of the 48 resellers who were a party to the investigation was in a dominant position in their respective geographic markets in the 2018-2019 seasons. Within the framework of the resale system designed by Digiturk, they did not make active or passive sales to each other's regions and that intra-brand competition had been eliminated in this way. To end the violation and ensure effective competition in the market, the TCA also decided that Digiturk should include a provision in its dealership contracts that explicitly states that passive sales are not prohibited and that the relevant change is conveyed to its dealers.

Turkey M&A Overview Report 2021

*The TCA's Mergers and Acquisitions Overview Report for 2021 (**"Report"**) was published on the TCA's official website on 7 January 2022. It provides an overview of the TCA's activities regarding M&A transactions and includes brief information on merger control filings by making comparisons between 2021 and previous years in different aspects such as the position of Turkish and foreign companies in the market and the total number and value of the transactions notified to the TCA conducted in various sectors.*

According to the Report, in 2021, the TCA reviewed 309 M&A transactions. Considering that the number of the M&A transactions notified to the TCA in 2020 had been 220, and the average number of the transactions notified to the TCA in the last 9 years had been 216, a significant increase was witnessed in the total number of M&A transactions notified to the TCA.

Additionally, while the total value of the notified transactions was approximately TRY 5.8 trillion (approx. EUR 553 billion) in 2021, this value was TRY 2.7 trillion (approx. EUR 336 billion) in 2020. In parallel with the dramatic increase in the number of the transactions reviewed, the total value of the notified transactions also increased in 2021 compared to 2020.

As in previous years, foreign investors continue to be interested in the Turkish market in 2021. Indeed, while foreign investors from 18 countries invested in Turkey in 2020, the number rose to 22 in 2021. Then number of transactions carried out by foreign investors investing in Turkish companies also rose, from 34 in 2020 to 50 in 2021. Luxembourg led in the ranking of foreign investors in 2021, with 10 transactions.

The Report also states that in terms of the number of transactions in 2021 based on their field of activities, similarly to 2020, most of the M&A transactions were realized in the area of "production, transmission and distribution of electricity" with 14 transactions and a total value of TRY 5.2 billion (approx. EUR 497 million).

2 The figures in EUR in this article are calculated at the average buying rate of exchange of the Central Bank of Turkey. For 2020, this rate was EUR 1 = TRY 8.03 for 2021, this rate was EUR 1 = TRY 10.47

Investigation into Singer's RPM Practices Concluded with Settlement

*On 3 January 2022 an investigation initiated by the TCA upon the claim that Singer Dikiş Makineleri Tic. A.Ş. (**"Singer"**) had violated the Competition Law with its practices in the supply of the sewing machines market such as RPM, restriction of online sales, and de facto exclusivity was concluded with settlement.*

Singer had monitored the online prices of its sales points and those undertakings that sold at a price lower than the recommended price were subject to pressure and sanctions, i.e. removing discounts or not supplying products. There was no collective ban from Singer on dealers regarding operating on sales platforms and that online sales could be made in practice, but Singer made great efforts to determine and control sales prices in online channels and interferes with resale prices.

Although the TCA did not make a clear statement that Singer was in a dominant position, it was emphasized that Singer held significant market power; it was difficult for dealers to deviate from the resale price determination practices of Singer.

During the investigation process, Singer made both commitment and settlement applications. The TCA stated that since the resale price determination practices constituted naked and hardcore infringements, no commitment application could be made regarding these. At this point, Singer's practice regarding resale price maintenance was evaluated within the scope of the settlement. Consequently, the TCA decided to conclude the investigation with a settlement and an administrative fine to be applied to Singer was determined as TRY 603,858.28 (EUR 57,675) with a 25% discount. It was also stated in the decision that Singer agreed to remove the non-compete clause from its dealership agreements.

Apple's Fight with the Dutch Competition Authority

*On 28 February 2022 the Dutch Consumers and Markets Authority (the Autoriteit Consument en Markt, **"ACM"**) rejected a proposal from Apple regarding the company's compliance with an abuse of dominance order. The ACM thus imposed a EUR 5 million weekly penalty, the sixth such penalty in successive weeks.*

In January 2022, the ACM announced that it had rejected a first proposal submitted by Apple since the company had failed to satisfy the requirements, including the failure to adjust its conditions against dating app providers since they were still unable to use other payment systems.

After this rejection, Apple changed its policy by creating a new system under which dating app providers were allowed to use alternative payment methods instead of that of its App Store's under several conditions. However, the ACM considered that the necessity to build a new app created a disadvantage for app providers since it obliged them to incur extra costs while consumers that currently used the app would have to switch to the new one. In other words, the ACM stated that the new system was still unreasonable and created an unnecessary barrier as it required providers to create a new app, violating an order imposed on Apple in August under which Apple was to adjust its "unreasonable conditions" for dating app providers.

