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Dear reader,

First quarter of 2024 brought ACTECON to various parts of the world, including Kenya where we were invited to International Competition Network ("**ICN**") 2024 Advocacy Workshop. We are proud that our advocacy project – a set of books on competition law for children "Secret Agreement" and "The Greatest Artist" – was warmly welcomed there. More attention has been paid these days to the role of the competition authorities as competition advocates. We believe that lawyers and law firms should also get involved more actively in this process and promote the competition law culture.

We were delighted to participate at the OECD Competition Open Day in Paris, to reconnect with the international competition law community and friends, and discuss various actual topics of competition law, such as (evolving) theory of harm, digital markets, algorithmic competition, as well as labour markets and sustainability. The agenda reflected the current developments in the European Union ("**EU**"), as well as Turkey.

Everybody's attention has been drawn to the historic moment of compliance with the Digital Markets Act ("**DMA**") time. We look forward to the outcome of the review and assessment of the compliance reports of the designated gatekeepers by the European Commission ("**EC**"). This may have an impact on the implementation of the DMA related amendments to the Turkish Competition Law (that are planned to be adopted this year).

As for labour markets, the competition authorities' focus on these cases continues to grow. The Turkish Competition Authority ("**TCA**") fined companies operating in the telecom and information technologies sector for their gentlemen's agreement in the labour market. Such violations are viewed as cartels and hence no effect assessment is required. We expect more cases and guidance on such practices will follow soon.

And finally, sustainability, and sustainability reporting requirements. Keeping a step with the developments in the EU, Türkiye has adopted criteria for determining the companies subject to mandatory sustainability reporting, which will take place for the first time in Türkiye. We are also following the developments in the EU regarding the upcoming ban on products made with forced labour, which is important and relevant to all market operators within and outside the EU.

Numerous interesting and important topics and developments are happening every single day. We invite you to discover them in more detail in this issue of The Output®.

Sincerely,
ACTECON Team

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In this issue:

TCA's Significant Fines for Resale Price Maintenance and Region/Customer Restrictions: Nestle Türkiye et al.

*On 21 February 2024, the TCA published its short-form decision regarding the investigation against Nestle Türkiye with the finding that the undertaking violated the Law on the Protection of Competition No. 4054 ("**Competition Law**") through resale price maintenance and region/customer restrictions on its distributors.*

The investigation, initiated by the Board decision dated 15 December 2022 with the allegations of resale price maintenance ("**RPM**") and imposition of customer/region restrictions on the company's distributors, ended with a fine of TRY 346.9 million (approximately EUR 9.9 million) imposed on Nestle Türkiye. The TCA also concluded that Nestle Türkiye's actions could not benefit from the block exemption and were not eligible for an individual exemption. The fine on Nestle Türkiye stands out as one of the significant fines imposed for RPM, along with the TCA's other significant decisions such as the TRY 365 million (approximately EUR 10.4 million) RPM fine on Arçelik in August 2023 and the TRY 507 million (approximately EUR 14.5 million) fine on Petrol Ofisi in 2020. In February, the TCA also concluded an investigation against Neolife İthalat İhracat AŞ ("**Neolife**"), a cosmetics products company. The investigation found that the company had infringed competition law through RPM and restriction of online sales. Neolife settled with the TCA regarding the allegations. A fine of TRY 209,063.78 (approximately EUR 5.9 thousand) was imposed on the undertaking as a result.

In addition, a reasoned decision was published regarding the investigation concluded against Panek Ziraat Aletleri Dayanıklı Tüketim Malzemeleri Otomotiv Yakıt Petrol Ürünleri Tarım Ticaret AŞ ("**Panek**"). The company operates in the food and beverage industry. The investigation focused on allegations that the undertaking had been involved in resale price maintenance. Panek settled with the TCA and was fined TRY 27,304,867.30 (approximately EUR 781 thousand) in December 2022.

88 Real Estate Agents in Ankara Cleared of Collusive Price Setting Amid Earthquake Aftermaths

The investigation against 88 real estate agents in Ankara was concluded with no finding of infringement on 22 February 2024. The investigation also revealed correspondences among real estate agents expressing their discomfort with respect to the rent increases applied by the property owners in the aftermath of the devastating earthquake in 2023.

The TCA's investigation against 88 real estate agents in Ankara concluded with no finding of infringement. The TCA found evidence that real estate agents had communicated with each other regarding real estate prices and rents within the context of shared portfolios or shared commission schemes. However, such information exchanges were not evaluated as an infringement of competition law since all of these correspondences were realized with the knowledge and consent of the property owner, who had the power to determine the prices or rents of the relevant properties.

Additionally, the TCA determined that certain communications between property owners and real estate agents with the purpose of influencing real estate prices/rents through fake listings on online platforms did not fall within the scope of competition law, since the relevant real estate owners were not 'undertakings' under competition law. Interestingly, the TCA also found messages among certain agents with the purpose to agree on not to charge commissions from earthquake victims and not to accept price increases by the property owners even if this meant ceasing to work with the relevant property owners.

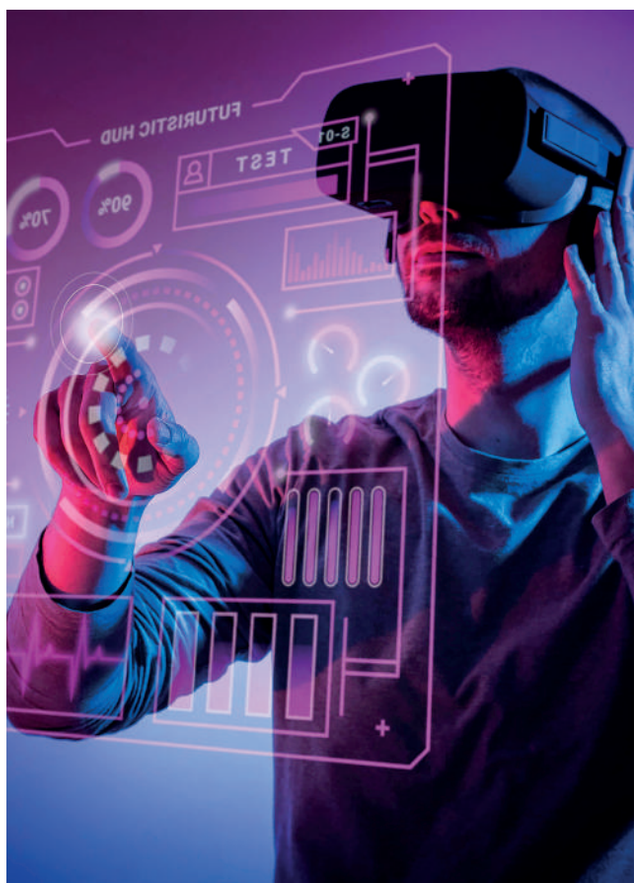
Say No! to Gentlemen's Agreements in Labour Markets: Telecom & IT Sectors This Time

On 1 March 2024, the TCA concluded an investigation against undertakings operating in telecommunications and information technologies sectors involving gentlemen's agreements in the labour market. The decision revealed that the TCA's focus on the labour market has continued to grow since its first-ever fining decision solely concerning labour markets in August 2023.

TThe TCA imposed fines on eight companies operating in the telecommunications and information technologies sectors (Ericsson, Netaş, Turkcell, Egem, Etiya, Innova, i2i, and Pia), having concluded that an infringement of competition law through gentlemen's agreements between competing undertakings in the labour market had occurred.

The fines ranged from TRY 725,000 (approximately EUR 20 thousand) to TRY 11.4 million (approximately EUR 326 thousand), totalling TRY 91.6 million (approximately EUR 2,6 million) for eight companies; whereas 12 of the investigated companies were not fined since an infringement involving these undertakings had not been determined.

The decision reveals that the TCA's growing interest in labour markets persists since the Authority concluded its first ever fining decision which solely concerned labour market restrictions very recently in August 2023. Additionally, the Authority initiated another investigation against undertakings mostly in the pharmaceutical sector in November 2023.



Assessing Information Exchanges in the Commercial Vehicles Sector

On 5 February 2024, the TCA concluded its preliminary inquiry into the light and medium class and heavy commercial vehicles sector and decided1 not to initiate an investigation. The released reasoned decision provides some details of the TCA's approach to information exchanges.

