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Recent Amendments to the Vertical Agreements Guidelines

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Recent Amendments to the Vertical Agreements Guidelines

The Turkish Competition Authority ("TCA") opened the Draft Guidelines on Vertical Agreements ("Draft Guidelines") to public consultation on July 20, 2017, and received opinions, suggestions and evaluations from all interested parties. Following this, on December 12, 2017, a workshop was held with a wide participation of various parties representing different interest groups, where the provisions of the Draft Guidelines were discussed. In this context, taking into consideration the opinions, suggestions and evaluations of the interested parties, the developments in the European Union legislation and the problems encountered in the past, the Guidelines on Vertical Agreements ("Guidelines") were updated on March 30, 2018, in order to respond to the needs of the relevant sectors, related to Internet Sales and Most Favoured Customer Clauses ("MFC").

Provisions Regarding the Internet Sales

The TCA stated that although the internet is a very important sales channel which has significantly increased the variety of products and sellers that the customers may reach whilst allowing the sellers to market their products to a wider customer base at lower costs, the rapid increase of internet sales in Turkey has necessitated certain regulations. The Guidelines stipulate that suppliers' restriction of their resellers' internet sales is regarded as a passive sales restriction in principle while also allowing suppliers to impose certain types of restrictions. The TCA stipulated that the aim was to strike a balance between the interests of suppliers in having a certain amount of control over their distribution network and those of resellers and customers in being able to benefit from the opportunities brought by the internet sales channel.

The actual effects of these amendments will undoubtedly depend on the way in which some of the vague principles set forth in the Guidelines are interpreted by the TCA. Yet it should also be noted that on its face, the Guidelines seem to favour suppliers vis-à-vis resellers and producers, especially due to the amendments, which seem to provide a considerable amount of discretion to suppliers with respect to the restrictions that may be imposed on internet sales by resellers through online marketplaces. Given how crucial sales through online marketplaces are for the development of the internet sales channel, the Guidelines may have some adverse effects on the development of this channel.

Provisions Regarding the MFC Clause

The TCA states that the MFC Clause is one of the subjects which competition authorities and competition enforcers have been analysing recently, and that with the increase of e-commerce, the MFC clause has become more important for competition authorities, which led to a necessity to draft specific regulations. The TCA notes that the MFC Clauses have important efficiency enhancing effects but reminds that they may also impede competition under certain circumstances.

The Guidelines contain detailed explanations as to how these effects should be assessed on a case by case basis. It is critical to note that, per the Guidelines, both wide[1] and narrow[2] MFC clauses may have an overall negative impact only in the presence of market power. The Guidelines expressly set forth that MFC Clauses (wide and narrow) benefit from a group exemption as long as the market share of the party benefiting from that clause is below 40%. If this threshold is exceeded, a detailed individual exemption analysis would be required.

1 Clauses that prevent suppliers to offer better terms or conditions concerning goods and services provided in the relevant market through rival platforms
2 Clauses that prevent suppliers to offer better terms or conditions concerning goods and services provided in the relevant market through suppliers' own platforms

The Required Standard of Proof Was Not Met: the Turkish Court Annulled the TCA's Infringement Decision Imposing a Monetary Fine

The 10th Administrative Court of Ankara, Turkey, annulled a penalty of TRY 14.5 million (approx. EUR 3.5 million) levied by the TCA on GOLTAS Cement and five other cement producers for allegedly entering into a collusive agreement to allocate certain geographical regions among themselves and collectively to raise the prices of cement products from January-March 2013 to October-December 2014. This is the first decision where an administrative court annulled an administrative fine on the grounds that the required standard of proof was not met. Although the decision of the 10th Administrative Court is subject to further judicial review in higher administrative courts, this is a landmark case that will fundamentally change the way in which the TCA establishes concerted practice.

In the GOLTAS Cement case, the TCA was not able to find evidence of any contact between the said undertakings with respect to market allocation or collective price increase and therefore relied on economic data, but in doing so mainly compared the market structure during the said period with the preceding and succeeding periods, and concluded that the market structure was similar to markets where competition was restricted. The cement companies submitted evidence showing that price increases had been "a result of natural market forces rather than ... anti-competitive behavior." The court accepted these arguments.

