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Unfair Price Assessment Board in Fight for Fair Prices in Turkey

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Dear reader,

In this issue we primarily cover the main cases in the industries that have been under a special scrutiny of the competition authorities in Turkey and in the European Union ("EU") (including at the level of the national competition authorities of the EU member states): oil/energy, automotive, cement, and pharma.

The Turkish Competition Authority has been quite "generous" in imposing fines on the companies for their Resale Price Maintenance ("RPM") practices (a record fine imposed on oil companies), joint price-setting and market partitioning (ready-mixed concrete), collusion in tenders (traffic signaling), providing false and misleading information, as well as gun-jumping (power solutions). Baymak case is of particular interest as it deals, among other violations, with online sale restrictions, a controversial issue that has been actively discussed in the EU after the Coty judgement.

The European Commission's ("EC") evaluations on the Vertical Block Exemption Regulation (" VBER") also emphasise on the impact of online sales and new market players such as online platforms on the distribution models. The new types of vertical restrictions such as online sale restrictions and restrictions on online advertising or retail parity clauses are to be reassessed and clarified in the near future. We welcome the EC's guidelines for National Courts Regarding the Disclosure of Confidential Information. It is of interest to national courts outside of the EU as well, as it sets the basic principles to which the courts shall adhere to in dealing with confidential information/evidence in private enforcement cases in particular.

As regards International trade, in addition to some changes in the customs duties on certain agricultural products in Turkey, and Ukraine's anti-dumping investigation into Turkish cement, there has been a call (initiated by certain WTO members) for more transparency on trade-related measures introduced around the world in response to the COVID-19 pandemic aiming at limiting obstacles to trade and supporting economic recovery. Similarly, with a view to defending the EU steel industry in the current difficult times, the EC's safeguard package in relation to imports of steel products is in place.

From the regulatory side, we would like to draw your attention to the peculiarities of functioning of the newly established Unfair Price Assessment Board in Turkey to tackle exorbitant prices and stockpiling activities, during state of emergencies. There have also been some interesting developments in relation to data protection (i.e. clarification of obligation to inform, formalitites in cross-border data transfers, etc.)

Sincerely,

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In this issue:

Oil Companies Face Record Fines in Turkey for RPM Practices

*The Turkish Competition Authority ("**TCA**") published its reasoned decision regarding investigation conducted into activities of BP Petrolleri A.Ş. ("**BP**"), OPET Petrolcülük A.Ş. ("**Opet**"), Petrol Ofisi A.Ş. ("**PO**"), Shell & Turcas Petrol A.Ş. ("**Shell**") and Güzel Yakıt Akaryakıt A.Ş.'s (formerly: Total Oil Türkiye A.Ş.) ("**Total**"). The investigation was initiated upon two applications with confidentiality requests and was concluded in March 2020 ("**Decision**") with a record administrative fine totalling TRY 1,502 billion (EUR 265,371.02 million)[1] imposed on BP, Opet, PO and Shell for violation of Article 4 of the Law on the Protection of the Competition ("**Turkish Competition Law**") by way of resale price maintenance ("**RPM**").*

BP, PO, Shell and Opet were fined TRY 213 million (approx. EUR 37 million), TRY 507 million (EUR 89 million), TRY 348 million (EUR 61 million) and TRY 433 million (EUR 76 million) respectively, amounting to 1% of their 2018 annual gross revenue. Within the scope of the investigation, the TCA assessed documents obtained during on-site inspections, compared ceiling prices reported by the relevant undertakings subject to investigation to their dealers and Energy Market Regulation Authority ("EMRA") with the minimum resale prices applied by the dealers.

In relation to BP the TCA concluded that four documents obtained during the investigation supported the RPM claims. By comparing ceiling prices reported by BP to its dealers and EMRA and minimum sale prices applied by the dealers, the TCA concluded that Article 4 of the Turkish Competition Law was violated taking into account that dealers' sale prices were almost equal to BP's recommended price.

As for Opet, no document indicating RPM was found within the scope of the investigation. Nevertheless, taking into consideration the similarities between ceiling prices, which should be recommended, and minimum sale prices applied by its dealers, it was concluded that Article 4 of Turkish

Competition Law was violated.

In investigating PO, the TCA found 2 documents proving RPM and that PO was intervening in its dealers' resale prices. Furthermore, the comparison of ceiling prices reported by PO to its dealers and EMRA and minimum sale prices applied by its dealers, showed that the latter were almost equal to recommended prices set by PO. Hence, the violation of the Turkish Competition Law was confirmed.