Most of the findings obtained from the undertakings2 relate to (i) competitor price information and (ii) market share data. Apart from these, correspondences also indicate that the undertakings obtained competitor information on premium systems, campaigns, vehicle delivery times, vehicle specifications, and details of customer purchases such as brands, quantities, and prices. A significant portion of the correspondence indicates that the source of the information is field research or publicly available sources. In some correspondence, however, the source of the information is not specified.

Evaluating these findings, the TCA made the following assessments:

• Undertakings operating in the sector can frequently obtain the price offers of competing undertakings.

• Among the documents received within the scope of the on-site examinations, no documents indicate that the price offers of the competing undertakings were shared directly between competitors and with the object of restricting competition.

• Price information can be obtained during customer visits, through dealers, as a result of field research, or from the websites of the undertakings.

• A bargaining system in which customers share the price offer received from one undertaking with another undertaking to obtain a better price offer and increase their bargaining power is common.

• Both market research by undertakings and price information obtained through customers and dealers are used by undertakings to offer lower offers, to gain new customers or prevent the loss of existing customers, and ultimately to make competitive moves.

• The market share data of competitors is available to undertakings through the Automotive Distributors Association, Automotive Manufacturers Association, Heavy Commercial Vehicle Association, and the Turkish Statistical Institute, which share data on the sector.

• The data shared publicly and retrospectively by the Automotive Distributors' Association, Automotive Manufacturers' Association, Heavy Commercial Vehicle Association, and the Turkish Statistical Institute do not lead to anticompetitive effects.

Accordingly, the TCA decided not to launch an investigation as no evidence indicated that the undertakings operating in the light and medium class and heavy commercial vehicles sectors were parties to an anticompetitive exchange of information.

[1] Anadolu Isuzu Otomotiv Sanayi ve Tic. AŞ, BMC Otomotiv Sanayi ve Tic. AŞ, Doğuş Otomotiv Servis ve Tic. AŞ, Ford Otomotiv Sanayi AŞ, Iveco Araç Sanayi ve Tic. AŞ, Man Kamyon ve Otobüs Tic. AŞ, Marubeni Dağıtım ve Servis A.Ş, Mercedes-Benz Türk AŞ, and Volvo Ğroup Otomotiv Tic. Ltd. Şti.

[2] Decision dated 17 August 2023 and numbered 23-39/723-247

Main Developments in Competition Law and Policy 2023 – Türkiye

TCA had a busy agenda in 2023 both in terms of enforcement and policy actions. Let us elaborate on some of them here. For your convenience, we have classified those in the following sections: (i) antitrust, focusing on violation in the digital markets, no-poaching agreements, resale price maintenance (ii) legislative developments regarding leniency policy and the draft DMA-related amendments to the Turkish Competition law, (iii) merger control, (iv) procedural issues primarily focusing on onsite inspections. We conclude with our vision of the TCA's priority areas for 2024.

Antitrust

Violations in the Digital markets

The digital economy was at the top of TCA's priorities in 2023.

• Automatic pricing mechanisms of three major online marketplace platforms Amazon, Hepsiburada and Trendyol. The investigation is still ongoing.

• Self-preferencing and other allegedly abusive practices of Google. The company allegedly abused its dominant position by tying and self-preferential actions regarding its online visual advertisement and advertisement technologies services operations. It was also alleged that it abused its dominant position in general search services market. The two cases are still ongoing.

• Prevention of data portability and exclusivity clauses of a major online second-hand shopping platform Sahibinden. It was concluded that the platform complicated the ability for its corporate members to use more than one platform by preventing data portability. By preventing data portability and via the non-competition obligations in its contracts, Sahibinden applied de facto/contractual exclusivity, thus complicating the activities of its competitors, according to the TCA's decision. The company was obliged to comply with several obligations to ensure the termination of the violation and the establishment of effective competition in the market.

• Tying arrangements, online advertisement bans of an online bus ticket purchasing platform The investigation was closed with binding commitments targeting tying arrangements between ticketing software services and other platform services, online advertisement bans for transport companies in competing platforms and clauses banning competing platforms to contact with transport companies.

• Long term exclusive agreements of a subscription services platform for audiobooks and eBooks. The TCA decided that the platform prevented the entry of competing firms in the market by concluding long-term exclusive agreements with publishing houses and authors. The investigation was closed with a range of commitments by the platform, which addressed the TCA's concerns on exclusivity arrangements.
• Cooperation agreement with the exclusivity clauses and minimum clicking obligations between a betting platform and an online platform offering worldwide sports news, scores, predictions, and analytics, based on market foreclosure concerns for other virtual betting sites. Interim measures were applied in this case. The decision particularly targeted the exclusivity clauses and minimum clicking obligations between the parties

No-poaching agreements
The TCA concluded an investigation into nearly 50 undertakings across many sectors focusing on whether the concerned undertakings had any blacklist/no-poaching/ gentlemen agreements to prevent/block the transfer of employees. It was found that 16 undertakings violated the Turkish Competition Law by agreeing on not to recruit each other's employees. The TCA concluded that in addition to reducing the mobility of workers between undertakings, these agreements also may have artificially depressed the real value of wages. As a result, inefficiency in the allocation of workers could arise and the competitive structure in labor markets might be harmed, according to the TCA.

The TCA concluded that such practices fell within the scope of the cartel definition and thus individual exemption provisions could not be applied to such agreements. An interesting observation that follows from the decisions of the TCA, as well as competition authorities in other jurisdictions in this regard is that labour markets are perceived broadly, i.e., even undertakings operating in different sectors may be viewed as competitors in terms of competition for labour capital.

According to the statistical information provided by the TCA, the number of investigations initiated in the first half of 2023 totalled to 56, which is a significant number considering that the total number of investigations initiated in 2022 was 78.

RPM
Resale price maintenance maintained its actuality in 2023. Among the landmark RPM cases in 2023 is the one related to the honey producer Sezen Gıda Mad. Tarım ve Hayvancılık Ürün. Tic. ve San. ("**Anavarza**"). The decision is a very good example of fact assessment in RPM allegations, instead of a formalistic approach and mainly relying on correspondences of the undertakings concerned.

The internal correspondence found at Anavarza did raise concerns that the company might have interfered in the resale prices, however, since it was an intracompany correspondence which did not demonstrate there was an agreement regarding the resale prices, the allegations were not confirmed. The TCA also took into account that (i) the supplier did not show any efforts to transform the recommended shelf prices into fixed resale prices, (ii) the communication between the supplier and the reseller was only a reminder that new list of prices was to be applied, (iii) the internal communications of the supplier did not prove any agreement between the supplier and its reseller, and (iv) the TCA did not find any evidence that would show a pressure or threat by the supplier with respect to the enforcement of the prices based on the fact that it was an intracompany correspondence.

The decision does not change the TCA's position regarding its by-object approach to RPM. However, it is remarkable since it emphasizes that internal communications may fall short of proving a pressure, threat or encouragement that prevents the purchaser from determining its own selling price, and thus are not able to demonstrate a violation of Article 4 of the Turkish Competition Law via the RPM.

Legislative developments
Amended leniency policy
As of 16 December 2023, there is a new Regulation on Active Cooperation in Detecting Cartels ("**Leniency Regulation**") in Türkiye. It brings certain significant amendments to the leniency policy. Among others, it introduces:
• a concept of "cartel facilitator", i.e. "undertakings and associations of undertakings that, without operating at the same level of the production or distribution chain as the cartel members, mediate in the establishment and/or maintenance of a cartel, facilitating the creation and/or continuation of a cartel with their activities;"
• a possibility for unconventional cartels such as hub-and-spoke to benefit from leniency;

• a requirement to submit information/documents with "significant added value", i.e. those that will "strengthen the TCA's ability to prove the cartel, considering the evidence that it already has." This means that applicants which simply repeat the information what the TCA already has in the file and do not provide any added value, will not be able to benefit from leniency;
• an opportunity for horizontal violations, e.g. anti-competitive information exchanges, that ultimately do not qualify as a cartel under the Leniency Regulation) to benefit from the leniency regime;
• a time limit of three months. To be eligible for a reduction in fines for the applicant who cannot be granted full immunity, the applicant must comply with a time limit of three months to submit the leniency application "following the notification of the investigation provided that it is before the notification of the investigation report" (Art. 5 of the Regulation).