The Spanish National Postal Company Fined for Abuse of Dominance via Discount Systems

*On 18 February 2022 the Spanish Competition Authority, Comisión Nacional de los Mercados y la Competencia (**CNMC**), found that the Spanish National Postal Company (**Correos**) had abused its dominant position by way of foreclosing the retail market for the provision of traditional letter mail services to mass mailers through certain discount practices. It fined Correos EUR 32,6 million.*

The CNMC first assessed the market structure and found that important natural and legal entry barriers exist. In terms of the position of Correos in the market, the CNMC established that the company enjoyed a near super-dominant position as its market share had increased to over 95% following the exit of Unipost, its main competitor, from the market in 2019.
The CNMC then reviewed the rebate system of Correos based on five criteria:

- Conditional and retroactive nature of the discount model. This enabled Correos to boost customer loyalty and draw clients from competitors, which led to considerable supply incentives for customers as a result of small variations in mail volume.
- Duration of the accrual period of the discounts: Correos generally signed one-year contracts with an automatic extension period of three months or more, which was considered by the CNMC as sufficient to boost loyalty.
- Lack of transparency: The contracts did not provide sufficient detail as to the full discount system and only provided the final discount and estimated annual deliveries, which resulted in customers not being aware of the full structure of the final discounts, further strengthening their incentives to maintain their relationship with Correos.
- Discount rates and volume aggregation: Correos implemented a structure whereby certain groups of shipments that could be handled differently were in fact aggregated, resulting in clients clearing the thresholds more easily.
- Lack of standardization in the application of discounts: The discount system resulted in the implementation of different discounts for similar shipment volumes, which discouraged customers from navigating between suppliers.

Accordingly, the CNMC concluded that the discount system implemented by Correos had created probable, possible, and potential exclusionary effects in the relevant market.

General Court Upheld the EC's Decision to Fine Scania for Participating in a Truck Cartel

*On 2 February 2022 the General Court (**"GC"**) fully endorsed the European Commission's (**"EC"**) decision to fine Swedish truck maker Scania for participating in a cartel and concluded that the cartel contacts must be assessed as a whole as part of a single and continuous infringement.*

The EC found that several companies ran a cartel in the heavy and medium-heavy trucks market between 1997 and 2011. Volvo/Renault, Daimler, Iveco, and DAF decided to settle the case while the whistle-blower MAN received full immunity since it had revealed the infringement. However, Scania refused to settle the case, which led to a EUR 880 million penalty in September 2017, which the company decided to challenge before the GC.

First, Scania argued that the EC had breached its rights of defence, the principle of good administration, and the presumption of innocence when adopting the settlement decision prior to the adoption of the Scania decision. The GC recalled the EC's right to use a hybrid procedure by adopting a settlement decision before the standard procedure decision, on the condition that full observance be made of the presumption of innocence, the rights of the defence or the duty of impartiality. The GC observed that these conditions had been fulfilled by the EC. The settlement decision did not influence Scania's interests and therefore the fact that Scania had not been heard in the settlement part of the procedure had not infringed on its rights of defence. The GC also stated that the fact that the EC had relied on the same evidence in both decisions did not presume that the EC had drawn the same conclusion regarding Scania.

In another argument, Scania stated that the EC had erred in law when concluding the existence of a single and continuous infringement and that it had been attributable to Scania. According to Scania, since the EC had identified three levels of collusive contacts for different periods, it should have assessed the evidence relating to each level of contact separately to assess the existence of a single and continuous infringement. The GC noted that the actions of Scania, taken together, had formed part of an overall plan aimed at achieving the single anticompetitive objective. Meaning that the EC had not been mistaken when it had not classified the conduct within each of the three levels of contacts which also recalled in the EC's decision that stated that if had been considered in isolation, it would have constituted an infringement of Article 101 TFEU. The GC also rejected Scania's complaint that there had been no links between the three levels of collusive contacts since they had made references to each other.

The arguments that the EC had failed to disclose reasons and wrongly concluded that the company had reached anti-competitive agreements concerning the timing of the introduction of emission technologies were also rejected by the GC since the exchanges of information on the timing of the introduction of emission technologies had been related and complementary to the exchanges of information on prices and gross price increases, and had formed part of the same single and continuous infringement.

Another argument of Scania was related to the nature of the shared information according to which the shared prices had not been future or pricing intentions but had concerned already public prices and had had no value regarding the prices charged to end customers. This argument was also rejected since the EC had gathered enough evidence to prove that the prices had indeed been future and had not yet been made public, thus confirming the classification of restriction of competition by object.