The TCA has long been criticized for its approach of amalgamating its claims concerning all investigated parties rather than conducting individualized economic assessments in concerted practice cases. The implications

of this decision are yet to be seen, but the court's decision sends a clear message to the TCA that it must separately assess the behaviours of each investigated party by taking into consideration the specific economic circumstances. So far, the administrative courts in Turkey have been reluctant to delve into the issue of standard of proof as well as other issues concerning the defensive safeguards associated with the general right to a fair trial. This may be a milestone in the judicial review of the TCA's decisions in general, since in 20 years of enforcement, this decision is the only instance where the administrative court, considering the essence of the case (mainly the standard of proof), annulled the TCA's decision imposing a monetary fine.

Abuse of Dominance by Electricity Distribution Companies in Turkey

The TCA concluded the investigation initiated against electricity distribution companies Akdeniz Elektrik Dağıtım A.Ş., CK Akdeniz Elektrik Perakende Satış A.Ş. and AK DEN Enerji Dağıtım ve Perakende Satış Hizmetleri A.Ş., to determine whether they violated Article 6 of the Turkish Competition Law, which deals with abuse of dominance.

The TCA determined that:

- Akdeniz Elektrik holds dominant power in the "electricity distribution service market" in the "Mediterranean electricity distribution area";
- CK Akdeniz Elektrik holds dominant power in "retail sale of electricity to non-eligible customers", "industrial customers connected to the integrated system via distribution level market", "retail sales to the commercial customers market" and "retail sales to the residential customers market" in the "Mediterranean electricity distribution area".

The geographical market was defined as the "Mediterranean electricity distribution area" because the companies involved are responsible for distribution in that area. It should be noted that the term Mediterranean electricity distribution area does not cover the entire Mediterranean but refers to one of 12

designated electricity distribution areas in Turkey, all of which have been privatized by the state.

As a result of the investigation, the TCA fined Akdeniz Elektrik TRY 11.8 million and CK Akdeniz Elektrik TRY 26 million for their abuse of dominance. The TCA found that EK DEN Enerji did not violate Article 6. Lastly, the vertically integrated entity (consisting of Akdeniz Enerji, CK Akdeniz Elektrik and AK DEN Elektrik) was ordered to cease practices restricting competition. The TCA's decision may be challenged in the Ankara Administrative Courts within 60 days of its receipt.

Outcome of the Investigation into the Activities of Petrol Companies in Turkey

The investigation into (tying) activities of petrol companies, initiated by the TCA following the order of the Council of State, was completed with no violation of competition law found.

Petrol Ofisi A.Ş. (former title: OMV Petrol Ofisi A.Ş.), Milan Petrol San. Tic. A.Ş. and TP Petrol Dağıtım A.Ş. were investigated in relation to allegations that their activities violated Articles 4 and 6 of the Turkish Competition Law by abusing their usufruct via obliging gas stations to purchase autogas LPG from the said undertakings or distributors that were selected by the aforesaid undertakings. Such activities could be defined as tying agreements, which may result in restricting the freedom of contract of dealers as well as competition in the market.

The TCA's 2009 decision. The investigation was initiated pursuant to the 13th Chamber of Council of State's decision (No 2010/609/E., 2016/3707 K. dated 14.11.2016) that annulled the TCA's 2009 decision No 09-43/1093-274 to reject the complaint and not initiate an investigation into the aforementioned undertakings. According to the TCA's 2009 decision, both the LPG Market Law and other laws oblige gas stations to conclude an exclusivity agreement with the distributor of autogas. Moreover, in order to enhance the distributors' trademark as well as standardization and for security reasons, such obligation should be regarded as fair. Such practices were seen as the long-established commercial custom in this sector. Thus, the practices did not fall under Article 4 of the Turkish Competition Law (prohibiting anti-competitive agreements).

As per the evaluation regarding the Vertical Block Exemption Communiqué, undertakings which have market share more than 40% shall refrain from concluding tying agreements with their customers. According to the Energy Market Regulatory Agency, none of the undertakings exceeded a market share of 40%. No dominance was found. As a result, the TCA concluded that there was no necessity to launch an investigation into the undertakings.

Decision of the Council of State. Upon appeal, the Council of State annulled the TCA's 2009 decision and ruled that the TCA should have opened an investigation into the activities of the said undertakings (since this ruling has not been published, the grounds for the annulment are not known). As a result of the annulment, the TCA launched an investigation into the said undertakings. The TCA determined that Turkish Competition Law was not violated, and did not impose a fine.