The Leniency Regulation also adjusts minimum and maximum discount ranges for the administrative fines and obliges the applicant(s) to provide a written and/or oral statement of the managers and employees, if deemed necessary by the TCA. Furthermore, the undertakings, whose leniency application is not accepted by the TCA, are provided with a guarantee that the information and documents submitted will not be used in the investigation file.

The changes harmonize Türkiye's competition law with the EU rules and are expected to encourage the submission of more leniency applications and contribute to cartel detection.
Draft DMA-related amendments

The DMA developments in the EU have impact on the laws of other jurisdictions, and Türkiye is a good example of that. There is a Draft Amendment to the Turkish Competition Law (expected to be adopted in 2024). With minor deviations, the provisions of the Draft Amendment are very similar to the DMA in the EU. They concern: (i) the main definitions, (ii) the obligations to be imposed on the undertakings, (iii) the processes envisaged for compliance with these obligations, including sanctions for any non-compliance, and finally (iv) amendments regarding the on-site inspections. For instance, undertakings offering at least one core platform service in Türkiye to fulfil certain technical and administrative requirements that will facilitate the Board's on-site inspection power for undertakings that do not have headquarters in Türkiye or do not have centralized technical and administrative equipment.

Merger control
Throughout 2023 we followed the TCA's practical application of the technology undertaking exception. The "technology undertaking" rule provides significantly lower thresholds for technology undertakings that (i) are active or (ii) have R&D activities, in the Turkish geographic market or (iii) that provide services to customers in Türkiye. Technology undertakings are defined as undertakings active in areas of digital platforms, software and gaming software, financial technologies, biotechnology, pharmacology, agrochemicals and health technologies.

Elon Musk was faced with a gun-jumping fine of USD 44 billion for a failure to notify the Twitter deal. The transaction should have been notified to the TCA, since Twitter is a digital/ online platform that qualifies for the technology undertaking exception; thus, there was no need even to check Twitter's (Target) turnover in Türkiye for the thresholds analysis. Following the assessment of its effects on the competition in the market, the TCA concluded that there was no significant impediment to the effective competition in the market, hence, it was approved. Nevertheless, due to the non-compliance with the merger control formalities in Türkiye, the TCA imposed an administrative fine on Elon Musk/ Acquirer (at the rate of 0,1% of Elon Musk's economic unit's gross income generated in Türkiye).

Procedure: Unconstitutional On-site Inspections
Important developments shaping the procedural rules of onsite inspections was brought on an individual application by the Constitutional Court of Türkiye.[4] It 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. Despite the determination of constitutional violation, the Constitutional Court did not annul the article related to dawn raids (Article 15) in the Turkish Competition Law as the judgement of the Constitutional Court was made upon an individual application of an undertaking putting forward the violation of constitutional rights of the undertaking concerned. Since the Constitutional Court is not authorized to annul an article / a law upon an individual application, it notified the Turkish Grand National Assembly of the decision with the purpose to solve the structural problem under Article 15 of the Turkish Competition Law. The decision creates repercussions on the TCA's dawn-raiding methods, since it has been conducting on-site inspections without a judge's order over nearly 25 years, a practice which was also

approved by the Council of State up to this date.

Additionally, 2023 added several decisions on the hindrance of on-site inspections. Just to name some of them:

• Several undertakings were fined because instant chat messages and/or emails were deleted during the inspection (see here, here, here and here). In another case an undertaking was hit with a monetary fine for disallowing the case team to conduct a remote inspection on a single e-mail account.[5]

• Fines were imposed on undertakings operating in the real estate sector in Ankara based on hindered or complicated dawn raids, by way of: employees leaving the premises, claiming that their relative had been involved in a serious traffic accident (which was not exactly correct), objecting to the inspection on the grounds that it might involve the personal data of more than 4,000 members of the relevant association, refusing the TCA access to the phone claiming that it was for personal use, but following the court order it was inspected and found to contain work-related correspondence. In this case TCA fined Çilek, Empa, Şanal, and GBK in the amount of 0.5% of their annual turnover. However, considering that this amount would be below the lower threshold set for administrative fines, the amount was increased to TRY 105,688.00 for each undertaking. Additionally, for Şanal and GBK, the TCA imposed a periodical fine of 0.05% of their turnover for each day the completion of the on-site inspections was delayed.

• A private school was fined as well for hindering the onsite inspection by keeping the case-handlers waiting, questioning their authority, and not allowing them to conduct their inspection and not providing them with the requested information and documents.

2024 Expectations

Digital markets will continue to be in the spotlight of the TCA, just like in other jurisdictions where regulating the digital markets has become a trend and an objective necessity. We expect a significant "digital" transformation of the Turkish Competition Law in line with the EU rules. The technology sector and the DMA-related amendments to the Turkish Competition Law are likely to be among the top enforcement areas of 2024 in Türkiye.

Additionally, competition enforcement in the labour markets will be strengthened, and hence undertakings should refrain from collaborating/exchanging information on wages and no-poaching. A strong competition compliance policy for employees and employers is encouraged.

[1] The TCA published its 403-page preliminary report titled "Online Advertisements Inquiry Preliminary Report" and its 293-page work titled "Reflections of Digital Transformation on Competition Law" in 2023. Furthermore, it announced that it initiated a sector inquiry into mobile ecosystems to understand the competitive/anti-competitive effects that mobile ecosystems (might) cause and design effective policies based on this.

[2] Trendyol decision dated 26.07.2023 and numbered 23-33/633-213.

[3] This figure was calculated based on TCA's Decision Statistics Report for the first half of 2023 as well as public announcements regarding the fines imposed on undertakings, on TCA's website.

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

[5] Çözüm case (22-56/878-363)

Settlement with the TCA on Negative Matching in the Used Car Market

*The TCA investigation carried out to determine whether Arabam Com İnternet ve Bilgi Hizmetleri A.Ş (**"Arabam.Com"**), Vava Cars Turkey Otomotiv A.Ş (**"Vavacars"**), Letgo Mobil İnternet Servisleri ve Ticaret A.Ş (**"Letgo"**), and Araba Sepeti Otomotiv Bilişim Danışmanlık Hizmetleri Sanayi ve Ticaret A.Ş. (**"Araba Sepeti"**) had violated the Turkish Competition Law through various practices was concluded with a settlement procedure for Arabam.Com and Letgo. The reasoned decision is now available and provides some important guidance on the matter.*

The decisions[3] summarized the allegations under investigation as the restriction of competition in the online used car buying/selling market through negative matching agreements for Google text ads. Negative matching is a type of keyword that prevents an ad from being triggered by a particular word or phrase. The ad is not shown to anyone searching for that phrase. In the decisions, the types of non-advertising under negative matching are analyzed in three categories:

• Negative Exact Match: If the searches contain the specified negative keywords in the same order and without extra words, the advertiser's relevant ads are not displayed in the search results.
• Negative Phrase Match: If the searches contain the specified negative keywords in the same order, the advertiser's relevant ads are not displayed in the search results.
• Negative Broad Matching: If the searches contain the specified negative keywords in a different order, the advertiser's relevant advertisements are not displayed in the search results.

The decisions state that due to negative matching agreements in various types of matching when users search with generic words next to the brand names of undertakings, only the advertisement of the relevant brand was displayed on the results page. For example, when the search 'brand + vehicle valuation' was made on Google, the advertisements of undertakings that negatively matched the relevant brand could not be triggered by the generic phrase 'vehicle valuation' and the advertisements of the said undertakings could not be displayed due to the negative matching. It was stated that this situation led to the blocking of the display of the competing undertakings' advertisements even in searches containing generic words, contrary to the nature of advertising.

The decisions also analyze the relationship between negative matching and trademark rights protected under industrial property law. In this context, it is accepted that the use of competitor brand names in certain ways may lead to a trademark infringement. On the other hand, it is stated that in case there is no use (advertising, targeting) of the competitor's brand names by the undertakings, sending a cease-and-desist letter and requesting to be included in the negative keyword list exceeds the limits of the trademark right.

At this point, the decisions concluded that the equivalent of the trademark right in Google Ads had been non-targeting of advertisement, whereas the mutual negative matching of the undertakings (i) was beyond the protection of the trademark right, preventing the triggering of advertisements by generic words and offering options to the consumer with the Google algorithm; (ii) had caused only the advertisement of the relevant brand to appear in brand searches; and (iii) had an effect in the form of an allocation of advertising space in this respect. In addition, the decisions stated that the request of the undertakings was not only for the protection of the trademark right; in addition to requesting negative matching of the trademark words within the scope of exact matching, they also asked that various variations of these words also be negative matched as a phrase and broadly, and therefore, this was a practice that exceeded the protection of the trademark right.