Google's Privacy Sandbox Commitments and Announced Project

*On 11 February 2022, the UK Competition and Markets Authority (**"CMA"**) announced that it had accepted revised commitments of Google to address concerns related to its proposals to remove third-party cookies and other functionalities from its Chrome browser, i.e., Privacy Sandbox project. Subsequently, on 16 February 2022, Google announced its project to build the 'Privacy Sandbox' on its Android operating system in order to introduce more private advertising solutions.*

In January 2021, the CMA initiated an investigation into Google's proposal to remove third-party cookies and other functionalities from its Chrome browser. Further to two rounds of consultations, the CMA accepted the modified commitments since they addressed competition concerns raised by the CMA and third parties. Under the commitments, Google committed to engaging a more transparent process than the initial commitments, including engagement with third parties and publishing test results. In addition, Google agreed not to remove third-party cookies until the CMA is satisfied that the competition concerns have been addressed. The commitments provided by Google are designed to restrict the sharing of data within its ecosystem to ensure that it does not gain an advantage over competitors when third-party cookies are removed and Google committed not to self-preference its advertising services. In order to ensure Google's compliance with its obligations provided within the scope of commitments, it also was agreed to appoint a monitoring trustee. The CMA also announced it would work with the Information Commissioner's Office in the development and testing of the Privacy Sandbox proposals to ensure they achieve effective outcomes for consumers to protect both competition and privacy.

After the acceptance of these commitments, on 16 February 2022, Google announced a project to build the Privacy Sandbox on its Android operating system with the purpose to introduce more private advertising solutions while again closely working with regulators.

The EC's Final Report on the Consumer Internet of Things Sector Inquiry

*The European Commission published its final Report on the Consumer Internet of Things (**"IoT"**). The Report presents the EC's findings, taking account of comments received during the public consultation on the preliminary report of June 2021 and confirming the preliminary report's conclusions.*

The Consumer IoT sector encompasses various services, devices, and technologies that support the interaction of consumers with connected devices that collect and exchange data over the internet. The main findings of the sector inquiry on the Consumer IoT cover the following points: (i) the characteristics of consumer IoT products and services, (ii) the features of competition in these markets, and (iii) the main areas of potential concern raised by stakeholders in relation to the current functioning of consumer IoT markets, as well as to their future outlook. The EC identified certain competition concerns in the Report, such as:

- Regarding interoperability, integration processes are determined largely by the presence of a few providers of leading proprietary voice assistants and operating systems that enable these providers to independently determine the requirements needed to achieve interoperability and limit the functionalities of third-party smart devices and Consumer IoT services compared to their own.
- In relation to standardization, the major technology companies mostly take the lead when it comes to technology solutions, which may enable them to leverage their market power as patent owners into downstream markets and may lock users into proprietary ecosystems.
- With respect to data, voice assistant providers can control not only data flows and user relationships but can leverage these advantages into adjacent markets, which may cause limits on the data that third parties receive from the leading voice assistant providers and hinder them in their own business development.
- Some potential competition concerns in relation exclusivity clauses of the leading voice assistant providers, as well as the out-of-the-box features that are available to users are raised as well.

In conclusion, the findings of the sector inquiry confirm the rapid growth of Consumer IoT markets while identifying a number of potential competition concerns, which are to be dealt with in the course of time.

Countervailing Duties on the Imports of Indian PET Films to Remain in Force

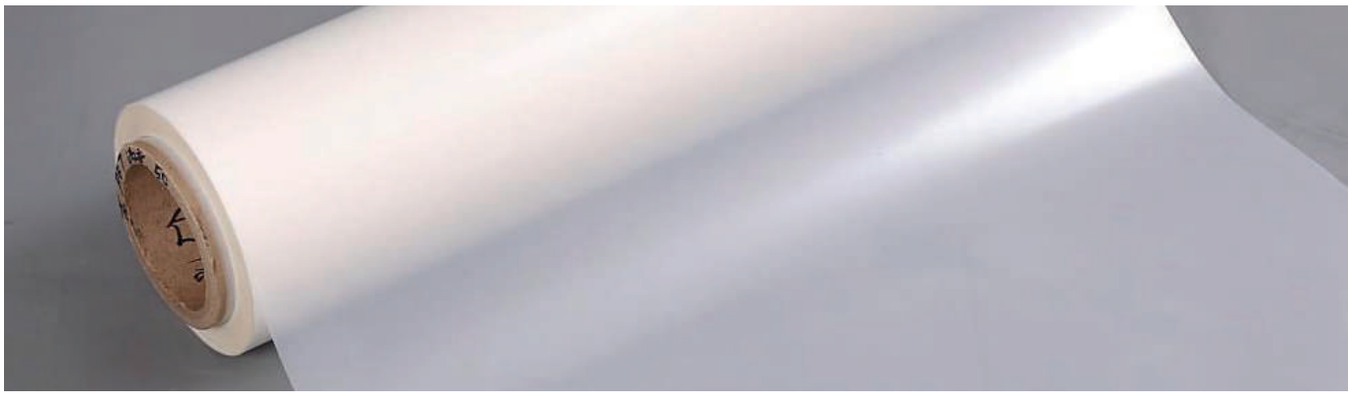
*On 6 March 2022 Turkish Ministry of Trade Ministry concluded its expiry review investigation concerning the countervailing duties on the imports of "polyethylene terephthalate film" (**"PET film"**) originating in India through Communiqué No. 2022/8 on the Prevention of Unfair Competition in Imports.*

