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ACTECON

Turkish Constitutional Court Shook the Foundation of On-Site Inspections

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Dear reader,

In the second quarter of 2023 we witnessed the active role of the courts in shaping the Competition Law. There was a constitutional review of the amendments to the Turkish Competition Law in relation to the Turkish Competition Authority's ("**TCA**") power to impose structural remedies, take copies of the examined data and documents during dawn raids, and to change the status of its personnel. The Court decided to annul the amendments regarding the status of the personnel of the TCA based on the rule of law principle. The provisions regarding the TCA's powers related to structural remedies and taking copies of the examined data during dawn raids were found in line with the Constitution.

In addition, in a separate case, the Constitutional Court of Turkey concluded that on-site inspections conducted solely based on the TCA's decision without a court order were not in compliance with the Turkish Constitution and deemed them a violation of the right to the inviolability of domicile. The decision is expected to amend the legislation regarding on-site inspections carried out by the TCA and therefore to have a significant impact on future procedures to be conducted by the TCA.

Another interesting court judgement is in relation to parallel proceedings. The Administrative court of Turkey emphasized that the TCA's decision on proposed merger must wait until the completion of the antitrust investigation, since the findings in the latter may affect the merger assessment.

We cannot but also mention here the revisions adopted in the European Union ("**EU**") under the Horizontal Guidelines and the Block Exemption Regulations ("**BER**") Those provide a clearer guidance to businesses on when horizontal cooperation may lead to competition concerns. The emphasis on sustainability agreements enables (safer) collaboration between competitors for the good cause. The informal guidance opportunity from the European Commission ("**EC**") shall lead to more legal certainty and hopefully more sustainability aimed projects.

We invite you to discover this issue of The Output® with more details on the above, as well as some other interesting developments related to competition law, international trade and regulatory.

Sincerely,

Fevzi and Bahadır

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In this issue:

Turkish Constitutional Court Shook the Foundation of On-Site Inspections

*On 20 June 2023, the Turkish Constitutional Court ("**Court**") announced its landmark judgement regarding on-site inspections conducted by the TCA. The Court concluded that on-site inspections conducted solely based on the TCA's decision without a court order are not in compliance with Article 21 of the Turkish Constitution and deemed them a violation of the right to the inviolability of domicile. The decision is expected to amend the legislation regarding on-site inspections carried out by the TCA and therefore to have a significant impact on future procedures to be conducted by the TCA.*

The case concerns the individual application of Ford Otomotiv Sanayi A.Ş. ("**Ford Türkiye**") by alleging the violation of its fundamental rights and freedoms.

The Court held that the premises of undertakings are considered within the scope of domiciles and that the on-site inspections carried out by the TCA at the premises constitute an interference with the right to the inviolability of domicile protected by Article 21 of the Turkish Constitution. The Court states that Article 15 of Law No. 4054 on the Protection of Competition ("**Competition Law**"), which allows the TCA to conduct on-site inspections without a judge's decision, violates the constitution since Article 21 of the Turkish Constitution requires a judge's decision (a written order of an authority authorized by law in cases where a delay is inconvenient) as a measure to interfere with this right. Therefore, the Court held that the right to the inviolability of domicile of Ford Türkiye had been violated.

The Court also notified the Turkish Grand National Assembly of the Decision to resolve the unlawfulness of the legislation. In light of the evaluations made in the Court's respective decision, the Turkish Grand National Assembly is expected to amend the respective article in the Competition Law on on-site inspections in accordance with this judgement.
The Court further evaluated that Ford Türkiye's right to trial within a reasonable time also had been violated due to the lengthy duration of the judicial proceedings, almost ten years.

Until the Turkish Grand National Assembly resolves the unlawfulness of the legislation, it remains to be seen what the impact of this decision will be on existing cases.

No Commitment Option Possible for Negative Matching Agreements

*In April 2023 the TCA published reasoned decisions in which it rejected the requests of the undertakings that operate in the purchase and sales of second-hand passenger cars via their online platforms, i.e. Arabam.com and Vava Cars to re-evaluate their requests to initiate commitment negotiations within the scope of the initiated investigation ("**Decisions**").*

On 21 July 2022, the TCA initiated a full-fledged investigation against Arabam.com, VAVA CARS, Araba Sepeti Otomotiv Bilişim Danışmanlık Hizmetleri Sanayi ve Ticaret A.Ş. ("**KAVAK**"), and Letgo Mobil İnternet Servisleri ve Ticaret A.Ş. ("**Letgo**") to determine whether these undertakings had violated the Turkish Competition Law by imposing a negative matching obligation. Within the scope of the investigation, Arabam.com and VAVA CARS submitted their requests to initiate commitment negotiations; however, the TCA rejected their requests. Subsequently, as per Article 11 of Administrative Procedure Law No. 2577, both undertakings requested a re-evaluation of their commitment requests prior to challenging the relevant decisions before the administrative judiciary.

In the relevant requests, the undertakings argued that the investigated practices did not constitute a violation of the Turkish Competition Law as they (i) aimed at the use of the trademark right and the prevention of infringement of the trademark right by competitors under Intellectual Property Law No. 6769 and (ii) were considered to be the only method in their challenge to protect their trademark rights against Google Ads. In terms of the nature of the investigated practices, Arabam.com also highlighted that the investigated practices should not be considered as a naked and hard-core infringement, which are listed numerus clausus within the scope of relevant legislation, in line with TCA's Modanisa Decision, along with the EU competition law legislation and precedents and U.S. Federal Trade Commission precedents.

However, the TCA evaluated that negative matching agreements restrict the ability of consumers to compare prices between competitors and artificially direct them to certain undertakings. In support of this, the TCA referred to its evaluation in Modanisa Decision which found that "negative matching agreements have similar effects to customer/market sharing agreements between competitors in the relevant markets." The TCA explained that such agreements lead to the reduction of the possibility of competing undertakings appearing in the text advertisements at the top of the search engine results page and the possibility of digital comparison, as well as the fact that the consumer may be provided with fewer options.

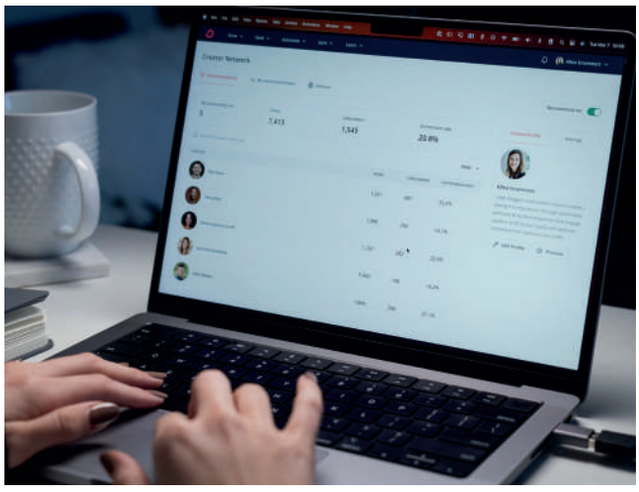
Based on these grounds, the TCA rejected Arabam.com and VAVA CAR's requests for a re-evaluation of their requests to initiate commitment negotiations.