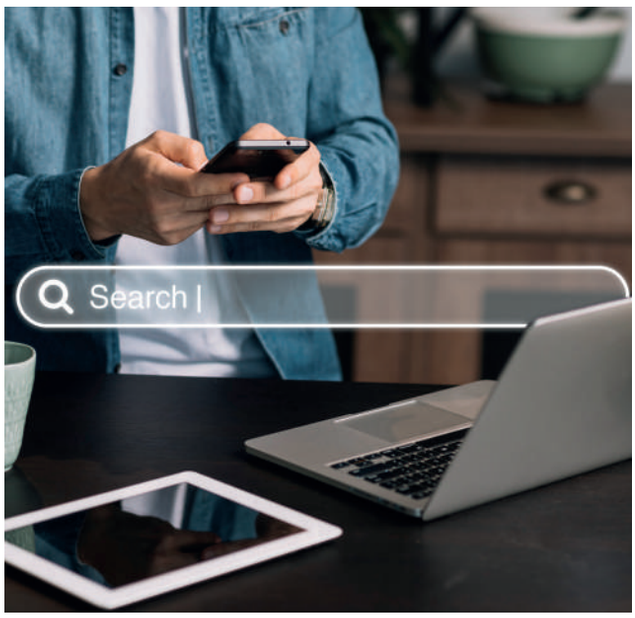
It was also stated that the undertakings obtained a cost advantage in Google Ads tenders in line with negative matching practices. On the other hand, it was evaluated that the cost advantage provided in the relevant budget had been utilized by the undertakings within the marketing and advertising budget, the cost advantage in question was not reflected to the consumers, and the cost advantage was used again to advertise on Google Ads, and no change in the undertaking budget allocated to Google Ads had occurred.

Finally, it was accepted that an undertaking's discretionary inclusion of competitor brand names in the negative keyword list in various matching types could be evaluated within the framework of the advertising policy carried out by the undertaking. However, it was stated that the practices of the parties to the investigation to mutually negatively match each other's brand names in such a way that certain advertisements were displayed according to the searches made by the users eliminated the competition that the undertakings should be in for the advertising space. In other words, it was concluded that mutual negative matching practices are incompatible with the nature of advertising.
Finally, the TCA decided to fine Let Go and Arabam Com by applying a 25% discount and to conclude the investigations accordingly.

[3] TCA's decision dated 20 July 2023, numbered 23-32/629-211 and 23-32/630-212

Gatekeepers, It's DMA Compliance Time in the EU!

As of 7 March 2024, six designated by the European Commission gatekeepers must fully comply with the DMA obligations. The DMA rules are established for large online platforms that provide the core platform services, i.e. online marketplaces, app stores, search engines, etc. to make digital markets more open and contestable and provide end-users and innovative businesses with new rights and options online.



Gatekeepers are required to prove their full compliance with the DMA by outlining the steps undertaken in the respective compliance reports along with non-confidential versions. On 25 March the EC opened non-compliance investigations against Alphabet, Apple and Meta under the DMA. It intends to conclude the proceedings within 12 months. The concerned gatekeepers will be informed about its preliminary findings and measures they should take to effectively address the EC's concerns. In case of an infringement, fines up to 10% of the company's total worldwide turnover may be imposed (up to 20% in case of repeated infringement).

Abuse of Dominance via Silencing Competitors on Your Platforms – EUR 1.8 Billion Fine for Apple

In March 2024, the EC fined Apple Inc. EUR 1.8 billion for abuse of dominance in the market for the distribution of music streaming apps through the App Store by way of restricting music streaming app developers from informing consumers about alternative, cheaper music services available outside of the Apple ("anti-steering provisions"). The company is also ordered to stop preventing music-streaming apps from informing users of cheaper deals outside of the Apple's App Store.

The case started five years ago upon complaint of Spotify. According to the EC's findings, the anti-steering provisions are against Article 102 TFEU, they amount to unfair trading conditions which cannot be justified (neither necessary nor proportionate) and affected interests of the iOS users for almost ten years since they may have overpaid significantly for music streaming subscriptions. High commission fees imposed by Apple on developers were passed on to consumers in the form of higher subscription prices for the same service at Apple App Store.

The total amount of the fine of over EUR 1.8 billion was determined by the EC as proportionate to Apple's global revenues and necessary to achieve deterrence. In addition, Apple was ordered to remove the anti-steering provisions and to refrain from repeating the infringement or from adopting practices with an equivalent object or effect in the future.

The EC's Revised Market Definition Notice: What's New

*On 8 February 2024, the EC adopted revisions to the Market Definition Notice ("**Notice**") for the first time since its adoption in 1997. The changes aim to bring the Notice in line with significant societal and technological changes, especially digitalization. The EC had concluded that the original Notice was generally still fit for purpose, but some updates and clarifications had been necessary to give more emphasis to non-price elements such as innovation, reliability of supply and the quality of products and services.*

Significant changes were made to both relevant products and geographical markets with the new amendments. Particularly, non-price elements were included as criteria to be considered when defining the relevant product market.

Accordingly, it was explained that non-price elements can be considered as being more important compared to a product's price depending on consumers' evaluation. Such non-price parameters of competition include innovation as well as quality aspects of products and services (i.e. "their sustainability, resource efficiency, durability, the value, and variety of uses offered, the possibility to integrate the product with others, the image conveyed or the security and privacy protection afforded, as well as its availability, including in terms of lead-time, resilience of supply chains, reliability of supply and transport costs). The listed elements are meant to be indicative and not exhaustive.

While acknowledging the SNIP test as "a conceptual framework for the interpretation of available evidence", the EC emphasizes of the importance of Small but Significant Decrease in Quality method to assess switching behavior of customers in digital related cases (e.g., case AT.40099 Google Android). At the same time, the Notice is not relevant for enforcement under the Digital Markets Act since no market definition assessments under the DMA are expected as those do not rest on establishing market power in the sense of EU competition law.

Furthermore, the term "global market" was introduced regarding the relevant geographic market definition. Other new concepts such as after-markets, bundles, and digital ecosystems were also added to the Notice.

Dutch Court Awards Vestel EUR 684 Million in Cartel Damages

*On 17 January 2024, the Dutch East Brabant District Court ("**Dutch Court**") partially accepted Vestel's cartel damages lawsuit against two cathode ray tube ("**CRT**") manufacturer subsidiaries of Technicolor and ordered TTD International S.A.S ("**TTD**") and TDP SP. Z.O.O. ("**TDP**") to pay EUR 684 million to Vestel.*

The Dutch Court awarded Turkish television manufacturer Vestel Elektronik Sanayi ve Ticaret A.Ş. ("**Vestel**") EUR 684 million in damages on 17 January 2024, arising from cartel activities within the cathode ray tube industry.

This case follows the EC December 2012 decision, which fined seven CRT producers a combined total of EUR 1.47 billion for their participation in two separate cartels regarding color display tubes ("**CDT**") used in computer screens, and color picture tubes ("**CPT**") used in televisions.

Following the EC's decision, Vestel initiated legal proceedings in the Netherlands in 2014 against Philips, Samsung SDI, LG Electronics, and Technicolor, as well as the two Technicolor subsidiaries, seeking treble damages totaling EUR 2.05 billion under a legal principle aimed at deterring anti-competitive behavior by imposing damages thrice the loss suffered. Initially, a settlement was reached with Philips in 2019.

The rest of the defendants, however, contended that the matter had already been settled in Turkish courts. In this regard, the Dutch court recognized the validity of the Turkish judicial proceedings, agreeing that the case had been addressed conclusively in another jurisdiction, thus limiting its scope to rule on this matter.

In addition, for TTD and TDP, the court found these subsidiaries liable for the cartel's damages. However, it deemed the sought-after treble damages punitive and excessive, ultimately determining compensation of EUR 434 million, with additional Turkish interest accrued until 1 December 2014, summing up to EUR 684.4 million.