The original investigation that constituted the basis of the expiry review investigation regarding imports of the PET film originating from India was concluded on 22 March 2009 through Communiqué No. 2009/8 on the Prevention of Unfair Competition in Imports. This investigation resulted in the imposition of countervailing measures ranging from 4.25% to 11.61% of the CIF price. In the latest expiry review investigation, dated 16 September 2015, was concluded with the decision to continue the same level of countervailing measures without any changes.

With the present expiry review investigation at hand, the Ministry concluded that subsidisation and injury are likely to continue or reoccur if the existing measures were repealed. Indeed, the Ministry evaluated various incentive schemes granted by national and regional Indian governmental bodies and concluded that there is a direct or indirect financial contribution by India, which confers a benefit or any form of income or price support to the Indian exporters/producers. Accordingly, the Ministry decided the continuation of the countervailing measures ranging from 4.25% to 11.61%, without any changes.

3 Classified under the CN Code 3901.10.90.00.11, defined as "low-density polyethylene"

4 Classified under the CN Codes 3920.62.19.00.00, 3920.69.00.00.00 and 3921.90.10.00.00 and defined as "polyethylene terephthalate film ("PET films')



Dumping Investigation into Imports from Saudi Arabia Terminated without Duties

On 26 March 2022 through the Communiqué No. 2022/11 on the Prevention of Unfair Competition in Imports, the Ministry terminated the dumping investigation on the imports of "low-density polyethylene" from Saudi Arabia

The complainant in the concerned dumping investigation, Petkim Petrokimya Holding A.Ş. ("Petkim"), withdrawn its complaint wherein Petkim argued that the imports of the low-density polyethylene originating in Saudi Arabia was dumped and thereby caused injury to the domestic industry. In its non-confidential version of the complaint, Petkim argued that there was a dumping margin varying between 5-15%, a price undercutting of 6-10%, and that its economic indicators deteriorated and demonstrated a material injury before the domestic industry.

The Law on the Prevention of Unfair Competition in Imports provides that the Board of Evaluation of Unfair Competition in Imports may decide to terminate the investigation in cases where the complaint is withdrawn. The investigation thus has been terminated without the imposition of any anti-dumping duties with respect to the imports of the low-density polyethylene originating in Saudi Arabia.

Expiration of Anti-Dumping Duties Announced

The Ministry announced the anti-dumping duties that are to expire within 2022 via Communiqué No.2022/5 on the Prevention of Unfair Competition in Imports. The expired duties were announced in the Official Gazette on 11 February 2022 and entered into force the same day.

The concerned products and their relevant details are below for ease of reference:

Commodity	CN Code	Country	Communiqué No.	Final measure date	Normal expiry date
	5811.00.00.07.00, 5811.00.00.09.00, 5811.00.00.92.00, 5811.00.00.93.00)				
Dioctyl Phthalate	2917.32.00.00.00	Korea	2017/23	20.10.2017	20.10.2022
Dioctyl Terephthalate	2917.39.95.90.13	Korea	2017/24	20.10.2017	20.10.2022
Heavy Plate	7208.51.20.10.11 7208.51.20.10.19 7208.51.20.90.11 7208.51.20.90.19 7208.90.80.10.11 7208.90.80.10.12 7208.90.80.20.11 7208.90.80.20.12 7211.13.00.11.00 7211.13.00.19.00 7211.14.00.21.12 7211.14.00.29.11 7211.14.00.29.12 7225.40.40.00.00 7225.99.00.00.10 7225.99.00.00.90	China	2017/32	29.11.2017	29.11.2022
Certain Types of New Pneumatic Tires, of rubber	4011.20.90 4011.70.00.00.00 4011.80.00.00.00 4011.90.00.00.00	China	2017/33	2.12.2017	2.12.2017
Uncoloured Float Glass	7005.29	Russia	2017/35	23.12.2017	23.12.2017

Ukraine and Turkey Signed a Free Trade Agreement

On 3 February 2022 the Prime Minister of Ukraine and the Minister of Trade of the Republic of Turkey signed a Free Trade Agreement in Kyiv along with the Presidents of Ukraine and the Republic of Turkey. The agreement allows for increasing trade with Turkey from USD 7.5 billion to USD 10 billion in five years.