Do not Make the Case Handlers Wait! Three New Decisions on Hindrance of On-Site Inspection

*In April 2023 the TCA published three decisions on hindrance of on-site inspections by way of deleting messages/email and/or making the case handlers wait and questioning their authority. Güven Grup Hazır Beton Hafr. İnş. Maden Petrol Nak. Tic. Ltd. Şti. ("**Güven**"), Natura Gıda Sanayi ve Ticaret A.Ş. ("**Golf**"), and Açı Eğitim Öğretim Hizmetleri A.Ş. ("**Açı Schools**") were fined as a result of these decisions.*

In the two cases, the hindrance of inspection was by way of deleting messages/emails. In the Güven (Case 22-54/831-341), the TCA detected that one of Güven's employees had deleted the WhatsApp messages during the on-site inspection and the content of the deleted messages could not be retrieved. In the Golf (Case 22-41/599-250), some employees had deleted their e-mails during the on-site inspection. Although the content of the deleted e-mails had been retrieved by the case handlers, the relevant behavior of Golf's employees was deemed to result in obstruction of evidence, and Golf received an administrative monetary fine.

As for the Açı Schools (Case 22-49/723-303), the case-handlers were prevented from conducting the inspection, they were kept waiting, their authority was questioned by company representatives, and they were not allowed to conduct their inspection and the requested information and documents were not provided to them. The case handlers went to the campus of Açı Schools in Akatlar, which was stated to be the registered office in the trade



registry to conduct an on-site inspection. After the case handlers had been informed that the manager of Açı Schools, whom the case handlers had requested to question was on a different campus of Açı Schools, they went to this campus, but it was understood that the relevant manager was not there either. As a result of its assessment, the TCA ruled that the relevant behaviors were in the nature of hindrance of on-site examination.

The TCA imposed administrative fines on each of the above undertakings amounting to 0.5% of their annual turnovers.

Reflections of Digital Transformation on Turkish Competition Law

*On 18 April 2023 the TCA published a report in relation to the digital markets, namely its working paper titled "Reflections of Digital Transformation on Competition Law" ("**Working Paper**").*

Within the scope of this Working Paper, the TCA examines the main indicators regarding the current status and potential of the digitalization process in Turkey, the competitive concerns arising from digitalization, and the studies, regulations, and practices of the competition authorities of different countries regarding these

competition problems. The Working Paper examines competitive concerns and possible competition law violations such as data combination, excessive data collection, data portability, interoperability, self-preference, tying and bundling, exclusivity practices, MFN clauses and unfair contract terms, lack of transparency, and merger and acquisition transaction concerns in digital. There are also opinions obtained from the stakeholders in the market regarding the core platform services. Most importantly, the TCA also points out possible solutions for dealing with such violations. These solutions are given under sections titled "Suggestions for Turkey" for each competitive concern identified in the Working Paper. For instance, it is argued ex-ante regulation for data combination and self-preference conducts is needed, while behaviors such as excessive data collection do not need to be regulated in this manner. Nevertheless, the need for a regulatory initiative mentioned repeatedly in the Working Paper appears to be the rationale behind the forthcoming DMA-like regulation.

In conclusion, considering the global practices and academic studies and the regulatory requirements for digital markets, the TCA concluded that it would be appropriate to prepare a draft that includes the basic procedures and principles for the regulation in digital markets as well as more detailed explanations through secondary legislation.

Examining the Constitutionality of the 2020 Amendments to Turkish Competition Law

*The Constitutional Court of Turkey ("**Court**") judgment was published in The Official Gazette on 30 March 2023 ("**Decision**"). It relates to the action for an annulment application against amendments introduced in 2020 to various articles of the Turkish Competition Law. The Decision makes the constitutional review of the amendments (**i**) in relation to the TCA's power to impose structural remedies, (**ii**) regarding taking copies of the examined data and documents during dawn raids, and (**iii**) that empower the TCA to change the status of its personnel through Article 34 and temporary Article 6 of the Turkish Competition Law. Considering the articles regarding the status of the personnel of the TCA, the Court decided to annul these amendments based on the rule of law principle. Regarding the TCA's powers related to structural remedies and taking copies of the examined data during dawn raids, the relevant provisions were found in line with the Constitution.*

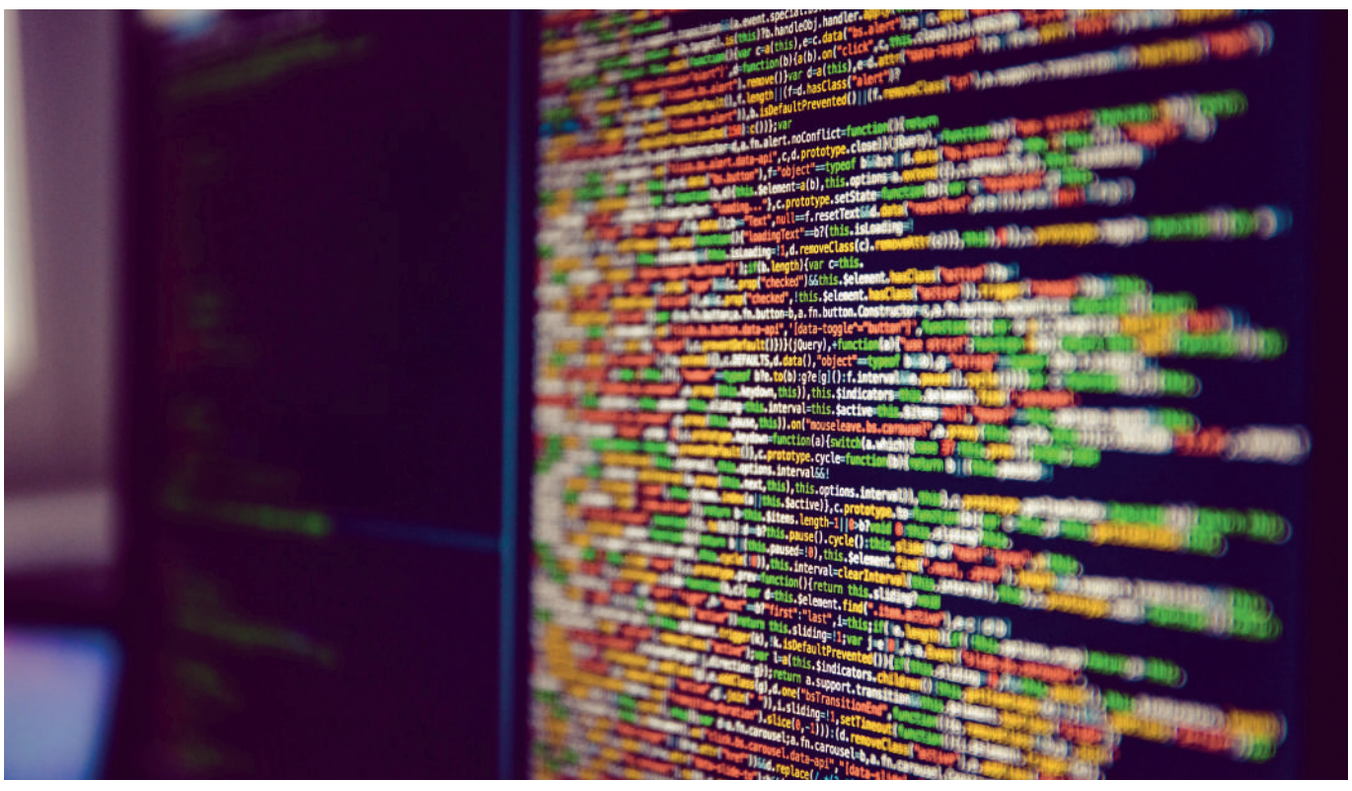
The Decision makes the constitutional review of the TCA's authority to (i) order structural remedies, (ii) take copies of the examined data during the dawn raids, and (iii) change the status of its personnel. The rules in question regarding the status of the TCA personnel, namely Article 34 and temporary Article 6 of the Competition Law, are found to be contrary to the Constitution. With regard to the structural remedies' constitutionality, the applicants argued that the TCA's authority to impose a structural remedy was contrary to the right to property and freedom of work and contract. The Court stated that the structural remedies were imposed only if the behavioral remedies were found ineffective. Additionally, the authority of the TCA to impose a structural remedy is well-established and proportional to reach the goal of sound and orderly markets.