Vestel announced on the Public Disclosure Platform ("**KAP**") that the Dutch Court had partially accepted and partially rejected its compensation claims. Vestel also emphasized that the decision and the amounts specified within the decision had not been finalized yet, and the parties had a right to object to the decision. In this regard, Vestel officially announced that it would exercise its right to appeal against the part of the decision ruled against their company within the legal period.

The CMA's Report on Labour Market and Competition

*On 25 January 2024, the Microeconomics Unit of the Competition Market Authority ("**CMA**") published a research report on competition and market power in the UK labour market ("**Report**"), focusing on the market power of employers, the impact on wages, the use of non-compete clauses, and recent developments such as hybrid working.*

The first finding within the Report is that the UK's labour market concentration and employer market power have not increased over the last 20 years, in contrast to the trends observed in the US.5 Several studies show that the ratio between the number of workers and the number of employers has remained largely consistent in the UK, whereas the labour market power in the US has been increasing. However, the Report also states that both measurements consistently and significantly differ between sectors, businesses, and regions. For instance, it has been detected that labour markets outside of London and the Southeast are more concentrated compared to other regions. Next, the concentration of white-collar workers has remained constant over the years, whereas that of blue-collar workers has decreased in their respective industries. The Report also states that labour market concentrations have a direct impact on workers' wages and that workers in concentrated markets earn 10% less than workers in less concentrated markets.

Additionally, the Report finds that the share of income that workers receive compared to their input has been rising slightly in most of the UK. In this respect, it also states that currently, the share of income received by workers in the market has increased to a level equivalent to about two-thirds of their contribution to income.

The Report highlights the prevalence of "non-compete" clauses in the UK, affecting approximately 30% of workers in the UK overall. This percentage rises to over 40% in the information and communication technology and scientific services. These clauses limit employees' future job opportunities after leaving a company and are prevalent in a range of sectors, including some unexpected ones like retail and education.

Additionally, the Report shows that non-compete clauses are common throughout the UK economy, including in industries where businesses are not anticipated to need to safeguard their intellectual property. For instance, the Report reveals that non-compete agreements are present in the contracts of almost 20% of employees in the retail, education, and food services industries.

Lastly, the Report finds a significant increase in the number of firms offering hybrid working arrangements in recent years. Following the pandemic, the number of companies offering remote working opportunities has increased to approximately 20% in the UK market. This practice appears more frequently applied in geographical regions with low concentration in the market. Finally, the Report claims that the hybrid working system has the potential to affect the power dynamics between employers and employees by expanding the potential job pools of workers.

[5] The Report states that labour market concentration measures how many employers operate in a particular market. The fewer the firms, the greater the concentration

First In-Depth Investigation Under the Foreign Subsidies Regulation in the EU

On 16 February 2024, the EC launched its first in-depth investigation into foreign subsidies, exercising its powers under the Foreign Subsidies Regulation.

The EC initiated the investigation following a notification by CRRC Qingdao Sifang Locomotive Co., Ltd., a subsidiary of CRRC Corporation, a Chinese State-owned train manufacturer. The notification related to a public tender issued by the Bulgarian Ministry of Transport and Communications for electric "push-pull" trains and related services. According to the Foreign Subsidies Regulation, a company is obliged to notify public procurement tenders for public contracts in the EU when the estimated value of the contract exceeds EUR 250 million and the company has received foreign financial contributions of at least EUR 4 million from one or more third countries in the three years prior to the notification.

The preliminary assessment by the EC determined that sufficient indications show that CRRC Qingdao Sifang Locomotive has been granted a foreign subsidy that distorts the internal market, which justified opening an in-depth investigation.

As per the Foreign Subsidies Regulation, the investigation by the EC may (i) accept commitments proposed by the company if they fully and effectively remedy the distortion, (ii) prohibit the award of the contract, or (iii) issue a no-objection decision at the end of its in-depth investigation. The Commission has 110 working days, until 2 July 2024, to further assess the alleged foreign subsidies, obtain all the information required, and take a final decision.

Highlights of the WTO's 13th Ministerial Conference

*The 13th Ministerial Conference of the World Trade Organisation ("**WTO**") took place from 26 February to 1 March 2024 in the United Arab Emirates. A Ministerial Declaration outlining a proactive reform agenda for the organization was approved along with several key decisions, such as reaffirming pledges to establish a fully operational dispute settlement system by 2024 and enhancing the utilization of special and differential treatment measures for developing and least-developed countries.*

Members adopted the Abu Dhabi Ministerial Declaration, committing to strengthening the multilateral trading system, centered around the WTO, to address current trade challenges. The Declaration acknowledges the system's potential to support the UN 2030 Agenda and Sustainable Development Goals, as well as the crucial role of women's economic empowerment in sustainable development.

Regarding dispute settlement reform, members approved a Ministerial Decision acknowledging the progress towards establishing a fully operational dispute settlement system accessible to all members by 2024.

Furthermore, the Ministerial Decision addressing a longstanding mandate to review special and differential treatment provisions for developing and least developed countries to enhance their precision, effectiveness, and functionality was endorsed.

Ten WTO members-Brunei Darussalam, Chad, Malaysia, Norway, the Philippines, Rwanda, Saudi Arabia, South Africa, Togo, and Türkiye-submitted their acceptance documents for the Fisheries Agreement. This action increased the total number of WTO members that have officially accepted the Agreement to 71, accelerating the progress towards its entry into force and marking a significant milestone for ocean sustainability.

Dumping Investigation into BOPP Film Imports from China, Egypt, and Russia

*On 1 February 2024, the Ministry of Trade of Türkiye ("**Ministry**") initiated a safeguard investigation into the importation of biaxially-oriented polymers of propylene film, ("**BOPP Film**") originating from the People's Republic of China ("**PRC**"), the Arab Republic of Egypt ("**Egypt**"), and the Russian Federation ("**Russia**") through Communiqué number 2024/4 on the Prevention of Unfair Competition in Imports.*

The Communiqué analyzes the period between 1 January 2020 and 30 June 2023 in terms of damage and causality and offers the following assessments:

• Taking 2020 as the base year, imports of products originating from the PRC, Egypt, and Russia increased significantly in both absolute and relative terms during the period under review.

• Imports originating from the PRC suppressed the domestic market sales prices of the domestic production branch between 1 July 2022 and 30 June 2023.

• Imports originating from Egypt undermined and suppressed the domestic sales prices of the domestic production branch in 2020, 2021, 2022 and from 1 July 2022 to 30 June 2023.

• Imports originating from Russia undermined and suppressed the domestic sales prices of the domestic production branch in 2022 and from 1 July 2022 to 30 June 2023.

• A deterioration occurred in the basic economic indicators of the domestic production branch. This decline in production, domestic sales amount, stock amount, product cash flow, capacity utilization rate and market share of the product subject to investigation. Furthermore, unit profitability from domestic sales decreased significantly in this period.

• The PRC, Egypt, and Russia have an important position in the global market in terms of production capacity and export capability.

• When the imports of the products originating from the PRC, Egypt, and Russia subject to the investigation are evaluated, with the base year as 2020, it is seen that the imports of the products increased significantly both in absolute and relative terms in the period from 1 January 2020 to 30 June 2023.

• Imports originating in the PRC, Egypt, and Russia cause material damage/threat of material damage to the economic indicators of the domestic production branch.

For the reasons explained, with the decision of the Board of Assessment of Unfair Competition in Imports, it has been decided to open a dumping investigation for the product originating from the PRC, Egypt and Russia.

[12] *Classified under the CN Code 3920.20.21.00.19*

Prioritizing Human Rights: Upcoming EU Ban on Products Made with Forced Labour

On 4 March 2024, the EU legislators agreed to adopt a Regulation to ban forced labour products. Once the European Parliament and Council give a final green light to this provisional agreement, and following its publication in the Official Journal, companies will have three years to ensure full compliance with the rules that aim to combat forced labour. The rules will apply to all companies irrespective of the size and the sector of activities.

The rules create an important system to ensure that companies that place products in the EU market and/or export those outside the EU do not violate human rights. The national authorities of the Member States together with the European Commission will be in charge of conducting investigations and taking respective decision. The new Forced Labour Single Portal, which also contains a whistle blower tool, will help to enforce the rules.

Once detected that the products were produced using forced labor (including child labour), the goods may not be placed in the EU market or exported. If they are already in the market, they will be removed (or donated/recycled or destroyed at the expense of the manufacturer concerned). The companies may be faced with penalties.