The Free Trade Agreement is designed to promote trade and economic cooperation between the two countries through the introduction of a free trade regime. It is expected that the document will promote trade intensification between the two countries, increase exports due to domestic producers benefiting from the liberalization of the market of goods and services of the Republic of Turkey, provide opportunities for technology transfer and the modernization of production in Ukraine, create jobs, and allow for the exchange of experience.

A joint committee also was established to ensure the proper and effective implementation of the Free Trade Agreement. To further facilitate trade in goods, the Free Trade Agreement provides for the simplification of trade procedures by the parties as far as possible in accordance with their obligations under the WTO Trade Facilitation Agreement, encouraging multilateral cooperation between the parties to strengthen their participation in the development and implementation of international rules of conduct and recommendations on trade facilitation.

The Outcome of the Expiry Review Investigation into the Imports of Bicycle Tyres

On 20 January 2022 the Ministry concluded its expiry review investigation concerning anti-dumping duties on imports of "new pneumatic tyres of rubber of a kind used on bicycles," "inner tubes of rubber of a kind used on bicycles," and "other: parts" originating in China, Indonesia, India, Malaysia and Thailand through Communiqué No. 2022/3 on the Prevention of Unfair Competition in Imports.

The original investigation that constituted the basis of the expiry review investigation regarding imports of the pneumatic tyres and inner tubes of bicycles originating in China, Thailand, and India was concluded on 30 April 2003 through Communiqué No. 2003/6 on the Prevention of Unfair Competition in Imports.

This investigation resulted in the imposition of anti-dumping measures ranging from 20% to 100% of the CIF price. The latest expiry review investigation, dated 24 July 2015, was concluded with the decision to continue the anti-dumping measures ranging from 0.22 USD/kg to 2.02 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 ranging from 0.22 USD/kg to 2.02 USD/kg, without any changes.

The Outcome of the Expiry Review Investigation into the Imports of Motorcycle Tyres

The Ministry concluded its expiry review investigation concerning anti-dumping duties on imports of "new pneumatic tyres, of rubber, of a kind used on motorcycles,"2 "inner tubes of rubber of a kind used on motorcycles,"3 and "road wheels and parts and accessories thereof" 4 originating in China, Indonesia, Malaysia, and Thailand through Communiqué No. 2022/4 on the Prevention of Unfair Competition in Imports.

The original investigation that constituted the basis of the expiry review investigation regarding imports of the pneumatic tyres and inner tubes of motorcycles originating in China and Thailand was concluded on 30 April 2003 through Communiqué No. 2003/7 on the Prevention of Unfair Competition in Imports. This investigation resulted in the imposition of anti-dumping measures ranging from 37% to 100%. The most recent expiry review investigation, dated 25 July 2015, concluded with the decision to continue the concerned anti-dumping measures ranging from 19.6% to 100%.

With the present expiry review investigation at hand, the Ministry concluded that dumping and damage were likely to continue or reoccur if the existing measures were repealed. Therefore, it was decided to continue the anti-dumping measures ranging from 19.6% to 100%, without any changes.

2 Classified under CN code 4011.40
3 Classified under CN code 4013.90.00.00.11
4 Classified under CN code 8714.10.30.00.00

Revaluation of Fine Rates for Data Protection Law Breaches in Turkey

*The administrative monetary fines defined under Law No. 6698 on Protection of Personal Data (**"DP Law"**) are determined at the beginning of each year in consideration with the revaluation rates pursuant to Tax Procedure Law No. 213.*

Pursuant to the table published by the Personal Data Protection Authority (***"DPA"***), the revaluation rate in the administrative monetary fines for the years between 2017 and 2022 are determined as 36.20%.Accordingly, the administrative monetary fines regarding the violations of DP Law for 2021 and 2022 are as follows:

Violation Types	2021 (TRY)	2021 (Approx. EUR)	2022 (TRY)	2022 (Approx. EUR)
Failure of obligation to inform	9,832 - 196,684	629 - 12,584	13,391 - 267,883	857 - 17,140
Failure of data security obligations	24,500 -1,966,860	1,569 - 125,846	40,179 -2,678,863	2,570 - 171,402
Failure to comply with the Board decisions	46,167 -1,966,860	2,954 - 125,846	66,965 -2,678,863	4,285 - 171,402
Failure of obligations to register on and notify the Registry	39,334 -1,966,860	2,517 - 125,846	53,572 -2,678,863	3,428 - 171,402

Sharing An Exam Result Document - Explicit Consent Required

The DPA published its decision No 2022/12 dated 6 January 2022 regarding the sharing of an exam result document by a local news website without the explicit consent of the data subject. The DPA imposed on the website an administrative monetary fine of TRY 30,000 (approx. EUR 1,920).