In relation to Shell, nine documents obtained during the on-site inspections showed that it directly interfered with its dealers' resale prices. Following the comparison of the prices, just like in relation to the companies above, it was concluded that there was a violation.

Finally, as regards Total, no document that could indicate the RPM was found. The comparison of recommended and resale prices applied by dealers also showed that those were quite different. Therefore, it was concluded that Total did not violate Article 4 of the Turkish Competition Law.

1 At the 2018 exchange rate, i.e. EUR 1 = TRY 5.66

Luxury Automobiles under the TCA's Scrutiny

Following a preliminary inquiry in June 2020, on 1 July 2020 the TCA decided to investigate whether Audi, Porsche, Volkswagen, Mercedes-Benz, and BMW had violated Article 4 of the Turkish Competition Law by means of coordinating, through working groups, with regard to the development and manufacturing of certain car components, environment and security technologies, as well as certificates and standards in the market for passenger cars including vans.

In particular, the TCA concluded that the findings concerning the following claims were significant and sufficient:

- under the scope of the cooperation for security between the companies concerned, the maximum speed at which adaptive cruise control can work and the maximum speed at which roofs can be opened and closed was set;

- within the scope of the cooperation for the environment, the use of a petrol particulate filter was prevented and its roll-out delayed, competition-sensitive information regarding SCR technology (SCR software and dosing strategy including certification and cost elements) was shared, and the size of the AdBlue tank was determined.

The compliance of the practices mentioned above with the Turkish Competition Law are subject to the ongoing assessment.

The Consequences of Joint Price-Setting and Market-Partitioning in the Ready-Mixed Concrete Market

As a result of an investigation carried out within the scope of the claim that ready-mixed concrete companies operating in Yozgat province had violated Article 4 of Turkish Competition Law by practices such as joint price-setting and market paartitioning, on 7 September 2020 eight investigated undertakings were subjected to an administrative fine amounting to 1.2% of their annual gross revenue.

Relevant market. The TCA determined the relevant product market as "the ready-mixed concrete market," in line with the established market definitions determined in the Board's prior decisions. The investigated undertakings were competitors operating in the ready-mixed concrete market within the determined relevant geographical market of Yozgat City Center and Sorgun District.

The information and documents obtained within the scope of the investigation showed that undertakings operating in the production and sales of ready-mixed concrete in Yozgat City Center, namely Irgatoğlu Beton, Tamer Beton, Coşkunlar Beton, and Koç Beton, had established Güven Beton, which would become the only undertaking operating in the marketing and sales of ready-mixed concrete in Yozgat city center. Similarly, it was understood that undertakings operating in Sorgun District, namely Irgatoğlu Beton, Ekiciler Beton, and Üç Yildirim Beton, had established Sorgun Emek Beton for the same purpose.

Anticompetitive practices. Within the scope of the investigation and documents seized during the on-the-spot inspections, it was found that the undertakings operating in Yozgat City Center and Sorgun District (**i**) had been exchanging commercially sensitive information with regard to the dates of sales of ready mixed concrete, customer names, quantities, types of ready

mixed concrete sold, and prices via their reseller Güven Beton and Sorgun Emek Beton respectively; **(ii)** collectively had determined conditions such as the sale price, quantity, payment options, and terms of payment, each of which had been expected to be freely determined by the market; and (**iii**) had allocated market regions. In addition, pursuant to the information kept up to date by Sorgun Emek Beton and Güven Beton and shared with all undertakings, it was evaluated that the provisions of the agreement had been monitored and derogating undertakings had been sanctioned.

Individual exemption. The TCA also evaluated whether the conduct of the investigated undertakings could be granted an individual exemption as per Article 5 of the Turkish Competition Law and concluded that the investigated conduct could not benefit from such exemption as the agreements had been in favor of the investigated undertakings only and to the detriment of consumers.
In light of its evaluations carried out within the scope of the investigation, the TCA decided to impose administrative fines on 8 undertakings, namely Coşkunlar, Irgatoğlu, Sorgun Emek, Tamek, Taş, Üç Yıldırım, Yozgat Güven, and Yozgat Koç amounting to 1.2% of their annual gross revenue.