The applicants also requested that "the TCA power to take copies and physical samples of all kinds of data and documents examined during on-site inspections" be annulled since the lack of any limitation on what type of information and documents could be obtained by the TCA was contrary to the principle of legality and the right to request the protection of personal data. The Court primarily examined the right to request personal data protection under Article 20 of the Constitution.

The Court stated that since the wording of Article 20 of the Constitution includes "everyone," there is no clear definition of the ratione personae of the protection of personal data and legal persons also can enjoy the right to request the protection of personal data. The Court further emphasized that the authority to obtain the information and documents examined during the dawn raids is essential to prevent the suppression of evidence and the detection of competition law violations. Overall, the TCA's authority to take copies and physical samples of all kinds of documents was found in line with the Constitution.

The decision on the power to obtain examined data and documents was not reached unanimously; indeed, five members including the president, of the Court opposed the constitutionality of the amendment. Dissenting opinions revolve around the same points: the TCA's power to conduct on-site inspection restricts the right to request the protection of personal data and the inviolability of domicile as fundamental rights protected under Articles 20 and 21 of the Constitution.

Consequently, although the Court's decision affirms the constitutionality of the two powers under scrutiny and states that they are necessary for the TCA to accomplish its task of protecting competition in the markets, the legality of the TCA's on-site inspection powers will continue to be discussed and even challenged further down the line.



Key Changes under the New Horizontal Guidelines and BERs

*On 1 June 2023, the EC adopted revised Block Exemption Regulations on Research and Development and Specialisation agreements (**"HBERs"**), alongside the revised Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements (**"Horizontal Guidelines"**). The revisions provide a clearer guidance to businesses on when horizontal cooperation may lead to competition concerns. Emphasis on sustainability agreements enables better collaboration between competitors for a good cause. The informal guidance opportunity from the EC shall certainly lead to more legal certainty and hopefully more sustainability aimed projects.*

The new adoption introduces the following changes for HBERs:

- The **Specialisation Block Exemption Regulation** will cover more production agreements involving multiple parties. The revised rules allow for a flexible calculation of market shares and provide guidance on its application.
- The revised rules for the **R&D Block Exemption Regulation** improve market share calculation in clarity and flexibility. They prioritize safeguarding innovation competition, particularly in cases where market share calculation is challenging. The rules highlight the authority of the EC and national competition authorities to withdraw exemption benefits in problematic instances.
- The **Introductory Chapter** of the Horizontal Guidelines is updated with recent case law, covering important concepts such as concerted practices, potential competition, restrictions by object and by effect, and ancillary restraints. It also provides new guidance on applying Article 101 TFEU to agreements between joint ventures and their parent companies, as well as expanded instructions for agreements involving multiple types of activities.
- The Horizontal Guidelines on **Production Agreements** now feature a dedicated section on **Mobile Telecommunications Infrastructure Sharing Agreements,** incorporating recent enforcement practices. This new guidance outlines key assessment factors and provides a list of minimum conditions for companies to follow to mitigate the risk of competition rule violations.
- A new section on **bidding consortia** has been added to the Horizontal Guidelines on **Commercialisation Agreements,** providing guidance on differentiating them from bid rigging.
- The Horizontal Guidelines on **Information Exchange** have been restructured and expanded to incorporate recent case law and enforcement experience. The updated chapter provides additional guidance on commercially sensitive information, different types of information exchange that may restrict competition, the potential pro-competitive effects of data pools, indirect forms of information exchange, anti-competitive signalling through public announcements, and practical measures that companies can adopt to prevent infringements.
- The Horizontal Guidelines on **Standardisation Agreements** are amended to provide more flexibility regarding open participation in the standard-setting process. The revisions also clarify that disclosing a maximum cumulated royalty rate and requiring participants to disclose relevant intellectual property rights are not considered anti-competitive.
- A new chapter has been added to the Horizontal Guidelines, specifically addressing **Sustainability Agreements** and affirming that antitrust rules do not hinder agreements among competitors with sustainability objectives. The guidance provides a broad definition of sustainability objectives aligned with the UN Sustainable Development Goals and offers examples of such agreements that typically do not fall within the scope of Article 101(1) TFEU.

It appears that the revised Horizontal Guidelines acknowledge that out-of-market efficiencies are acceptable if they directly benefit consumers who have been harmed by an agreement. The EC, despite having limited enforcement experience in this area, seemingly aims to adopt a conservative stance based on its interpretation of case law.

Electrolux Settles French RPM Investigation for EUR 56 Million

*The Electrolux Group ("**Electrolux**") reached a settlement with the French Competition Authority ("**FCA**") regarding an ongoing investigation surrounding alleged resale price maintenance ("**RPM**"). As a result of the settlement, an administrative monetary fine of approx. EUR 56 million is expected to be imposed on Electrolux.*

In 2013, Electrolux came under scrutiny by the FCA due to potential infringements of antitrust rules. Following that, the FCA initiated two distinct investigations: The first investigation focused on the period 2006-2009 and concluded in December 2018. As for the second investigation, in February 2023, the FCA issued a Statement of Objections involving multiple parties within the household appliances sector. The allegations pertained to a breach of antitrust rules by Electrolux France specifically, occurring from 2009 to 2014.