It was seen that the website belonging to the data controller had published the name, surname, photograph, higher education program placement, and placement points of the data subject within the news segment. The DPA considered that the relevant data processing action could not be regarded to have been within the scope of freedom of speech, and the data subject's personal data provided in a news article on the website belonging to the data controller had been processed in violation of Article 12(1)(a) of the DP Law. The DPA also took into consideration the mitigating factor that the relevant personal data had been removed from the data controllers' website as of the date of the decision and imposed an administrative monetary fine.

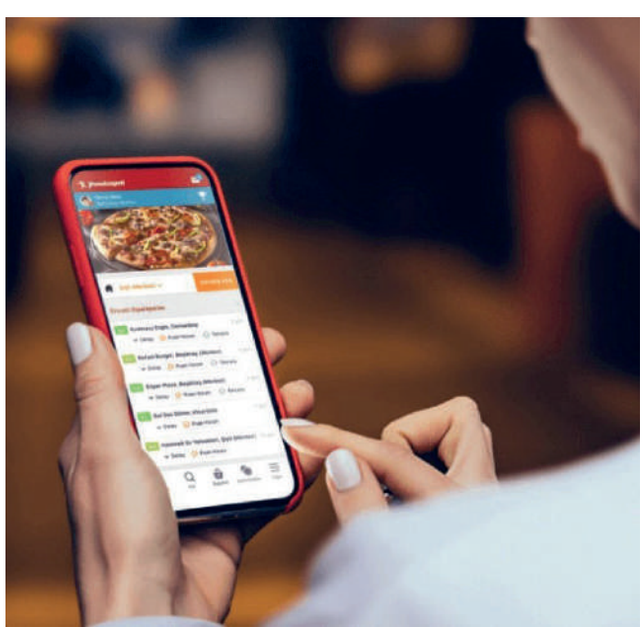
Yemek Sepeti Fined for its Failure to Ensure Data Security

On 7 February 2022 the DPA published its decision No 2021/1324 regarding a data breach notification, as a result of which Yemek Sepeti was fined TRY 1.9 million (approx. EUR 121,600).

The DPA took into consideration the following in its decision:

- The server had been accessed by installing an application and running a command due to vulnerability on a web application server belonging to the data controller.
- The number of Yemek Sepeti users affected by the relevant breach was 21,504,083 and among the affected data were usernames, addresses, phone numbers, e-mail addresses, passwords, and IP information.
- The breach was broad due to the large number of people affected and the leaking of almost the entire customer database.
- Due to the scope of the violation and the size of the data, the persons in question faced risks such as the loss of control over their own data.
- The data controller had not realized there had been a breach for eight days due to their failure to check the software and services running in their networks and determining whether there had been any penetration or any action that should not occur in the networks.
- As of 18 March 2021, alarms had occurred in the security software, but the alarms had been turned off before the Yemek SepetiSecurity Teams were notified and the necessary actions taken.
- Considering that the cyberattack had been noticed as a result of the examination of the alarm sent on 25 March 2021 by the YemekSepeti Security Teams, this indicates that the data controller did not have an effective control mechanism over the third-party companies, and that there were deficiencies in the follow-up of security software and the use of security procedures.
- The data obtained during the breach was transferred to a location belonging to an IP address in France; and
- the data controller had failed to carry out the data security checks considering that a total of 28.2 GB data had been leaked from the system and a leakage test had not been carried out effectively by the data controller.

It was determined that the risks and threats had not been well defined by the data controller, which processes large amounts of data, and had failed to intervene in such a comprehensive data breach. Therefore, the DPA imposed an administrative monetary fine on Yemek Sepeti according to subparagraph (b) of paragraph (1) of Article 18 of the DP Law considering that Yemek Sepeti had failed to take technical and administrative measures to ensure data security.



Blacklist (Illegal) Practices of Car Rental Companies

On 20 January 2022 the DPA issued a decision on the practice of car rental companies of keeping blacklists of customers and sharing these blacklists with other car rental companies.

The DPA determined that in car rentals, blacklists were being kept through some software, which included the negative experiences that occurred during the use of the car by the customers, and the comments of the car rental company. Information on persons added to the blacklist could also be viewed by other car rental companies in cases where the customer rented a car from other companies. Furthermore, people who gave their data to the car rental company were not aware that this data and information were shared with an unknown number of users.

It was stressed that there is a difference between processing personal data limited to business activities and giving it to other data controllers through software companies. In this context, sharing the personal data processed by the car rental company with an unknown number of car rental companies through software companies were considered to be against the principles of (i) lawfulness and fairness, (ii) processing data for specified, explicit and legitimate purposes and (iii) being relevant, limited and proportionate to the purposes for which the data are processed.