Highlights of the TCA's M&A Overview Report 2017

The TCA released its M&A Overview Report for 2017 (Report) providing brief information on the Turkish merger control system, comparing 2016 and 2017, and determining the position of Turkish and foreign companies in the market.

The number of M&A transactions notified to the TCA in 2017 decreased compared with 2016 – from 209 transactions in 2016 to 184 M&A transactions in 2017. Four of the notified transactions were taken to Phase II by the TCA in 2017. One of these transactions was not approved by the TCA; the review process for other three has not been concluded yet. During 2017, two transactions were approved subject to remedies given by the parties.

According to the categorization in terms of the origin of the transaction parties, 31 transactions were realized solely between Turkish companies in 2017, while in 2016 this number was 34. Furthermore, 83 out of 184 transactions in 2017 were foreign-to-foreign transactions (i.e., 24 fewer transactions than in 2016, when foreign-to-foreign transactions amounted to 107). Finally, 54 transactions in 2017 were between Turkish and foreign companies (with 50 such transactions in 2016).

The value of Turkish-to-foreign transactions increased from TRY 10 billion (approx. €2.2 billion) in 2016 to TRY 11 billion (approx. €2.4 billion) in 2017. The value of transactions solely between Turkish companies decreased from TRY 7.3 billion (approx. €1.6 billion) in 2016 to TRY 5.2 billion (approx. €1.1 billion) in 2017. Lastly, the value of foreign-to-foreign transactions decreased from TRY 1.5 trillion (approx. €333 billion) in 2016 to TRY 1 trillion (approx. €222 billion) in 2017.

According to the ranking of foreign investors in terms of transactions, the Netherlands and Japan were leading (with six transactions), followed by France (4), Luxemburg (4), United Kingdom (3) and Austria (3).

The M&A transactions notified to the TCA in 2017 were concluded within an average of 15 days following the date of final notification.

The EC Fined Eight Japanese Producers of Capacitors for Participation in a Cartel

The European Commission (EC) fined Elna, Hitachi Chemical, Holy Stone, Matsuo, NEC Tokin, Nichicon, Nippon Chemi-Con, and Rubycon €253,935,000 for participating in a cartel to supply aluminium and tantalum electrolytic capacitors – essential parts of almost all electronic products that store energy electrostatically. The cartel operated between 1998 and 2012. The meetings and contacts took place in Japan, but the cartel was implemented on a global scale. The aggravating factor in this story was the evidence that the companies were aware that their behavior was anticompetitive and tried to conceal it.

In fact, nine Japanese companies colluded, but only eight were fined, as Sanyo was a leniency applicant and obtained immunity from fines. Senior managers and even presidents of the companies concerned took part in meetings and contacts to exchange commercially sensitive information and coordinate future behavior in order to avoid price competition. The companies exchanged information on future prices and supply and demand intentions.

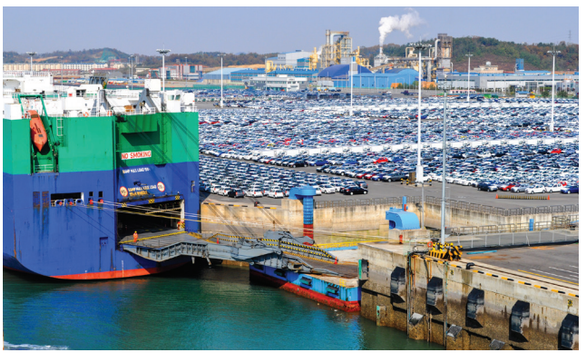
The aggravating factor in this story was the evidence that the companies were aware of the anticompetitive nature of their behavior and tried to conceal it: e.g., the communication between companies included such wording as "Discard after reading it", "After reading this email please destroy it", etc.

The EC's Whistleblower Tool In Action: Total Fines of €546 Million Imposed in Three Cartel Settlements in the Maritime Car Carriers and Car Parts Suppliers Sectors

The EC investigated and fined four maritime car carriers (€395 million), two suppliers of spark plugs (€76 million) and two suppliers of brake systems (€75 million) for participating in cartels. All three investigations started with immunity applications (with full immunity from fines for such applicants). All involved in the cartels acknowledged their participation in a cartel and agreed to settle with the EC, which led to a 10% reduction in their fines.