Following negotiations, a settlement has been reached between the FCA and Electrolux. Accordingly, Electrolux allocates this provision in accordance with accounting principles, yet the final amount will be determined and agreed upon by the conclusion of the procedure.

The EC vs the CMA in Acquisition of Activision Blizzard by Microsoft

*In May 2023 the EC approved the contemplated acquisition of Activision Blizzard ("**Activision**") by Microsoft Corporation ("**Microsoft**") with the commitments offered by Microsoft, while the Competition and Markets Authority ("**CMA**") blocked the acquisition just weeks before the decision of the EC.*

First, within the preliminary investigation conducted regarding the acquisition, it was determined by the EC that Microsoft could harm competition (i) in the distribution of console and PC video games, including multi-game subscription services and cloud game streaming services, and (ii) in the supply of PC operating systems. In addition, as a result of the in-depth market investigation, the EC stated that Microsoft would not be able to harm competing consoles and competing multi-game subscription services. The main concern indicated was that Microsoft could harm competition in the market for PC operating systems and enhance its dominance in the market for cloud-based game streaming services.

In this regard, the EC indicated its evaluations regarding the acquisition:

- Microsoft would have no incentive to refuse to distribute Activision's games to Sony, the leading distributor of console games worldwide. On the contrary, Microsoft would have strong incentives to continue distributing Activision's games via a device as popular as Sony's PlayStation.
- Even if Microsoft did decide to withdraw Activision's games from the PlayStation, this would not harm competition in the consoles market significantly as Activision's games (such as Call of Duty) have a relatively small percentage in the European Economic Area ("EEA"). In addition, Sony's extensive collection of games and strong market position would enable it to cover this situation effectively.
- The acquisition would harm competition in the distribution of PC and console games via cloud game streaming services, especially if Microsoft made Activision's games exclusive to its own cloud game streaming service.
- If Microsoft made Activision's games exclusive to its own cloud game streaming service, Microsoft could also strengthen the position of Windows in the market for PC operating systems.

To eliminate the concerns of the EC, Microsoft offered some commitments with 10-year duration:

- All existing and upcoming Activision PC and console games for which they hold a license would be available to customers in the EEA as a free license, allowing them to stream via any cloud game streaming services of their choice.
- A free license to cloud game streaming service providers to let gamers in the EEA stream any Activision PC and console games.

According to the EC, gamers would be able to stream the relevant games with any cloud game streaming service of their choosing and play them on any device running any operating system thanks to the licenses offered within the commitments of Microsoft. Moreover, the EC emphasized that these commitments completely address the competition concerns raised by the Commission and constitute a major improvement for cloud game streaming compared to the current situation. According to this, the commitments would enable millions of EEA users to stream Activision's games through any cloud gaming provider present in the EEA. Consequently, the EC decided that the contemplated acquisition would no longer raise competition concerns.

The CMA's approach to the issue was different from that of the EC. With respect to the said acquisition, the CMA had concluded already that the deal could harm the competition in cloud gaming in the UK since Microsoft is currently in a powerful position and head start over other competitors in cloud gaming and this deal could strengthen that position by giving it more power to overcome new and innovative competitors. Lastly, the CMA maintained its position even after the EC's decision and declared that "While we recognise and respect that the European Commission is entitled to take a different view, the CMA stands by its decision." Now, we are looking forward to seeing how the Competition Arbitration Tribunal will evaluate the deal.

Outcome of Expiry Review Investigation into Imports of Woven Fabrics

*On 1 June 2023, the Ministry of Trade of Turkey ("**Ministry**") concluded its circumvention investigation concerning "woven fabrics of synthetic filament yarn (for clothing)" and "woven fabrics of synthetic and artificial stable fibres" originating in Bosnia Herzegovina and North Macedonia through Communiqué No. 2023/20 on the Prevention of Unfair Competition in Imports.*

The investigation determined that imports of the concerned products classified under 54.07 CN Codes had been circumvented without a sufficient due cause or economic justification other than the avoidance of the anti-dumping duty in force by Bosnian and North Macedonian companies except for Better House-Bolji Dom D.O.O., which cooperated with the Ministry. It also was determined that imports of the concerned products classified under CN Codes 55.13, 55.14, 55.15, and 55.16 had been circumvented by North Macedonian companies except for Jagjemezler Dooel, which similarly cooperated with the Ministry.

Within this scope, the Board of Evaluation of Unfair Competition in Imports decided to impose anti-dumping measures into the importation of products originating in/ consigned from Bosnia Herzegovina and North Macedonia as indicated in the Table-1 below, except for the Bosnian company Better House-Bolji Dom D.O.O.

Moreover, the Ministry decided to impose anti-dumping measures on the importation of products originating in or consigned from North Macedonia classified under CN Codes 55.13, 55.14, 55.15, and 55.16, as indicated in the Table-2 below, except for the company Jagjemezler Dooel.

Table-1

Country of Origin	Company Name	Anti-dumping Measures for 110 gsm weight, and above (CIF%)	
Bosnia Herzegovina	Better House-Bolji Dom D.O.O.	0	0
	Others	42.44	21.13
North Macedonia	All Companies	42.44	21.13

Table-2

CN Codes	Description of the Product	Country of Origin	Company Name	Unit Customs Value
55.13	Woven fabrics of discontinuous synthetic fibres (primarily or exclusively containing synthetic discontinuous fibres, with a weight of less than 85% and a weight per square meter not exceeding 170 g, including only cotton blended with synthetic discontinuous fibres)	North Macedonia	Jagjemezler Dooel	0
55.14	Woven fabrics of discontinuous synthetic fibres (primarily or exclusively containing synthetic discontinuous fibres, with a weight of less than 85% and a weight per square meter exceeding 170 g, including only cotton blended with synthetic discontinuous fibres)			
55.15	Other woven fabrics of discontinuous synthetic fibres		Others	44
55.16	Woven fabrics of artificial discontinuous fibres			

New Products under Import Surveillance Application

On 29 May 2023, the Ministry decided to apply surveillance on the imports of certain products through Communiqué No. 2023/8 on the Application of Surveillance in Imports.

Surveillance is an instrument by which import trends, import conditions, and the effect of imports on the domestic industry may be observed. If the Ministry decides to implement surveillance, every country is subject to the measure. This allows the Ministry to monitor and calculate a better outlook on future imports. In other words, surveillance provides warning of the types and number of products a company plans to export from or import to Turkey. Companies that do not have the required surveillance documents may be obliged to pay the relevant duties and taxes by considering the respective unit customs value.