The car rental company that had control over the data would be considered as a joint data controller with the software companies, yet the conditions of the concrete case would be taken into account in determining the amount of liability and defect. The DPA decided that car rental companies should put an end to illegal practices and that necessary administrative and technical measures should be taken by data controllers. In addition, it was emphasized that if the practice continues and the necessary measures were not taken, administrative fines would be imposed on data controllers.

Draft Guideline on Cookie Applications in Turkey

*On 11 January 2022 the DPA published the «Draft Guideline on Cookie Applications» (**Guideline**) for public consultation.*

The Guideline defines cookies as low-sized rich text formats that allow some information about users to be stored on users› terminal devices when a web page is visited. It is recommended that the following criteria be considered in the processing of personal data through cookies:

■ Criterion A: The use of cookies only for the purpose of providing communication over the electronic communication network.

■ Criterion B: The use of cookies is strictly necessary for the information society services that the subscriber or user explicitly requests to receive the service.

Accordingly, cookies do not require explicit consent if one of these two criteria is met. If both criteria are not met, explicit is required (through an active action and by specifically and separately informing the relevant persons about what they are asked to consent to). Obtaining cookie consent by using cookie walls that prevent users from viewing website content harms free will. It was underlined that explicit consent obtained in this way may not be considered as valid consent.

Exemption Request for the Prohibition of Online Sales on E-marketplaces Rejected

By Umay Rona

*The TCA shed some light on a long-awaited discussion on whether the online sales of authorized resellers may be restricted. In Februaly 2022, the TCA, in light of the market dynamics of e-marketplaces as well as the previously established jurisprudence, analysed whether BSH Ev Aletleri Sanayi ve Ticaret A.Ş.'s (**"BSH"**) negative clearance/individual exemption request concerning the implementation of a clause to its distribution agreements prohibiting its authorized resellers' sales on e-marketplaces is viable under Block Exemption Communiqué No. 2002/2 on Vertical Agreements (**"Communiqué No. 2002/2"**) or the individual exemption conditions set under Article 5 of Law No. 4054 on the Protection of the Competition (**"Competition Law"**).*

Before delving into the TCA's separate assessments, it initially should be stated that BSH operates under the Bosch, Siemens, Profilo, and Gaggenau brands in Turkey and is a producer as well as distributor of domestic appliances including washing machines and refrigerators and small household gadgets (i.e., vacuum cleaners). After evaluating the distribution agreement conducted between BSH and its authorized dealers as well as the circular note conveyed by BSH to the authorized dealers, the TCA noted that the distribution and sales of Bosch, Siemens, and Profilo branded domestic appliances were conducted through authorized dealers within a selective distribution system. BSH prohibited its authorized dealers from conducting sales in any e-marketplaces such as N11, Trendyol, Hepsiburada, Morhipo, and Amazon. The prohibition was established to protect brand image, prevent free-riding, and enhance distribution efficiency. If the authorized dealers did not abide by the ban, BSH would terminate their distribution agreement based on justified grounds.

To establish the grounds of its assessment, the TCA defined the selective distribution systems as provided under Article 3 of Communiqué No. 2002/2 as "a distribution system whereby the provider undertakes to sell directly or indirectly, goods or services that are the subject of the agreement, only to distributors selected by it, based on designated criteria, and whereby such distributors undertake not to sell the goods or services in question to unauthorized distributors." It also indicated that the prohibition of an authorized dealer from actively or passively selling to end-users is considered a hard-core restriction. The TCA noted that internet sales are considered to be passive sales and their prohibition would not benefit from the protective cloak of the block exemption.

The TCA stated that suppliers may indeed prohibit its authorized dealers' online sales in cases where the nature of the product is important and may raise concerns regarding free-riding, brand image, the inadequacy of the pre and post-sales services or loss of control over the product.

To determine the context of its evaluations, the TCA first indicated that the prohibition of authorized dealers' sales on their own website differs from that of authorized dealers in e-marketplaces. The TCA noted that although suppliers cannot altogether prevent their distributors from conducting sales on their own websites, they may bring certain conditions. However, considering in the case at hand that BSH does not directly restrict its authorized dealers' online sales but solely their sales on e-marketplaces, the TCA concluded that the case indeed required an assessment concerning authorized dealers' prohibition of internet sales in e-marketplaces.

Accordingly, to determine whether the BSH's prohibition of its authorized dealers' online sales may benefit from the conditions of the individual exemption set under Article 5 of the Competition Law, the TCA analysed whether (i) the said prohibition violates Article 4 of the Competition Law, which regulates anti-competitive agreements; (ii) if yes, whether it benefits from the protective cloak of the block exemption

provided under Communiqué No. 2002/2; and (iii) if it does not benefit from the block exemption then, whether it fulfils the conditions of the individual exemption set under Article 5 of the Competition Law.