The Regulation is expected to have a huge impact on how the product are being manufactured and contribute to a better observance of human rights in the EU, as well as outside of it.

Major Revisions Made to Personal Data Protection Law in Türkiye

*On 2 March 2024, the proposal on the long-awaited amendment to Law No. 6698 on the Personal Data Protection Law ("**KVKK**") was approved by the General Assembly of the Turkish Parliament. The amendment ("**Amendment**") brings the Personal Data Protection Law closer to the General Data Protection Regulation ("**GDPR**") and responds to essential problems encountered in practice. The Amendment will enter into force on 1 June 2024.*

The Amendment focuses on three main issues: (i) the processing of special categories of personal data, (ii) the transfer of personal data abroad, and (iii) appeal procedures against decisions of the Turkish Personal Data Protection Authority ("**PDPA**").

In terms of the conditions for the processing of special categories of personal data, the current legislation provides for a binary distinction in terms of the types of data concerned, namely personal data concerning health and sexual life and other special categories of personal data. The Amendment removes the said binary structure and regulates that the processing of special categories of personal data is lawful where:

- explicit consent of the data subject is obtained;
- processing is expressly provided by-laws;
- processing is necessary for the protection of life or physical integrity of the data subject or of any other person who is unable to explain their consent due to physical disability or whose consent is not deemed legally valid;
- processing relates to personal data made public by the data subject and is in line with the data subject's intention of making it public;
- processing is necessary for the establishment, exercise or protection of any right;
- processing is necessary by the persons subject to secrecy obligation or competent public institutions and organisations for the protection of public health, operation of preventive medicine, medical diagnosis, treatment and nursing services, and the planning and management of health-care services as well as their financing;
- processing is required for fulfilment of legal obligations in the fields of employment, occupational health and safety, social security, social services, and social aid;
- processing concerns current or former members or associates of such organisations or entities, or persons who are in regular contact with such organisations or entities; and
- foundations, associations and other non-profit organisations or entities established for political, philosophical, religious or trade union purposes, provided that (i) they comply with the legislation to which they are subject and their purposes, (ii) they are limited to their fields of activity and (iii) they are not disclosed to third parties where the processing is intended for current or former members and members or persons who are in regular contact with these organisations and entities.

Regarding the conditions for the transfer of personal data abroad, it is stipulated that personal data may be transferred in case one of the conditions for processing personal data is met and an adequacy decision exists on the country, international organisation or sectors within the country subject to the relevant transfer. In the absence of an adequacy decision, the transfer is made in case the following criteria are met:

- one of the conditions for processing personal data is met,
- data subjects have the opportunity to exercise their rights and to apply for effective legal remedies in the relevant country, and
- the parties ensure one of the appropriate safeguards determined by the Amendment.

The Amendment also regulates the conditions of transfers in incidental circumstances where no adequacy decision and appropriate safeguards are in place:

- where data subjects provide their explicit consent for the relevant transfer after being informed of the possible risks;
- where the transfer is mandatory for the performance of a contract between the data subject and the data controller or for the implementation of pre-contractual measures taken upon the request of the data subject;
- where the transfer is mandatory for the establishment or the fulfilment of a contract between the data controller and another natural or legal person for the benefit of the data subject;
- where the transfer is necessary for an overriding public interest;
- where the transfer of personal data is mandatory for the establishment, exercise or protection of a right;
- where the transfer is mandatory for the protection of life or physical integrity of the data subject or another person who is unable to disclose consent due to actual impossibility or whose consent is not legally valid; and
- where the transfer is made from a registry available to the public or persons with a legitimate interest, provided that the conditions required to access the registry in the relevant legislation are met and further to the request of the persons with a legitimate interest.

Moreover, data controllers and processors will be obliged to notify the PDPA within five business days of the standard contractual clauses (which are deemed as an appropriate safeguard) agreements. Failure to this notification obligation is also subject to administrative monetary fines on both data controllers and data processors.

The Amendment approved by the General Assembly also stipulates that the PDPA's administrative fines may be appealed before administrative courts. In any event, applications pending before criminal courts as of 1 June 2024, will be resolved by these courts.

Deadline for Adopting European Sustainability Reporting Standards Postponed till mid 2026

*On 8 February 2024, the political agreement was reached between the European Parliament and the Council on the EC's proposal to postpone by two years the deadline for adopting sector-specific European Sustainability Reporting Standards ("**ESRS**").*

According to the Corporate Sustainability Reporting Directive ("**CSRD**") all large companies and listed SMEs are required to report on the social and environmental risks they face, and on how their activities impact people and the environment by using common mandatory standards. The reporting obligation is applicable to some non-EU companies if they generate over EUR 150 million on the EU market. This helps to evaluate the sustainability performance of companies as part of the European Green Deal.

The CSRD envisages the adoption of sector specific ESRS. The deadline for these sector-specific standards was postponed from mid-2024 to mid-2026 giving more time for the companies to comply with other standards adopted in July 2023, which apply to all companies, irrespective of their economic sector and cover the full range of environmental, social, and governance issues, including climate change, biodiversity, and human rights.

The EC's First European Cybersecurity Certification Scheme

On 31 January 2024, the EC adopted the first European cybersecurity certification scheme offering a framework to ensure that products used in some of the most sensitive environments, like routers and ID cards, are cyber secure. Users of products certified under this scheme will benefit from greater security.

The regulation specifies the roles, rules, and obligations, as well as the structure of the European Common Criteria-based cybersecurity certification scheme, in accordance with the European cybersecurity certification framework set out in the Regulation. It applies to all information and communication technologies ("**ICT**") products, including their documentation, which are submitted for certification under the scheme, and to all protection profiles submitted for certification as part of the ICT process leading to the certification of those ICT products.

The scheme introduces a set of security requirements for ICT security products such as firewalls, encryption devices, electronic signature devices, and ICT products with inbuilt security functionality such as routers, smartphones, and bank cards. For certification, conformity assessment bodies and national cybersecurity certification authorities obtain confidential and sensitive data and business secrets, also relating to intellectual property or compliance monitoring that require adequate protection. The European Union Agency for Cybersecurity should provide a list of certified protection profiles on its cybersecurity certification website and indicate their status.

Updated Administrative Fines under the Data Protection Law

On 5 January 2024, the DPA published the updated limits of the administrative fines to be imposed within the scope of Turkish Personal Data Protection Law No.6698.

The fine limits for 2024 for the relevant types of violations, determined by applying a revaluation rate of 58.46%, are provided below in TRY and EUR:

Violation	Fine (TRY)	Fine (EUR)
Failure to fulfil the obligation to inform	47,303-946,308	1,450-28,950
Failure to fulfil obligations regarding data security	141,934-9,463,213	4,340-290,000
Non-compliance with DPA decisions	236,557- 9,463,213	7,325-290,000
Violation of the obligations to register with and notify the Data Controllers' Registry	189,245-9,463,213	5,790-290,000

A New Era in Turkey: Turkish Sustainability Reporting Standards

*The Public Oversight, Accounting and Auditing Standards Authority's ("**POA**") published the criteria for determining the companies subject to mandatory sustainability reporting, which will take place for the first time in Türkiye.*

The POA's decision setting forth the scope of the implementation of Turkish Sustainability Reporting Standards ("**TSRS**") is published in the Official Gazette dated 27 December 2023. The relevant decision made sustainability reporting mandatory for institutions, organizations and businesses meeting certain criteria. Companies engaged in the specified businesses are subject to mandatory sustainability reporting if they exceed at least two of the following criteria in two consecutive reporting periods:

- Total assets of 500 million Turkish liras
- Annual net sales revenue of 1 billion Turkish liras, and/or
- 250 employees.

Accordingly, the first mandatory reporting covering the accounting period for 2024 will take place in 2025, provided that it is determined for the relevant companies that two of the three criteria are met in 2022 and 2023. In any event, companies beyond the scope of mandatory sustainability reporting will continue to voluntarily report on sustainability.

Preventing Data Portability as Abuse of Dominance: The TCA's Approach in Sahibinden Decision

by Erdem Aktekin, Helin Yüksel, and Seda Eliri

1. Introduction

On 23 August 2023, the Turkish Competition Authority announced that it had fined Sahibinden Bilgi Teknolojileri Pazarlama ve Ticaret A.Ş. ("**Sahibinden**") for abuse of dominance and required the undertaking to implement certain remedies. The TCA decided ("**Sahibinden Decision**") that Sahibinden had infringed Article 6 of the Turkish Competition Law in the market of vehicle sales/rental platform services by way of preventing data portability and implementing exclusivity through the non-compete obligations in its agreements.