Cartel settlement 1 - Maritime car carriers

The five maritime car carriers - Chilean maritime carrier CSAV, the Japanese carriers "K" Line, MOL and NYK, and the Norwegian/Swedish carrier WWL-EUKOR had participated in a cartel concerning intercontinental maritime transport of vehicles for almost six years in the market for deep sea transport of new cars, trucks and other large vehicles, on various routes between Europe and other continents. The anticompetitive behavior, such as coordinating and maintaining artificially high prices, allocation of customers and exchange of commercially sensitive information, was possible due to coordination via regular meetings of carriers' sales managers at various venues (including social gatherings) and contacts by phone. The investigation started with an immunity application by MOL.



Cartel settlement 2 – Spark plugs

Bosch (Germany), Denso and NGK (both Japan) participated in a cartel concerning supplies of spark plugs (automotive electric devices built in petrol engines of cars) to car manufacturers in the EEA. The cartel lasted 11 years. The anticompetitive behavior included exchanges of commercially sensitive information, price coordination to certain customers, and allocation of customers and 'respect of historical supply rights' in the spark plugs industry in the EEA, which was possible via bilateral contacts between the cartel participants. The investigation started with an immunity application by Denso.

Cartel settlement 3 – Brake systems

Two cartels relating to brake systems were found by the EC concerning (i) the supply of hydraulic brake systems, which lasted four years and involved ZF TRW (Germany), Bosch (Germany) and Continental (Germany); and (ii) the supply of electronic brake systems, which lasted approximately one year and involved Bosch and Continental. The cartel participants coordinated their behavior by exchanging commercially sensitive information (pricing elements, primarily), discussing general sales conditions for certain customers, as well as colluding in relation to one specific tender for electronic brake systems (the second cartel). The coordination was possible via bilateral meetings, phone conversations and email exchanges. The investigation started with an immunity application by TRW.

The decisions are part of a series EC investigations into the automotive (parts) sector, which indicates the importance of the sector for European consumers and industries. The whistleblower tool has proved to be effective in detecting cartels. Currently, even individuals may alert about a cartel anonymously by using a specifically-designed encrypted messaging system.

The EC Conditionally Approved the Concentration of US-Based Global Media Companies

The EC approved acquisition by Discovery of Scripps (both US-based global media companies) subject to conditions. The EC has had the jurisdiction to assess the concentration in question under the EU Merger Regulation since the parties to the transaction -- Discovery and Scripps -- are both active as providers of basic pay-TV channels to TV distributors in the European Economic Area, despite being based in the US.

It was determined that the transaction would lead only to a limited overlap of activities in the UK; whereas in Poland it could increase Discovery's bargaining power vis-à-vis TV distributors due to the acquisition of certain channels that are important in distributors' pay-TV channel packages; eventually there was a risk that Discovery would impose the licensing of its TV channel portfolio, increase its licensing fees, as a result of which Polish consumers might be affected.

To address these concerns, Discovery proposed as a remedy to make some channels available to current and future TV distributors in Poland at a reasonable fee for a period of seven years. The commitment was sufficient enough for the EC to clear the transaction.

Hoffmann-La Roche and Others: An Agreement Between Undertakings Aimed at Artificial Differentiation Between Two Equivalent Products -- A Restriction Of Competition by Object?

The Court of Justice of the EU (CJEU) on 23 January 2018 delivered its judgement in Case C-179/16, F. Hoffmann-La Roche and Novartis, upon a request for a preliminary ruling from the Council of State of Italy in relation to the interpretation of Article 101 of the Treaty on the Functioning of the EU (TFEU). In particular, the main question in the case, among others, relates to whether the agreement between the two pharmaceutical groups which aims at reducing the use of one medical product (Avastin) and to increase the use of another (Lucentis) by way of misleading safety claims shall be regarded as a restriction of competition by object.

Background

In 2014 the Italian Competition Authority investigated and fined Roche group and Novartis, each amounting to approximately Euro 92 million, for a market sharing agreement artificially differentiating between Avastin and Lucentis, the two equivalent in all respects for the treatment of eye diseases, inter alia by way of disseminating information giving rise to concerns regarding the safety of Avastin in ophthalmology. The main aim of such concerted practice was to make customers shift from the cheaper product, Avastin, to the more expensive product, Lucentis. The undertakings appealed the decision of the Italian Competition Authority to the Council of State of Italy, which referred the matter to the CJEU for the preliminary ruling.