No "Signaling" in the Traffic Signaling Systems Tenders

As a result of an investigation carried out by the TCA to determine whether undertakings operating in the traffic signaling sector violated Article 4 of Turkish Competition Law by submitting colluding bids in tenders, on 25 August 2020 nine undertakings were sanctioned to administrative fines ranging from 2% to 3% of their respective annual gross revenue.

Signaling systems are products developed and used for the safe and orderly continuation of traffic on railways, roads, and airline or sea routes. Highway safety systems that are important in terms of the investigation at hand are sets of systems which (**i**) allow passengers or drivers using the road to travel smoothly and safely on the road, (**ii**) regulate or guide traffic, and (**iii**) in case of an accident, minimize damages and reduce the loss of life as far as possible. In line with the TCA's precedents on this sector, the relevant product market was determined as "traffic signaling systems" and "Systems with LED."

Not only undertakings that produce traffic signaling products, but also those that are not manufacturers can participate in tenders opened by public administrations. The production of traffic signaling systems is carried out by a small number of undertakings in Turkey. As stated, the undertakings that are not manufacturers of traffic signaling systems also operate in this market since such undertakings can obtain these products from the manufacturers prior to or in consequence of tenders. Therefore, it is seen that some undertakings are both a customer and a competitor of another undertaking in a tender.

Within the scope of its investigation, the TCA found that Mosaş/Rayennur, AAB, NÇT, Buharalılar, Tandem, Asya Trafik, İshakoğullari, and Tankes were in collusion for certain tenders. Matrisled, another investigated undertaking, was determined to have been in contact with Tandem, but it was evaluated that the relevant communications may have originated from a purchase relationship. As there was no other incriminating evidence against Matrisled, it was concluded that it had not violated Article 4 of the Turkish Competition Law.

In light of all these evaluations, the TCA found that Mosaş, Rayennur, NÇT, AAB, Buharalılar, Ishakoğulları, Tandem, Tankes, and Asya Trafik had submitted colluding bids tenders, therefore violating Article 4 of the Competition Law, which resulted in administrative fines ranging from 2% to 3% of their respective annual gross revenue.

Online Sale Restrictions and More (Baymak Case)

*On 21 August 2020 the TCA published its reasoned decision regarding the fine levied against Baymak Makina San. and Tic. A.Ş. ("**Baymak**") for its vertical practices and agreements. Baymak manufactures, exports, and imports products in the categories of heating, cooling, water heaters, water technology, and renewable energy.*

The TCA examined whether Baymak had violated Article 4 of the Turkish Competition Law via the following practices:

a. Non-Compete Obligation Imposed for an Indefinite Period: It was evaluated that the Agreements between Baymak and its authorised dealers ("Agreements") signed for an indefinite period, containing non-competition obligations and the duration of the five years in terms of the agreement period, would not cause a foreclosure effect in the market; therefore, the negative effects of the non-compete obligation in the Agreements would be limited on the market.

b. Determination of the Resale Price of the Dealers: Baymak intervened in the prices of its dealers by actively controlling its sales prices and thus competition in the market had been restricted due to decreasing intra-brand competition.

c. Preventing Dealers from Making Online Sales: Although there was no provision regarding the restriction of online sales in the Agreements, it was determined from the e-mail correspondences obtained during the on-the-spot inspections that Baymak restricts the distributor dealers from making online sales via their own web sites or third party platforms, regardless of end-user or sub-dealer/retail dealer. The TCA also stated that the products sold and marketed by Baymak through its dealers cannot benefit from the individual exemption since a justifiable reason cannot be put forward for the restriction of the online sales of these products.

Therefore, it was concluded that Baymak's practices constituted a violation of Article 4 of the Turkish Competition Law. Furthermore, the Agreements did not meet the conditions stipulated in the Block Exemption Communiqué on Vertical AgreementsNo. 2002/2, therefore they could not benefit from the block exemption.

Finally, the Agreements or said practices could not benefit from the individual exemption either since they did not meet the condition set out in Article 5(1)/d of the Turkish Competition Law. The stated efficiencies also could be achieved without the restrictions regarding the determination of the resale price, the restriction of the online sales of the dealers, and the non-competition obligation for an indefinite period. The said provisions in the Agreements or said practices restrict competition more than necessary to achieve the goals.
Ultimately, the TCA decided that Baymak violated Article 4 of the Turkish Competition Law through its vertical agreements and practices and thus imposed an administrative monetary fine of TRY 26,813,704.10.