Although the reasoned decision has not yet been published, the remedies imposed on Sahibinden provide valuable insights into how the TCA approaches conduct or complaints related to data portability.

Background Information - Data Portability Cases at a Glance

Data portability in the online platform services market for real estate sales/rental services was identified in the Sahibinden/REOS Decision and eventually addressed by the Sahibinden Decision.

a. Sahibinden/REOS Decision

Before delving into the details of the remedies imposed on Sahibinden, it is worth noting that the TCA hinted through its previous decision ("**Sahibinden/REOS Decision**") that it is in favour of imposing a remedy concerning data portability on Sahibinden. The TCA issued its Sahibinden/REOS Decision after it had assessed the allegations that Sahibinden had abused its dominant position in the online platform services market for real estate sales/rental services via its exclusionary behaviours.

The complainant, REOS Bilişim Teknolojileri A.Ş. ("**REOS**"), argued that integration with Sahibinden, i.e., access to application programming interfaces ("**API**"), is a mandatory element of the provision of collective and multiple listing services. REOS stated that via this way real estate agents can input their listings and publish them on their chosen platforms by using REOS. The term "inputting" included not only the creation of the listing but also the updating and removing of the listing as well. Therefore, it is alleged that Sahibinden's refusal to provide this integration caused two different infringements of competition law, namely refusal to deal without objective justification and complicating the activities of other undertakings or excluding them from the market by preventing interoperability.

By way of background, REOS is active in designing technological solutions to the real estate sector and provides portfolio and demand, and customer tracking and digital marketing platform services for real estate agencies, brokers, and consultants. According to the complaint, REOS intends to operate as a collective listing provider. The basis of its business model is to bring together platforms such as online listing platforms (e.g., Sahibinden, Emlak Jet), the websites of real estate agents, and the listing portals of real estate chamber associations under a single roof so buyers can access multiple property options. While the system itself requires Sahibinden to allow access to its API so that the collective and multiple listing service can operate, i.e., to ensure interoperability, Sahibinden rejected REOS' requests for integration.

After considering the benefits and harms that granting such interoperability may bring, the TCA decided that the harms outweighed the benefits and concluded that an integration involving such core activities of Sahibinden could ultimately mean the transfer of economic rents to REOS and/or the undertakings integrated through Sahibinden and could lead to the problem of free-riding. In light of these considerations, the

TCA decided that Sahibinden's acceptance of the integration would mean the transfer of its business activities to REOS and therefore the refusal should be considered justified.

One of the key analyses in the decision is the finding that the expected benefits of integration also can be achieved through data portability, which is considered to be less restrictive of competition. The survey conducted as part of the investigation showed that real estate agents had motivations to multi-home. However, the TCA found that the barriers to multi-homing, such as limited time, the costs associated with multi-homing, the inability of agents to adapt to the software interface of a second platform, and consequently the emergence of limited competition due to high concentration in the market for online listing services market, have resulted in a market environment where data portability is not yet available.

Although the TCA's analysis showed that a market failure had occurred, and data portability had been considered an appropriate remedy, the decision did not impose such a remedy. This may raise the question as to why the TCA did not impose data portability but did so this time. The next section examines the Sahibinden Decision in which the TCA decided to impose a data portability obligation.

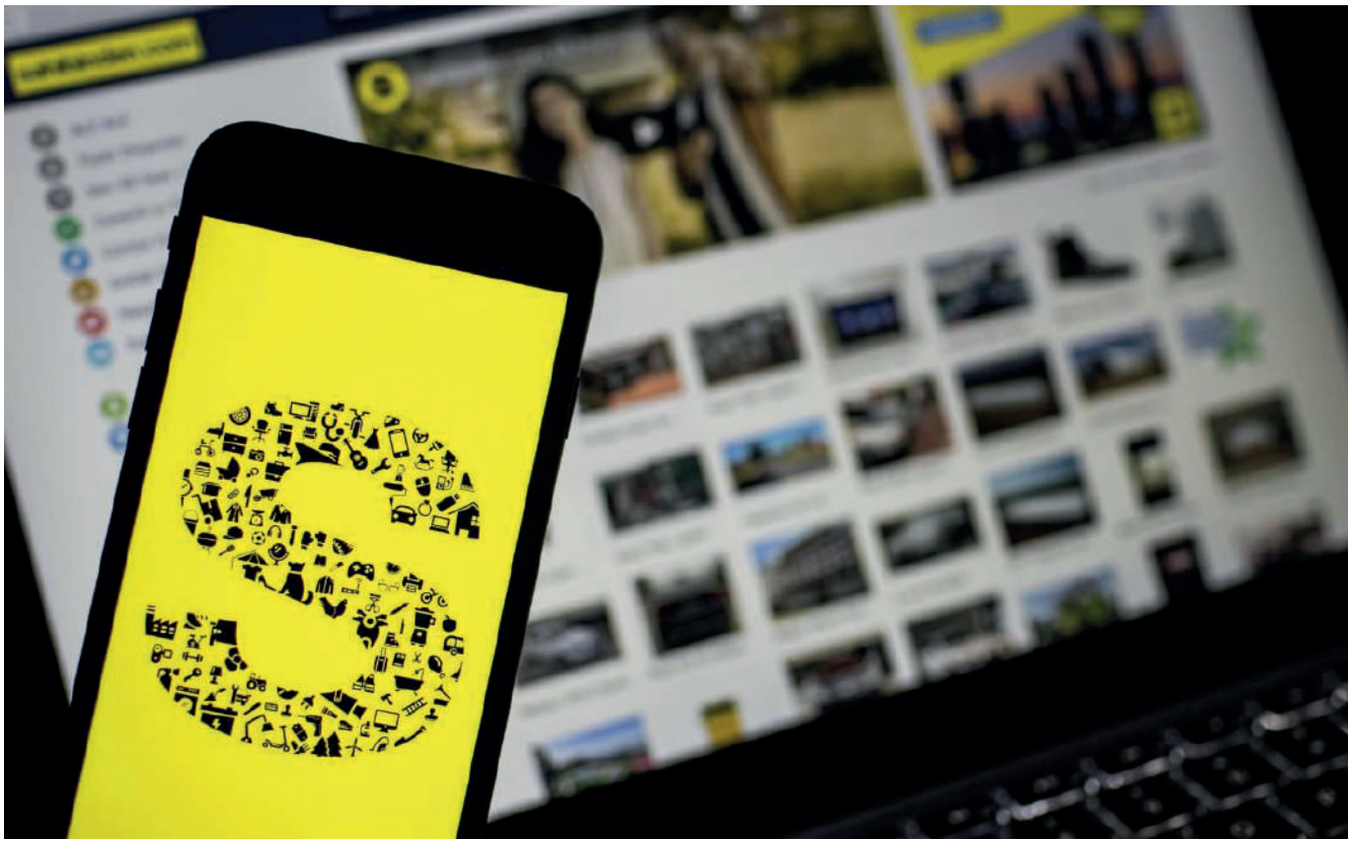
b. Sahibinden Decision

In the Sahibinden Decision, the TCA examined allegations that Sahibinden (i) made it difficult for its business members to use more than one platform by preventing them from transferring their data, (ii) implemented de facto/contractual exclusivity in this way and through the non-compete obligation imposed in its contracts, (iii) made it difficult for its business members to use more than one platform by imposing sub-user restrictions, (iv) did not publish promoted ads transparently, (v) did not act transparently in the publication of its native ads, (vi) favoured itself through the ranking algorithm, and (vii) favoured itself/ provided misleading results in other services it provides (such as real estate/vehicle valuation, referral to the authorised dealer in the sale of new vehicles, provision of expertise).

As a result of the investigation, the TCA concluded that Sahibinden holds a dominant position in the markets for "online platform services for property sales/rental activities" and "online platform services for vehicle sales activities of business members." It is concluded that Sahibinden has made it difficult for its business members to use more than one platform by preventing them from transferring their data. This action effectively implements de facto/contractual exclusivity and imposes a non-compete abuse in its contracts. Therefore, it is decided that Sahibinden has infringed Article 6 of the Competition Law by abusing its dominant position via preventing data portability.