About the products. Avastin had market authorisation in the EU for the treatment of certain tumorous diseases; Lucentis, for the treatment of eye diseases. However, even prior to placing Lucentis on the market, doctors prescribed Avastin to their patients with eye diseases (so called 'off-label' product in ophthalmology). Given its lower price, Avastin's use for eye diseases continued even after Lucentis was placed on the market. Hence, the two products were the main competitors in Italy in the field of ophthalmology.

The CJEU's position - Restriction by object confirmed

The CJEU ruled that the joint practice between the undertakings that is intended to emphasise that a medical product is 'less safe or less efficacious' shall be regarded as a restriction of competition by object regardless of its effects, where:

- the information jointly disseminated is sufficiently misleading,
- it exaggerates the likelihood of adverse reactions arising from the off-label use of another product; and
- a party that is not the market authorisation holder is also involved in reporting the risks associated with the off-label use of a product. (The CJEU emphasises that it is solely the responsibility of the market authorisation holder to report any such risks, and hence involvement of another party in this process may be problematic from a competition law perspective.)

International Sports Unions In the Spotlight: Severe Penalties on Athletes Breach EU Competition Law

The European Commission's (EC) investigation launched in 2015 against the International Skating Union (ISU) and its eligibility rules was finalised in December 2017. It was found that the ISU's eligibility rules (envisaging severe penalties for athletes for participation in events unauthorised by ISU) restricted the commercial freedom of such athletes and prevented new organisers of international speed skating events from entering the market because they were unable to attract top athletes. The ISU must modify its rules within 90 days or be liable for non-compliance payments of up to 5% of its average daily worldwide turnover. The EC's decision is a reminder that sports federations/unions are undertakings within the meaning of competition law, and hence sporting rules are subject to EU antitrust rules.

Background of the case. The investigation was launched upon the complaint of two professional speed skaters in October 2015 (Case AT.40208). Sports federations are subjects of EU antitrust rules when they are engaged in economic activity and sporting rules shall be compatible with EU law, i.e., they shall pursue a legitimate objective, and the restrictions that they create shall be inherent and proportionate to reaching that objective.

ISU & Eligibility Rules. The ISU is the sole body recognised by the International Olympic Committee to regulate the sports of ice figure skating and speed skating. Its members are national ice skating associations. The ISU generates revenues from organizing ice skating competitions. Under its 1998 Eligibility rules, speed skaters who participate in events that are not approved by the ISU are subject to severe fines (up to a lifetime ban from all international speed skating competitions). Such fines are imposed at the ISU's discretion, even when there is no risk to legitimate sports objectives.

The EC's main findings

- The ISU's eligibility rules prevent athletes from offering their services to organizers of competing skating events and deprive them of additional sources of income.

- The system of penalties under the ISU's eligibility rules is disproportionately punitive and limits the development of alternative/innovative speed skating competitions.

- The ISU's eligibility rules are anticompetitive and breach Article 101 of the Treaty on the Functioning of the EU. They restrict competition and enable the ISU to pursue its own commercial interests, to the detriment of athletes, independent organizers of sport competitions, as well as fans.

Consequences. The ISU must now comply with the EC's decision or be liable for non-compliance payments of up to 5% of its average daily worldwide turnover. In particular:

- It has 90 days to its illegal conduct and refrain from any measures that have a similar effect; and

- It has to modify its eligibility rules so that they are based only on legitimate objectives, i.e., that explicitly exclude the ISU's own commercial interests; and are inherent and proportionate to achieve those objectives. In summary, the rules for the ISU's authorisation of third party competitions must be objective, transparent and non-discriminatory, and must not simply exclude competing independent competition organizers.

Finally, any person/company affected by the anti-competitive behaviour of the ISU may bring an action for damages before the EU member states' courts and seek compensation for their damages. The EC's decision constitutes a binding proof that anticompetitive behaviour did take place and was illegal.

Hot Summers Are About to Continue: Another Five Years for Air Conditioners

The Ministry of Economy of the Turkish Republic (Ministry) has concluded its expiry review investigation of the anti-dumping investigation regarding air conditioning machines originating in the People's Republic of China. The anti-dumping measures, which have been in force since 2006, shall be applicable for another five years. In March 2017, upon the complaint of the domestic industry, the Ministry launched an expiry review investigation of the concerned product to determine whether the expiration of the current definitive measures in force regarding the concerned product would likely to lead to a continuation or recurrence of dumping or injury.