Sanctions for False and Misleading Information and Gun-Jumping: Be Careful When Calculating Turnovers

*On 14 July 2020 the TCA published its reasoned decision concerning the acquisition of sole control of Johnson Controls International's ("**JCI**") power solutions business unit by Brookfield Asset Management Inc. ("**Brookfield**"). Although the transaction had been authorized by the TCA, the TCA decided to impose two separate administrative fines on Brookfield on the grounds that (i) the concerned acquisition had been realized without the prior authorization of the TCA and (ii) the notifying party had provided false and misleading information regarding Brookfield's turnover.*

Assessments Made with Respect to the Authorization of the Transaction. The TCA first examined the nature of the transaction within the scope of Turkish Competition Law. The transaction was related to the acquisition of 70% of the shares of the power solutions business unit (which had been controlled solely by JCI) by Brookfield. Ultimately, the TCA found that the transaction at issue would not create or strengthen a dominant position that could result in the significant lessening of competition and decided to authorize the acquisition.

Assessments Made within the Scope of Gun-Jumping. The transaction was notified to the TCA on 9 October 2019, after the transaction closing date of 30 April 2019. Therefore, the TCA decided to impose an administrative fine on Brookfield, equal to 0.1% of the turnover generated by Brookfield in 2018 on the grounds that the concerned transaction which was subject to authorization had been realized without the prior authorization of the TCA.

Assessments made with Respect to Providing False or Misleading Information. In calculating the administrative fine due to gun-jumping, the TCA requested additional information regarding Brookfield's turnover. It was seen in the transaction at hand as well as in the market determinations in the case was a transaction concerning the acquisition of sole control on JC Autobattarie, Brookfield had submitted its turnover information without the turnover generated by Graftech (which was controlled by Brookfield) in 2018. Therefore, the TCA's decision, dated 22 November 2019 and numbered 19-41/679-293, had been based on false and missing information. Even though the determination as to whether the transaction was subject to the TCA's authorization as well as the relevant market determinations in the case was not affected due to the lack of information, the TCA nevertheless decided to impose an administrative fine since the information provided by Brookfield had been false and misleading.

Eye Drug Clash Turns Costly for Roche and Novartis in France

*On 9 September 2020 the Autorité de la concurrence (**"French Authority"**) imposed an administrative monetary fine totaling EUR 444 million on Novartis group (Novartis Pharma SAS, Novartis Groupe France SA, and Novartis AG, "Novartis") and Roche group (Roche SAS, Genentech Inc. et Roche Holding AG, "Roche") for collectively abusing their dominant position by sustaining the sales of Lucentis for AMD treatment to the detriment of a competitive medicinal product namely, Avastin, 30 times cheaper and thus violating Article 102 of the Treaty on the Functioning of the EU (**"TFEU"**).*

Lucentis is a drug used for the treatment of age-related macular degeneration ("**AMD**"). It was developed by Roche's Genentech division, and subsequently co-commercialized by Novartis and Roche. However, thereafter, Genentech also developed Avastin, a cancer drug that can also be used off-label to treat AMD. In other words, although Avastin had been approved to treat a form of cancer, it also could be used in an unapproved way to treat AMD. Taking into consideration that the estimated cost per injection of Lucentis's is EUR 1161, while that of Avastin is EUR 35, there was a great economic incentive to choose the off-label use of Avastin over the approved use of Lucentis.

This being the case, Novartis conducted an organized campaign towards ophthalmologists as well as public authorities to discredit the use of Avastin by (**i**) presenting out of context scientific studies that, (**ii**) stating that there were systematic reactions related to Avastin, and (**iii**) claiming that healthcare

professionals who prescribed Avastin off-label risked being held responsible under civil and criminal law to preserve the strong position of Lucentis and its high price. Thus, Novartis and Roche leveraged their collective dominance by exaggerating the risks of intravitreal use of Avastin to disincentivize the substitution of Lucentis while generating higher returns due to the price difference between the said drugs.

The French Authority concluded that Novartis and Roche, with the help of Genentech, had abused their collective dominant position to direct patients with an eye disorder to a more expensive medicine. Consequently, the French Authority imposed an administrative monetary fine amounting to EUR 385,103,250 on Novartis and EUR 59,748.26 on Roche for restricting competition within the meaning of Article 102 of the TFEU.