In this regard, the list of products on the imports of which the Ministry decided to apply surveillance is provided in the table below:

Item No	CN Codes	Description of the Product	Unit Customs Value (USD/kg)
1	6911.10.00.00.11	White	4
2	6911.10.00.00.12	Single-coloured	5.5
3	6911.10.00.00.19	Others	6
4	6911.90.00.00.11	White	8.5
5	6911.90.00.00.12	Single-coloured	6.5
6	6911.90.00.00.19	Others	6
7	6912.00.21.00.00	Clay	6
8	6912.00.23.00.00	Earthenware	4.5
9	6912.00.25.00.11	White ones	3
10	6912.00.25.00.12	Single-coloured	3.5
11	6912.00.25.00.19	Others	4.5
12	6912.00.29.00.00	Others	4.5
13	6912.00.81.00.00	Clay	5.5
14	6912.00.83.00.00	Earthenware	7.5
15	6912.00.85.00.00	Faience or thin pottery	4.5
16	6912.00.89.00.00	Others	5
17	6913.10.00.00.10	Handmade tile	9
18	6913.10.00.00.90	Others	7
19	6913.90.10.00.00	Clay ones	4.5
20	6913.90.93.00.10	Handmade tile	9
21	6913.90.93.00.90	Others	4.5
22	6913.90.98.00.00	Others	6
23	6914.10.00.00.00	Porcelain	5
24	6914.90.00.00.00	Others	4

The importers of the subject products may submit the relevant form to the Ministry to obtain a surveillance document. Accordingly, unless the importer manages to obtain and submit a surveillance document, the unit customs value will be taken as the tax base for the calculation of the customs duties, additional customs duties, and VAT.

Four Expiry Review Investigations of April 2023

*The Ministry concluded four expiry review investigations concerning the imports of (i) metalized yarn1 originating in the People's Republic of China ("**China**"), Chinese Taiwan ("**Taiwan**"), the Republic of Korea ("**Korea**"), and the Republic of India ("**India**"); (**ii**) hinges and other similar products2 originating in China; (**iii**) textile fabrics, coated, covered or laminated with polyurethane/others3 originating in China; and (**iv**) phthalic anhydride4 originating in Korea through Communiqués on the Prevention of Unfair Competition in Imports numbered 2023/11, 2023/12, 2023/14, 2023/16 and dated 6 April 2023, 6 April 2023, 8 April 2023, 14 April 2023, respectively.*

Following the investigations, the Ministry decided to continue the imposition of the anti-dumping measures amounting to 2.2 USD/kg for metalized yarn from China, Taiwan, Korea and India.

It was also decided to continue the imposition of the anti-dumping measure on the imports of hinges and other similar products from China at the revised rate of 1.35 USD/kg for the products classified under CN Codes 8302.10.00.00.11, 8302.10.00.00.19, 8302.50.00.00.00; and 0.65 USD/kg for the products classified under CN Code 8302.42.00.00.19.

As for textile fabrics, coated, covered or laminated with polyurethane/others from China, it was decided to continue the imposition of the anti-dumping measures at the same levels, i.e. 1 USD/kg and 2.2 USD/kg depending on the CN Codes for the products originating in China.

The Ministry also decided to continue to apply the same level of antidumping measures to phthalic anhydride originating in Korea, i.e. 8.44% of the CIF value.

Dumping Investigation Concerning Metalized Yarn from Georgia

On 6 April 2023, the Ministry concluded the dumping investigation concerning the imports of metalized yarn originating in Ğeorgia through Communiqué No 2023/10 On the Prevention of Unfair Competition in Imports dated 6 April 2023.

The concerned investigation was initiated upon the complaint from two domestic producers claiming that the imports of metalized yarn originating in Georgia had been dumped and thereby caused injury and threat thereof to the domestic industry. One producer/exporter company cooperated with the Ministry within the scope of the investigation. Accordingly, the concerned product and the product produced by the domestic industry were evaluated to be like products.

Further, the Ministry calculated a dumping margin of 19.7% of the CIF value. With regard to the injury determinations, the Ministry evaluated whether there had been an increase in absolute or relative terms in imports of the concerned product. Within this scope, it was evaluated that

i. the imports of the concerned product had been significantly dumped;
ii. although imports from the concerned country had decreased by 9.4% in 2020 compared to 2018, they had increased substantially compared to consumption due to the 31% decrease in consumption in the same period;
iii. the share of imports from the concerned country in the Turkish market was 31.4%, which was well above the increase in the market share of the domestic industry;
iv. the imports of the concerned product from the said country had undercut and suppressed the domestic market prices of the domestic industry;
v. between 2018 and 2020, while the prices of the domestic industry had decreased (albeit at a low rate) its costs had increased significantly, which resulted in a decrease in its profit;
vi. there had been significant deteriorations in economic indicators such as profitability-related cash flow and return on investments; and
vii. the dumped imports and injury had occurred simultaneously, indicating the existence of a causal link between the two.

Last, it was evaluated that other factors were not found to be of nature that could break the causal link between the dumped imports and the material injury/threat thereof to the domestic industry. Consequently, the Ministry, by applying the public interest principle and within the framework of lesser duty rule, imposed an anti-dumping measure in the imports of metalized yarn originating in Georgia amounting to 15% of the CIF value.

Some New Rules for the Authority and Social Network Providers

*The Decision of the Information and Communication Technologies and Communication Board ("**Board**") on Procedures and Principles Regarding Social Network Provider ("**Decision**") entered into force on 1 April 2023. The Decision stipulates provisions regarding the powers of the Information and Communication Technologies Authority ("**Authority**") and the obligations of the social network providers and serves as an update to the previous legislation covering these matters. The social network providers which do not comply with the requirements brought by the Decision may face significant consequences. Hence, the Decision should be examined thoroughly and its provisions must be strictly adhered to.*

Here are some of the rules according to the Decision:

- The social network providers with more than one million daily accesses from Turkey are obliged to appoint at least one real or legal person as an authorized representative in Turkey. Additionally, if a social network provider with access more than ten million from Turkey is a legal entity, the representative must be a branch established as a stock corporation ("Designated Corporation").
- The social network provider is obliged to notify the Authority with regard to the identity, title and communication information of the representative.
- If the notification obligation is not complied with, the liable social network provider is notified. In the event that the obligation is not fulfilled within thirty days following the notification, an administrative fine of TRY 10,000,000; and in case the obligation is still not fulfilled within thirty days after the notification of the administrative fine, an administrative fine of TRY 30,000,000 will be imposed. Further, an advertisement ban will be imposed for failure to fulfil the obligations within thirty days following the notification of the administrative fine imposed for the second time.
- The natural and legal persons who allege that their personal rights were violated can appeal to the social network provider (or in case it cannot be reached to the hosting service provider) and demand that the content to be removed.
- The social network providers with access of more than one million from Turkey should form an advertisement library for the purpose of enhancing transparency. In this library, matters such as the content, type, period of air, target group of the advertisement, the advertiser and the amount of people or groups the advertisement reached should be provided. In the event of non-compliance with this obligation a fine of TRY 10,000,000 will be imposed on the social network provider.
- The social network provider is under the obligation to prepare semi-annual reports and submit them to the Authority. In case the reporting obligation is not fulfilled a fine amounting to TRY 10,000,000 is imposed on the social network provider.
- The social network provider shall take the necessary measures to provide separate services to children. In case of non-compliance, a fine of at most 3% of the global turnover of the social network producer may be imposed.