The initial 2006 antidumping investigation was launched by the Ministry in July 2006 in order to determine whether imports to Turkey originating in the People's Republic of China were dumped. The Ministry concluded that general imports of the concerned product increased by 417% in the investigation period, which was 2014. Further, it was also stressed by the Ministry that quantity of imports of the concerned product from the People's Republic of China increased by 452% between 2002 and 2004. The share of imports of the concerned product from the People's Republic of China increased to 86%, from 81% between 2002 and 2003. Moreover, it was further expressed by the Ministry that imports of the concerned product from the People's Republic of China undercut the domestic industry's prices, and the imports caused injury. Therefore, the Ministry imposed a 25% duty (CIF) for the period of five years on imports of air conditioners designed to be fixed to a window, wall, ceiling or floor, "split system" and the internal and external parts thereof.

2012 prolongation of measures. In five years, prior to the expiration of the measures mentioned above, the domestic industry applied to the Ministry requesting to continue those measures in 2012. The domestic industry claimed that the expiration of the measures would likely lead to a continuation or recurrence of dumping or

injury. Following its examination, the Ministry decided to continue the measures for another five years.

2018 prolongation of measures. In 2017, the domestic industry again applied to the Ministry for the same reasons, following which the Ministry initiated an expiry review investigation for the concerned product. In its Communiqué No: 2018/5 on Prevention of Unfair Competition in Imports, published on 8 March 2018, the Ministry ruled that the measures in force shall be applicable for another five years.

In conclusion, air conditioner imports originating in the People's Republic of China have been subject to an anti-dumping measure of 25% of CIF for more than a decade in Turkey. Moreover, throughout that time the measures remained at the same level even though the export data and the economic indicators of the domestic industry have changed. The developments regarding the air conditioner market and the Ministry's position in relation to this are yet to be seen.

Imports of Polyethylene Terephthalate: Developments in Turkish Safeguard Legislation

The Turkish Ministry of Economy (Ministry) published a new regulation (Communiqué) which contains rules and procedures regarding the application, allocation and usage of tariff quotas to be issued with regards to the imports of polyethylene terephthalate (PET).

The main rules and procedures according to the Communiqué are as follows:

- any request for the issuance of a license will be carried out electronically (in case of a problem, physically),
- only one import license may be requested in an application,
- applications will be taken into consideration on a first come, first served basis,
- the volume per each import license shall not exceed 200 tons,
- an import license may be issued only for a country or customs zone,
- in order to issue a new import license, there shall be at least 15 days following the last issued import license for the same applicant,
- in cases where the import license is issued physically, it shall be returned to the Ministry after its expiry, and
- the import license is not transmissible or assignable.

Effective Data Protection Compliance In Turkey

Turkey recently announced the enactment of the Turkish Law on the Protection of Personal Data, after a decade of legislative process. Pursuant to the Turkish Law on the Protection of Personal Data, the Data Protection Authority ("DPA") was also established as the main regulatory body responsible for data protection in Turkey. The general framework of the data protection regime shall be governed by the Turkish Law on the Protection of Personal Data ("Data Protection Law").

The Data Protection Law empowers the DPA to enforce the legislation in a strict manner and to impose an administrative fine between TRY 5,000 (approx. EUR 1,100) and TRY 1,000,000 (approx. EUR 214,000) for non-compliance. Having said that, the DPA is under the obligation to provide guidance on the application of the rules so as to prevent any uncertainties. As the potential administrative fines described in the Data Protection Law are onerous, designing an effective system within a company to ensure compliance with the data protection rules and thus minimizing the risks associated with non-compliance have become one of the central concepts, particularly for multinational companies that have operations in Turkey.

How to Design a Data Protection Program:

As for the compliance aspect of the issue, firms are required to take all necessary measures to comply with the Data Protection Law. The Guideline on Personal Data Security which was published on the DPA's website may be considered as a starting point for designing an effective compliance program.

Have a Data Protection Policy. Firms need to establish a data protection policy or update their current one as soon as possible to comply with the Data Protection Law. Indeed, ensuring the effectiveness of such a policy is vital. All existing agreements and documents need to be reviewed with the participation of the responsible department to ensure that they are in compliance with the Data Protection Law. If any infringing clauses, statements or conditions are found within those documents, firms need to take the necessary steps to comply with notification obligations and to remedy the issue(s) before any further breaches occur. On the other hand, the Data Protection Law does not grant any intra-group processing activity, thus all entities in a group are responsible for their own data protection.