German Court Rejects Nokia/Daimler FRAND Argument

*On 18 August 2020 the Mannheim Regional Court (**"German Court"**) has backed Nokia's patent infringement claim against Daimler, but rejected arguments concerning a breach of fair, reasonable, and non-discriminatory (**"FRAND"**) terms in a standard essential patent (**"SEP"**) suit concerning technology for connected cars.*

In March 2019, Daimler complained to the EC over Nokia abusing its dominance over SEP licensing for 2G, 3G, and 4G cellular technology for connected vehicles. In return, Nokia filed 10 lawsuits against Daimler in regional courts in Munich, Mannheim, and Düsseldorf alleging infringement of connected car SEPs.

In its ruling, the German Court stated that the patent in suit EP 2 981 103 was infringed by Daimler's vehicles. The FRAND objection does not apply since, in the opinion of the German Court, Daimler and the interveners in the case were never willing to reach a licence agreement on FRAND terms. In the German Court's view, neither Daimler nor the interveners were seriously prepared or ready to conclude a license agreement with Nokia on FRAND terms

Deciding on the Future of the Vertical Block Exemption Regulation in the EU

*On 8 September 2020 the European Commission ("**EC**") published a Staff Working Document that examines whether the Vertical Block Exemption Regulation **("VBER")** meets the changing market requirements and whether it should be allowed to expire in May 2022, be renewed, or revised.*

The Staff Working Document reveals that the VBER and the Vertical Guidelines 2010 remain useful tools that facilitate the self-assessment of vertical agreements and reduce compliance costs for businesses entering into such agreements. The document also demonstrates that the market has significantly changed at the same time due to the increase of online sales and new market players such as online platforms that (**i**) affect distribution models with an increase of direct sales as well as selective distribution systems and (**ii**) introduce new types of vertical restrictions such as restrictions on sales through online marketplaces and restrictions on online advertising or retail parity clauses.

In fact, the EC noted that there are indeed provisions that require further clarification (*i.e.* agency agreements, parity clauses, restrictions on the use of price comparison websites, etc.) and that room exists for further cost reduction through the simplification of the said rules to ensure a uniform assessment framework for national competition authorities and national courts.

Therefore, EC, before the expiration of the VBER by 31 May 2022, has targeted to revise the rules that necessitate further clarification as well as an amendment to improve legal certainty. The inception impact assessment is available to the public for comments. Additionally, the draft regulation will be submitted to a public consultation in order to receive the stakeholders' comments.

Maximum Fine Possible for Acting/Violating Knowingly in Nord Stream 2 Transaction in Poland (Gazprom et al.)

*The Polish Office of Competition and Consumer Protection (**"UOKiK"**) imposed a fine of over PLN 29 billion (approx. €6.4 billion) on Gazprom, and over PLN 234 million (approx. €51.5 million) on 5 remaining companies (Engie Energy, Uniper, OMV, Shell and Wintershall) participating in the construction of the gas pipeline due to the lack of approval for the Nord Stream 2 transaction. The undertakings concerned are obliged to terminate the agreements for financing Nord Stream 2.*

In 2015 UOKiK received an application filed by six companies for approval to create a joint venture responsible for the construction and operation of Nord Stream 2 gas pipeline. The application was withdrawn following the expressed concerns of UOKiK that the planned transaction could lead to the restriction of competition.

Shortly thereafter, the same parties to the withdrawn transaction had concluded a number of agreements concerning the financing of the gas pipeline and also a number of other authorizations. UOKiK assessed that the same undertakings failed to receive an approval based on competition protection regulations later became parties to these financing agreements in similar terms and conditions which will allow them to take over the shares at a later stage of the project and that the project was not solely of a financial nature. It was also stated that a joint venture being financed by the actors of the gas market and not by a financial institution proves that the mentioned undertakings share the same economic interest.

In light of the foregoing assessment, UOKiK concluded that the companies had never given up their intention to continue with the concentration scheme, but completed the project in a different form and therefore, legal provisions and competition rules were violated. Such a violation may introduce territorial restrictions affecting the deliveries of natural gas and consequently would harm not only competition on the market, but the consumers alike.

In conclusion, the companies financing the gas pipeline have been fined with the highest financial sanctions available (10 per cent of their annual turnover) taking into account that the companies were acting knowingly. Additionally, parties involved were ordered to terminate the agreements concluded to finance Nord Stream 2 in purpose of reinstating the state of competition from prior to the concentration.

In August 2020 Gazprom was also fined EUR 48 million for not cooperating with the UOKiK in the investigation concerning the construction of the Nord Stream 2 gas pipeline. It failed to provide the necessary documents upon the request of UOKiK.