The Decisions brings forth the most up to date provisions covering the procedures and principles which should strictly be adhered to by the social network providers as well as the fines which will/may be imposed in case of non-compliance. Consequently, considering that the fines may have substantial consequences for the social network providers it is of utmost importance to closely monitor the compliance with the obligations set forth by the Decision.

[A full article was published by Lexology on April 14, 2023]

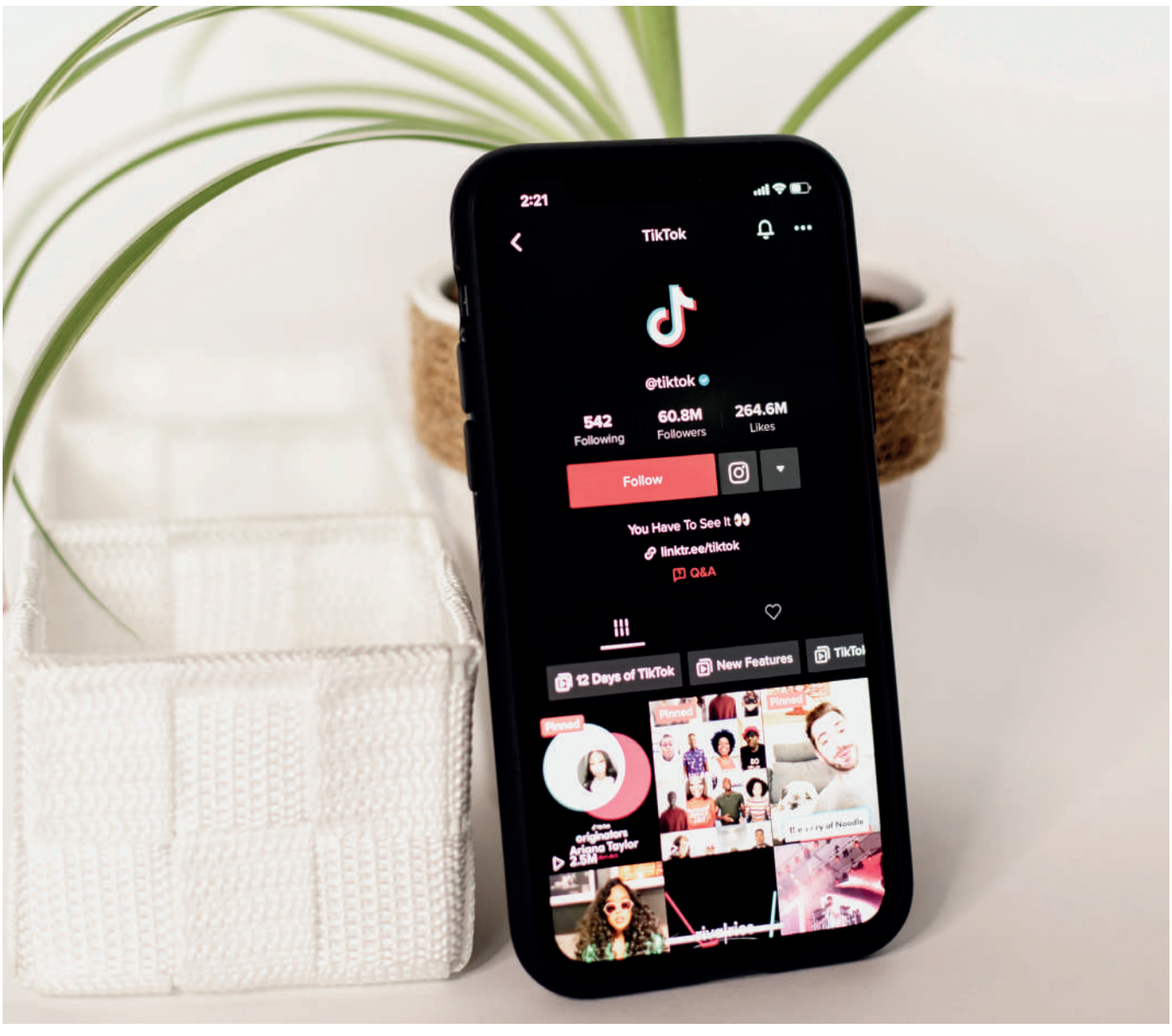
TikTok Fined for Various Breaches of the Data Protection Law, Including Unlawful Use of the Personal Data of Children

*On 15 May 2023 the UK Data Protection Authority, Information Commissioner's Office ("**ICO**"), announced that it had fined TikTok Inc. ("**TikTok**") GBP 12,700,000 for several data protection infringements which mainly concern the process of the personal data of children. It should be noted that the Turkish Data Protection Authority ("**DPA**") also fined TikTok for similar concerns regarding children's personal data, aside from South Korea, the Netherlands, and the USA.*

The ICO found that between May 2018 and July 2020, TikTok had breached the UK General Data Protection Regulation by (i) providing its services to UK children under the age of 13 and processing their personal data without consent or authorisation from their parents or carers; (ii) failing to provide proper information to people using the platform about how their data was collected, used, and shared in a way that was easy to understand; and (iii) failing to ensure that the personal data belonging to its UK users was processed lawfully, fairly, and in a transparent manner.

In Turkey TikTok was fined TRY 1.75 million (approx. USD 92.000) for not taking all necessary measures to ensure the appropriate level of security to prevent the unlawful processing of personal data. According to the decision of the DPA, the profiles of minors were publicly viewable by default, which poses a risk with respect to this vulnerable age group, before TikTok updated its privacy policy in 2021.

In addition, before this update was implemented, DPA stated that the minors' data had been collected without the appropriate parental consent. With regard to TikTok's privacy policy, which is provided only in English, the DPA ordered TikTok to take necessary measures for Turkish users to understand it clearly. It is also indicated that TikTok presented the same text for its privacy policy while obtaining the explicit consent of its users. The DPA decided that these two should be presented to data subjects separately.



Establishing Rebar Monitoring System – Making Construction Sector Safer and More Transparent

On 16 March 2023, the Ministry of Treasury and Finance published the Ğeneral Communiqué on Application of Rebar Monitoring System. It sets out the main procedures and principles for the monitoring of all stages and laboratory testing processes of rebars to be used in construction from production or importation to delivery, including the construction contractor. It will be effective from 1 January 2024. It aims to combat the shadow economy, monitor certain inputs in the construction sector, and contribute to ensuring construction safety and tax security.