Data Protection Risk Assessment. Firms need to analyse the characteristics and risks of the sector they are operating in as a part of their data protection compliance program, to understand their operations' risk level. In other words, by determining the risk level of data, firms can effectively take necessary measures to comply with the Data Protection Law and use their resources effectively. Since the DPA has so far been observing the markets and has yet to interfere, the sectoral laws and practices can serve as guidelines for firms to determine the best practices for data protection. Including but not limited to the above requirements, in order to ensure detection of breach *ex-ante*, it is also essential to carry out continuous audit internally and establish reporting mechanisms.

Rights of the Data Subject. The natural person whose personal data is processed is defined as the *"data subject"* and granted certain rights in the Data Protection Law. Within this scope, data subjects shall be informed regarding their data, such as whether their data is processed and if so, the purpose of processing the data, and other information including whether the data is transferred abroad or domestically. Moreover, the data subject has the right to correct his/her personal data if processed wrongly. Also, the data subject may request the erasure or destruction of his/her personal data under conditions laid down by the Data Protection Law.

Training the Staff. Along with the operation and the assets of the firm, a fundamental aspect of the data protection policy should be raising awareness of the firm's staff regarding data protection. The lack of properly trained staff might waste firms' investment in developing

data protection policies and also poses a risk of potential sanctions. Further, departments such as HR, marketing or IT are required to undergo more rigorous training regarding data protection since their daily activity is more data-oriented. Accessing personal data platforms by staff can be segregated based on a department's relevancy. Lastly, periodical/random internal auditing of data compliance could raise awareness of the staff as well as uncover any potential problems in terms of data protection.

Analysing the Status of Data and Cybersecurity. As some data can be out-of-date, firms need to reanalyse the relevancy and up-to-datedness of the data they process. In this regard, having and processing less data can mitigate the risk level of a firm. To ensure the cybersecurity of the firm, multiple and supplementary cybersecurity measures are always preferable to having one cybersecurity measure. Moreover, if the data are physically collected, such as paper, USB drives, CDs/DVDs, then additional physical security measures must be taken; for instance, recording the access to physical platforms and locking the entrance when not in use. On the other hand, if data are collected in cloud systems, encrypting the access to the cloud(s) as well as encrypting the data are suggested. According to Article 12 of the Data Protection Law, if the processed data are collected by other parties illegally, the controller shall notify the data subject and the Board within the shortest time. However, the type of breach such as technical or administrative was not specified, nor the meaning of the shortest time. Therefore, it shall be expected that future precedents of the DPA shall clarify these issues.

Transferring the Data. As a rule, the Data Protection Law seeks the explicit consent of the data subject for data transfer. However, personal data may be transferred without explicit consent if certain conditions are met, such as if it is clearly provided for by the laws or mandatory for the protection of life or physical integrity of the person or of any other person who is bodily incapable of giving his/her consent or whose consent shall not be deemed as legally valid. For data of a special nature, the same rule applies if sufficient measures to transfer such data are taken. However, the definition of sufficient measures is also ambiguous.

For transferring data abroad, the Data Protection Law follows the same approach and seeks explicit consent. Similarly, for transferring personal data abroad without explicit consent, the above conditions are still required along with the existence of sufficient protection in the foreign country. If sufficient protection is not provided, then the controllers in Turkey and in the related foreign country must guarantee sufficient protection in writing and the Board must authorise such transfer.

Conclusion

As the above findings suggest, data protection is highly significant and requires a tailored approach for firms' compliance with the Data Protection Law. However, since the data protection regime is so new in Turkey, vague language of the Data Protection Law is still an issue and some terms need to be defined for clarification. Moreover, even though there has been no fine imposed on a firm in Turkey and the DPA's approach is still ambiguous, fines ranging from TRY 5,000 (approx. EUR 1,100) to TRY 1,000,000 (approx. EUR 214,000) can pose a risk for firms. Also, since the DPA is not under the obligation to publish its decisions, firms can also face hardships in implementing the Data Protection Law. Though said deficits currently exist, firms need to start establishing or updating their data protection policies to comply with the Data Protection Law's requirements and prevent possible sanctions by the DAP.

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