The most significant part of the decision is the obligations imposed by the TCA. According to the Sahibinden Decision, Sahibinden is required to comply with the following obligations:

- To fulfil and submit to the TCA, within three months from the receipt of the reasoned decision, the rewriting of the agreement signed between Sahibinden and the business members in a way that does not include the provisions that are the subject of the infringement.
- To create an infrastructure, free of charge, that will allow business members to transfer the data they enter in their real estate and vehicle listings on the Sahibinden platform to competing platforms, and to keep this data up to date.
- If business members with memberships in the competing platforms request that their data be transferred to Sahibinden and kept up to date, and the competing platforms accept this request, Sahibinden shall ensure that the requests of the competing platforms are met uninterruptedly and effectively by setting up the required infrastructure free of charge and as soon as reasonably possible without delay.
- Sahibinden shall submit a report to the TCA for three years from the implementation of the first compliance measure and periodically once a year after that.



Practical Application of Data Portability Action

The need for data portability in the online platform services market for real estate sales/rental services identified in the Sahibinden/REOS Decision is addressed by the Sahibinden Decision. This is not the first time that the TCA has decided to implement a data portability obligation; however, there is a significant difference between the wording of the former application of data portability obligations and the latter Sahibinden Decision.

One of the notable decisions of the TCA regarding data portability is the Nadirkitap Decision. In this decision, the TCA examined whether Nadirkitap Bilişim ve Reklamcılık A.Ş. ("**Nadirkitap**") had abused its dominant position by hindering the activities of its competitors by not providing the data of its seller members who sought to market their products through competing intermediary service providers in the market for online sales of used books. As a result of the investigation, the TCA ruled that Nadirkitap should provide book inventory data to its business users upon their request in an accurate, understandable, secure, complete, free and appropriate format. The data portability requirement in the Nadirkitap Decision pertains solely to granting "access" to data. On the other hand, in the Sahibinden Decision, the data portability obligation extends beyond mere "access" to data. It necessitates the disclosure of data in a transferable format, continuously, and in real-time. This requirement demands a more elaborate solution, distinguishing it from mere "access."

The wording of the data portability obligation in the Sahibinden Decision is similar to that found in the EU's DMA. Article 6(9) of the DMA provides that

> The gatekeeper shall provide end users and third parties authorised by an end user, at their request and free of charge, with effective portability of data provided by the end user or generated through the activity of the end user in the context of the use of the relevant core platform service, including by providing, free of charge, tools to facilitate the effective exercise of such data portability, and including by the provision of continuous and real-time access to such data.

However, despite the similar wording and the impression that the TCA may have been influenced by the DMA, notable differences exist. First, Article 6(9) of the DMA regulates data portability for end users as opposed to the Sahibinden Decision, which targets business users. Article 6(10) of the DMA on business users states that:

The gatekeeper shall provide business users and third parties authorised by a business user, at their request, free of charge, with effective, high-quality, continuous and real-time access to, and use of, aggregated and non-aggregated data, including personal data, that is provided for or generated in the context of the use of the relevant core platform services or services provided together with, or in support of, the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users.

Thus, what is granted to business users in the DMA is not data portability, contrary to the Sahibinden Decision, but access to their data.

Moreover, unlike the DMA, the Sahibinden Decision extends the scope of the data portability obligation. It states that Sahibinden shall, free of charge and promptly, provide competing platforms with the necessary infrastructure. This infrastructure facilitates the transfer of data from the competing platform's users to Sahibinden and ensures their data remains up to date. This part of the Sahibinden Decision surpasses the traditional form of data portability, imposing partial (because it is tied to the acceptance of competing platforms) two-way data portability.

At this point, questions arise regarding the TCA's objectives with this obligation and which aspect of the theory of harm it aims to address. However, any speculation on this matter remains conjectural until the reasoned decision is published, providing concrete insights.

Conclusion

The Sahibinden Decision introduces an unprecedented data portability obligation given its target audience of business users and its two-sided nature. The full implications of this decision will become known once the reasoned decision is published. Moreover, it underlines the TCA's proactive stance in intervening within digital markets, demonstrating its readiness to address emerging challenges, also by way of striving to adopt DMA-like amendments to its Competition Law. Similar obligations likely will feature in other decisions in the coming days, signalling a continuing trend of regulatory action in this domain.

[1] https://www.rekabet.gov.tr/Dosya/sahibinden-nihai-kararr.pdf

[2] https://www.rekabet.gov.tr/Karar?kararId=7d0d65f9-f564-4f58-a8a5-7a62a1fa8fe7

[3] https://www.rekabet.gov.tr/Karar?kararId=b41fb670-edee-4cd3-b58c-f5f3e8118d38

Project Everest

A surprise encounter, an idea, exchanged why nots and here we go!

ACTECON's social responsibility initiative, The Story Books on Competition Law, was a dream come true, reaching over 25,000 children worldwide through The Secret Agreement and The Greatest Artist last year. This number will continue to increase to emphasize the notions of ethics and competition. This year, we are excited to be part of a challenge for future and new generations. ACTECON is proud to stand beside legendary alpinist Tunç Fındık, one of only 50 people to complete 14 X 8,000 m., as he climbs to the world's highest peak, Mount Everest this time without the aid of supplementary oxygen.

Global warming trend poses a confluence of threats, including the decline of water and oxygen levels, which are essential for sustaining life across the planet. To emphasize the vital role of water and oxygen for all living beings, Tunç has decided to climb Everest without oxygen support. As caretakers of the planet, it is our collective responsibility to combat global warming and protect our planet for future generations. This climb is not only a personal challenge for Tunç, but a call to action for all of us.

The ascent will begin in early April 2024 and we will be sharing regular updates along the way. ACTECON is excited to lend its support to Tunç Fındık as he embarks on his most competitive journey to conquer Mount Everest without oxygen aid.

Events

W@CompetitionTR Mentoring Breakfast

Empowered women empower women... and all of us!

ACTECON is proud to be among the sponsors of W@ CompetitionTR Mentoring Breakfast that was held on the International Women's Day on 8th of March.

Our team is delighted to be a part of this inspiring event that strengthens connection between female colleagues and to share the fruitful interaction between mentors and mentees within the mentorship program.

At ACTECON, we support gender balance and initiatives to achieve it.

OECD Competition Day in Paris

We are delighted to have attended the OECD Competition Open Day 2024 in Paris on 6th of March as delegates. Thank you OECD - OCDE and the panelists for an excellent day full of insightful discussions.

Mondaq Webinar

The Mondaq webinar was a great opportunity for us to discuss the cutting-edge issues of the Turkish competition law and draw parallels with the EU law in the following:

HR Issues: The TCA has increased the frequency of its assessments into the labour market.

Merger Control - Technology Undertakings: A special local turnover threshold exception was introduced for the notification of concentrations involving technology undertakings.

TCA's remarkable decisions in 2023: Investigation into labour market which resulted with fining of 16 undertakings on the basis of no-poaching agreements and the fining of Elon Musk due to failure to notify the Twitter Deal.

Tackling competition concerns in the digital markets (DMA/ DSA-like arrangements): Similar to its counterparts around the world, the TCA has displayed a remarkable level of interest in addressing competition concerns in digital markets.

ICN Advocacy Worshop

On behalf of ACTECON, our Counsel, Sera Erzene Yıldız participated in ICN Advocacy Workshop organized by The Competition Authority of Kenya on 22 – 23 February 2024 in Nairobi, Kenya.

We also had the opportunity to visit the Turkish Embassy in Kenya. This was a great pleasure to know more about our Embassy's activities and projects.We would like to thank our Ambassador Mr. Subutay Yüksel and Commercial Counsellor Dr. Mustafa Alıcı for their warm welcome.

We had a chance to give our Story Books for Competition, The Secret Agreement and The Greatest Artist to school children in Kenya.

TEİD Training

As the Education Committee President of Turkish Ethics and Reputation Society ("**TEİD**"), our managing partner Mr. Fevzi Toksoy, PhD conducted a training titled Public and Private Sector Tenders and Determination of Competition Law Based Non-Compliance.

Competition Law in Practice Seminars 2024

On February 20th, our managing partner Mr. Fevzi Toksoy, PhD gave a presentation about Current Developments in Competition Law in 2023 and Outlook for 2024 organized by Istanbul Bilgi University Competition Law and Policy Research Centre.

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