The General Directorate of Mint and Stamp/Security Printing (the "General Directorate" www.darphane.gov.tr) shall establish the Rebar Monitoring System ("**IDIS**") which involves using of security labels and/or signs on rebar, which will enable to monitoring of production process and transferring of data to the central system. The system will also track delivery transactions and transfer of the relevant data to various ministries.

The Communiqué imposes an obligation on all taxpayers operating in the construction sector to use IDIS, and taxpayers producing or importing rebar are required to apply a security label and/or security marking to the rebar.

Production, export, import, purchase, sale, and using of rebar shall not be carried out outside of the IDIS System. It is obligatory for those who currently produce or import rebar, exporters, wholesalers, dealers, traders, and construction contractors to make transition to IDIS before 1 January 2024.

Further, the General Directorate shall be responsible for the operation and supervision of IDIS, and the costs of security labels and/or security signs to be delivered to producers and importers shall be paid by depositing to the General Directorate's account opened at any public bank or via IDIS after the approval of the requests. Upon the deposit of the fee, the requests of producers and importers for security labels and/or security signs will be delivered within 15 days.

Fines are specified in case of incompliance with the obligations deriving from this Communiqué. Furthermore, a deadline is set to complete the transition to IDIS. Moreover, consequences are pointed out for those who have rebars in their stocks as of the publication date of the Communiqué and do not put security label and/or security sign on these rebars until the indicated deadlines.

The Communiqué is a significant regulation, which is expected to provide greater transparency, safety, and security in the construction industry in Turkey.

[Full version published on Lexology on April 6, 2023]

A Landmark Decision by the Constitutional Court: A Judge's Ruling is Necessary for Conducting On-site Inspections

by Mustafa Ayna, Özlem Başıböyük Coşkun, Arda Deniz Diler and Selim Turan

*The Constitutional Court published a significant judgement ("**Judgement**") which includes critical assessments on whether the on-site inspections conducted by the TCA violate the inviolability of domicile protected under Article 21 of the Constitution of the Republic of Turkey ("**Constitution**"). It is expected that the assessments made in the Judgement will shape the future of the on-site inspection procedure implemented by the TCA. Indeed, as a result of its assessments, the Constitutional Court concluded that the on-site inspections conducted solely based on the TCA's decision were not in compliance with Article 21[5] of the Constitution and considered such on-site inspections as a violation of the inviolability of domicile. Here we examine the Judgement in more detail and provide you with the assessment of its main takeaways.*

In its application, Ford Otomotiv Sanayi A.Ş. ("**FORD**") raised multiple claims on violations of (i) the right to inviolability of domicile as the on-site inspection at the premises had been unlawful; (ii) the right to property as the administrative fine had been imposed on the grounds that it had committed behaviours restricting competition; (iii) the prohibition of discrimination in connection with the right to property as Ford's export turnover had been taken into account in determining the amount of the fine, whereas the export turnover of other undertakings had not; (iv) the principle of ne bis in idem as the same act had been investigated twice; (v) the right to trial within a reasonable time due to the long duration of the proceedings; and (vi) the right of access to a court due to the abolition of the rectification of the judgment stage by the law that entered into force while the trial was in progress.

The main subject matter of the claim filed by includes statements about the violation of the right to the inviolability of domicile as the on-site inspection at the office premises was unlawful.[6]

1. The office premises are be considered within the scope of domiciles and therefore on-site inspections carried out by the TCA at these places constitute an interference with the right to inviolability of the domicile

The Judgement mainly examined whether the on-site inspection carried out at FORD's premises, which resulted in the taking of various e-mails from the computers of company personnel, constituted a violation of the "right to the inviolability of domicile" protected by Article 21 of the Constitution.

In this context, the Constitutional Court first analysed whether premises were included in the scope of domicile or not. The Constitutional Court pointed out that while premises were also considered to be domiciles, public areas of premises that did not contain private elements and were open to everyone could not be considered within the scope of the concept of domicile. On the other hand, it was stated that the on-site inspections carried out by the TCA were activities carried out in the headquarters, branch offices, and facilities where the undertaking carried out its administrative affairs, and there was no doubt that the parts where the administrative affairs of the undertakings were carried out and the areas where not everyone could enter freely, such as workrooms, were considered as domiciles.

Subsequently, the Judgement emphasized the characteristics of the institution of "search" to clarify the on-site inspection process. In this respect, it stated that the search was a protection measure carried out in a way that causes the limitation of some fundamental rights of individuals to prevent crime, obtain evidence before or after a crime is committed, and/or apprehends the defendant or suspect. Accordingly, it was concluded that the on-site inspection subject to the Judgement constitutes interference in the right to the inviolability of domicile, considering the fact that the documents had been seized from the company computers during the on-site inspection.

2. Article 15 of the Competition Law is unconstitutional as it allows on-site inspections without a judge's decision and therefore the inviolability of the domicile is violated.

The Court examined whether the interference with the inviolability of domicile constituted a violation in the light of Article 21 of the Constitution, which regulates the right to the inviolability of domicile. In this regard, it was stated that:

- unless there exists a decision duly given by a judge, no one's domicile may be entered or searched or the property seized therein,
- where a delay is prejudicial, a written order of an agency authorized by law may be deemed sufficient instead of a judge's decision given directly,
- the decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within 24 hours, and
- in case of a seizure, the judge having jurisdiction has the obligation to announce his/her decision within 48 hours of the seizure.

Despite these principles embodied in Article 21 of the Constitution, the Constitutional Court stated that a judge's decision is not required for on-site inspections under Article 15 of the Turkish Competition Law. Therefore, it was stated that the Competition Law authorizes the TCA's experts to conduct on-site inspections at premises considered to be domiciles without a judge's ruling. The Judgement also emphasized that while the Competition Law stipulates that on-site examinations shall be conducted without the requirement of a judge's decision and that the TCA's experts have the authority to enter areas deemed as domicile without a judge's decision, a judge's decision is required in case the on-site inspection is hindered or likely to be hindered. In this respect, the Constitutional Court stated that the requirement of a judge's decision introduced by Article 21 of the Constitution applies to any situation in which public officials want to enter the domiciles of individuals against their will and that the relevant provision of the Competition Law that makes the requirement of a judge's decision exclusive to the existence

of hindrance or the possibility of hindrance is unconstitutional. In the same respect, it also was stated that within the scope of the Turkish Competition Law, the on-site inspections that can be carried out by the TCA decision are recognized as a rule and not limited to cases where a delay is prejudicial. The Constitutional Court concluded that this situation is also contrary to Article 21 of the Constitution.