- Assessment of Article 4 of the Competition Law: The TCA noted that even though the characteristics of BSH's products met the establishment of a selective distribution agreement due to the importance of brand image, it concluded that the second and third criteria were not fulfilled since the said prohibition was not uniformly applied due to the ability of "electromarkets" (such as MediaMarkt as well as Teknosa) to conduct sales on e-marketplaces and lack of proportionality" condition as well as concrete grounds to establish the prohibition. Thus, the TCA concluded that BSH's prohibition of its authorized dealers' sales in e-marketplaces did infringe Article 4 of the Competition Law.
- Assessment under Block Exemption: The Board noted that the prohibition of sales in e-marketplaces is a restriction of all e-marketplace sales for its authorized dealers, it did not meet the "equivalence principle" as it lacked qualitative criteria and prevented the use of the internet as a distribution channel. Therefore, the Board concluded that the prohibition implemented by BSH to its authorized dealers did not meet the block exemption criteria.
- Assessment under Individual Exemption: The TCA assessed whether BSH's said prohibition fulfilled the cumulative conditions of the individual exemption. As for the first criteria, BSH argued that the prohibition in question ensured the improvement of the distribution system, required the protection of brand image, prevented consumers' misinformation/loss of trust and the elimination of free-riding problems. The TCA assessed that (i) the grounds of protecting brand image by way of prohibiting sales on e-marketplaces were not clear as many of BSH's competitors encouraged their resellers' online sales to increase their visibility, (ii) the consumers had the knowledge to identify whether the seller or the marketplace in question should be held accountable in case of misinformation, and (iii) the free-riding problem should not be a concern regarding BSH but of its authorized dealers.

As for the second criteria, the TCA evaluated that one of the reasons behind the prohibition of authorized dealers' sales in e-marketplaces was due to the purpose of eliminating price competition in the relevant market and thus, such restriction did generate consumer harm instead of consumer benefit.

As for the third criteria, the TCA concluded that in case an individual exemption is granted to such probation of BSH, its competitors would be encouraged to implement such a restriction, which would lead to a "domino effect" in the market, resulting in a reduction of "inter-brand" competition and consumer harm.

Finally, the TCA by referring to the possibility of this prohibition being the result of a strategy to control the resale prices of authorized dealers, concluded that the prohibition of its authorized dealers' sales in e-marketplaces excessively limited competition in the market and bearing in mind that there are other manners to maintain brand image and eliminate freeriding problems, the Board concluded that the conditions of individual exemption were not fulfilled and thus, BSH's prohibition of its authorized dealers' sales on e-marketplaces did not benefit from Article 5 of the Competition Law.

This decision is significant as it sets clear guidance and provides information on the TCA's stance and manner of assessment through this first decision concerning online sales restrictions in e-marketplaces.

Events

İstanbul Bilgi University's "Career Days in Law" Event

Our senior associate Mustafa Ayna and associate Özlem Başıböyük participated in the İstanbul Bilgi University's "Career Days in Law" event on 24 March 2022 and they made a presentation to the future lawyers about ACTECON, its practice areas and our expectations from young associates.

ELSA-Competition Law Competition

As always, ACTECON continues to support ELSA's activities. The ELSA "Competition Law Competition", which we are happy to contribute, was held at Bilgi University on April 23-24, 2022. Our senior associate Caner K. Çeşit was one of the jurors in the final and our associate Özlem Başıböyük was one of the jurors in the preliminary round. We congragulate winners and all participating teams.

ELSA ANKARA-Conference

We support the wide-ranging conferences organized by ELSA Ankara with the participation of expert lawyers and academicians. Our senior associate Muhammed Safa Uygur gave a presentation on "Introduction to Competition Law and Basic Concepts" on April 24, 2022 at Excellence Inn Hotel Ankara.

TÜSİAD Digital Turkey Online Conference

Our managing partner Dr M. Fevzi TOKSOY participated in TÜSİAD's (Turkish Industry and Business Association) Online Digital Turkey Conference as a speaker in which the digital transformation around the World, reshaped after the pandemic, is discussed from different perspectives.

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

Competition Compliance 2022
Turkey-Lexology Getting the Deal Through

The Public Competition Enforcement Review 2022
Turkey-The Law Reviews

The Private Competition Enforcement Review 2022
Turkey-The Law Reviews

Trade & Customs
2022-Lexology

Changes in Communiqué Concerning the Mergers and Acquisitions Calling for The Authorization of the Competition Board

Main Developments in Competition Law and Policy 2021:Turkey

A Look at TCA's Approach to Abuse of Dominance through the Lens of AG Rantos's Opinion

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

New Footprints in the Framework of SEPs and FRAND Terms

The First Settlement Decision in Turkey at a Glance: Philips et al. Case

Fintech in Turkey: Regulation & Competition Law Update

ACTECON

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