The Constitutional Court further stated that even if it is assumed for a moment that the TCA's decision to conduct an on-site inspection is limited to cases where a delay is prejudicial, the absence of the obligation to submit the TCA's decision to the approval of the judge having jurisdiction within 24 hours would render the current regulation incompatible with Article 21 of the Constitution. Indeed, in the case subject to the Judgement, since FORD did not take any action to prevent the on-site inspection, it was concluded that the on-site inspection had been carried out without a judge's decision and therefore, Article 21 of the Constitution and the inviolability of domicile had been violated.

3. The structural problem is to be resolved

Another critical aspect of the judgement is that the Constitutional Court also notified the Turkish Grand National Assembly of the judgment to solve the structural problem. In this framework, in light of the evaluations made in the decision, the Turkish Grand National Assembly may amend the provision on on-site inspection in the law in accordance with the issues emphasized in the Constitutional Court Judgement.

At this point, it should be stated that the decision of the Constitutional Court is applicable and binding only for the applicant and the administrative act or decision subject to the application since the decision of the Constitutional Court was taken as a result of an individual application. Indeed, Article 15 of the Competition Law has not been abrogated by the Constitutional Court Decision. However, as stated above, since the Judgement was also sent to the Turkish Grand National Assembly, the Assembly may consider amending the law. In addition, this Decision may be used as a basis for claims of unconstitutionality in lawsuits filed before the administrative courts and may pave the way for the Constitutional Court's review through concrete norm control and, ultimately, the annulment of Article 15 of the Competition Law.
It remains to be seen whether the Judgement will have an impact on ongoing cases and investigations and whether it will lead to an amendment of the law.

[Originally published by Concurrences on 23 June 2023]

[5] Article 21 of the Constitution titled "Inviolability of the domicile" is as follows:
The domicile of an individual shall not be violated. Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law in cases where delay is prejudicial, again on these grounds, no domicile may be entered or searched or the property seized therein. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his decision within forty-eight hours from the time of seizure; otherwise, seizure shall be automatically lifted.

[6] It was concluded that FORD's right to trial within a reasonable time also had been violated. In this regard, it was reasoned that the period of 9 years, 10 months, and 26 days between 24 June 2009, when the preliminary inquiry process was initiated against FORD, and 20 May 2019, when the administrative judicial process was finalized, was unreasonable. On the other hand, except for the violation of the inviolability of domicile and violation of the right to trial within a reasonable time, FORD's other allegations were not accepted by the Constitutional Court.

News

ACTECON is proud to sponsor the Lear Competition Festival (LCF) to be held in Rome between 26 and 29 September 2023

ACTECON is proud to be a partner of the Lear Competition Festival (LCF) to be held in Rome between 26 and 29 September 2023.

On September 27, 2023 at 15:00 CET, we will be hosting a session entitled "Innovation and Digitalisation Shaping Merger Control". The session will address the main challenges posed to merger control by innovation and digitalisation. It will focus on the measures taken to deal with killer acquisitions in various jurisdictions and evaluate how these align or on what points they create concerns for multinational transactions.

The session will be chaired by our Managing Partner Dr M. Fevzi Toksoy and will feature Bahadir Balki, our Managing Partner, Hanna Stakheyeva, Of Counsel at ACTECON, Gian Luca Zampa, Partner at Freshfields Bruckhaus Deringer and Pınar Akman, Professor of Law at the University of Leeds.

Please visit the link for further information on the event: https://www.learcompetitionfestival.com/

TEİD INTERNATIONAL ETHICS SUMMIT

ACTECON is the main sponsor of the 10th International Ethics Summit that will be held on October 4, 2023 at Hilton Istanbul Bosphorus Hotel with a full-day program under the theme of "Colors of Ethics".

At the event, topics such as business ethics, ESG, sustainability, digital ethics, compliance, internal control, and audit processes will be discussed with experts and experienced speakers.

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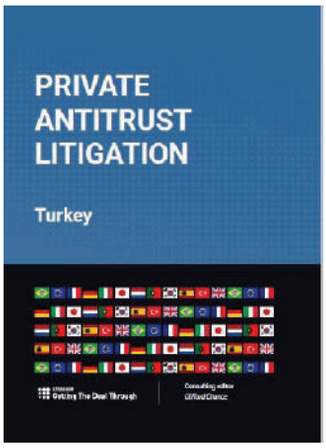
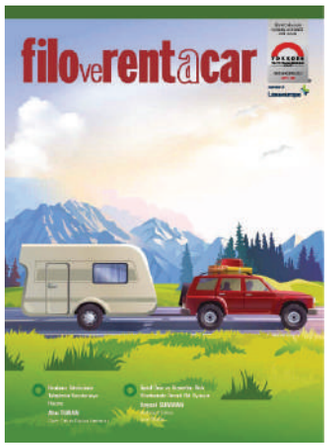


The Intellectual Property and Antitrust Review 2023, Turkey, The Law Reviews

Filo ve Rent A Car May-June 2023



Articles

A Landmark Decision by the Constitutional Court about On-site Inspections Conducted by the Turkish Competition Authority: A Judge's Decision is Necessary for Conducting On-site Inspections

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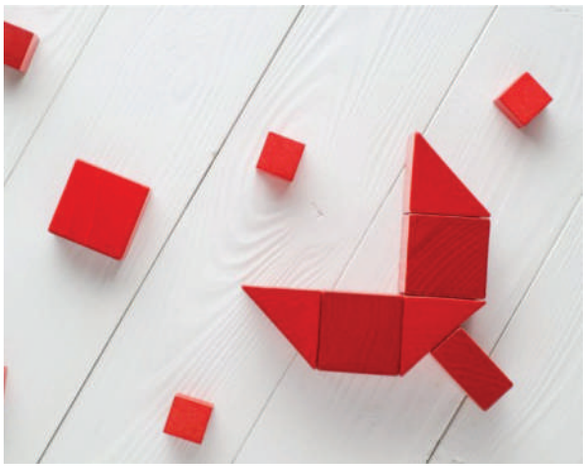
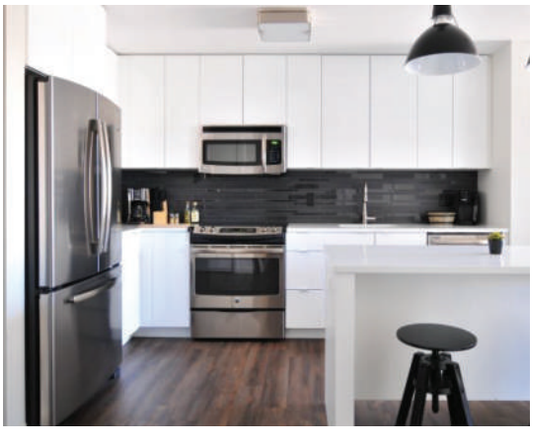


The Turkish Competition Authority Publishes the Final Report on the Turkish FMCG Retailing Sector Inquiry



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