Confidential Information in Private Enforcement Cases: To Be or Not to Be (Disclosed)

*Following a public consultation initiated in July 2019, on 20 July 2020 the EC introduced a Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (**"Communication"**). The guidance is of interest to national courts outside of the EU as it sets the basic principles to which the courts shall adhere in dealing with confidential information/ evidence in private enforcement cases in particular.*

As part of the private enforcement mechanism, the courts may receive requests for disclosure of certain confidential information/evidence. In ordering the disclosure of such evidence, the courts shall (i) consider the conditions for the disclosure of such information, and (ii) ensure effective measures to protect such confidential information. Considering that national laws across the EU member states differ as regards access to and the protection of confidential information, the EC via the adoption of the Communication aims at providing guidance to the national courts in selecting effective protective measures (particularly those listed in the Damages Directive).

Conditions for the disclosure of confidential information/ evidence:

- the claim for damages shall be plausible and the disclosure request concerns relevant evidence and is proportionate. Here the scope and cost of disclosure shall be considered:
- specified items of evidence or relevant categories of evidence shall be identified 'as precisely and as narrowly as possible' based on reasonably available facts,
- the request has been formulated specifically with regard to the nature, subject matter, or contents of documents submitted to a competition authority or held in the file thereof, and
- leniency statements and settlement submissions can never be disclosed.

Among the *protective measures* are:

- redaction (ordering the disclosing party to edit copies of documents by removing the confidential information);
- confidentiality rings (making confidential information available only to defined categories of individuals);
- external advisers (limiting access to the confidentiality ring to advisers that are not involved in the decision-making processes of the companies they represent);
- experts (appointing a third party individual with expertise in a specific field to access certain confidential information concerned by a disclosure request), etc.

The Communication is not binding for national courts but simply serves as "a source of inspiration and guidance" for them.

Turkish Cement in Ukraine: Dumped or Not?

*Upon the complaint of several Ukrainian cement producers ("**Complainants**"), on 2 September 2020 the Ukrainian Interdepartmental Commission on International Trade ("**Commission**") decided to initiate an anti-dumping investigation concerning imports of cement clinker, white cement, and portland cements ("**imports concerned**") originating in Turkey. While the Ukrainian Ministry of Economy is conducting the investigation, the Commission will determine whether the imports concerned are being dumped and causing injury to the domestic industry.*

According to the initiation notice, the Complainants have provided sufficient evidence of the fact that the imports concerned may have been dumped and that those imports may have caused injury to the domestic producers. The period of investigation has been set as 2017 to 2019 and predictions for 2020. The Commission considered that (**i**) the imports concerned increased between 2017 and 2019 by 809% in absolute terms and by 837% in relative terms, and (**ii**) the imports concerned are expected to increase in 2020 by 1,815% in absolute terms and by 2,547% in relative terms. Additionally, it has been asserted that the Complainants have been forced to decrease their selling prices despite increasing costs on the grounds that the prices of the dumped imports were been below the prices of the Complainants during the period of investigation and that imports had significantly increased in quantity during the stated period.

All interested parties wishing to participate in the investigation were invited to register within 30 days of the publication of the notice (i.e., by 5 October 2020); while within 60 days (i.e., by 4 November 2020) the participating companies could submit commentaries on the initiation of the investigation or the complaint.

A Call for More Transparency on Trade-Related Measures by WTO Members

On 24 July 2020 the EU, supported by ten other WTO members, announced a call for more transparency on trade-related measures introduced around the world in response to the COVID-19 pandemic with a view to limiting obstacles to trade and supporting economic recovery.

The EU, together with Australia, Canada, Chile, Japan, Mexico, New Zealand, Norway, Singapore, the Republic of Korea, and Switzerland discussed at the WTO Trade Policy Review Body and co-signed the communication undertaking to:

- notify all measures as early as possible,
- reduce the number and duration of new trade measures, and
- contribute to the monitoring of trade measures carried out by the WTO secretariat.

Other WTO members are invited to implement the same level of transparency. The WTO Secretariat is encouraged to intensify the frequency of reporting on trade-related measures and provide technical assistance to those members that may need support to comply with such transparency obligations during COVID-19.

Lesser Duty Rule in Practice in Turkey: Baby Products from Thailand and China

*On 18 August 2020 the Ministry concluded its anti-dumping investigation concerning imports of a wide range of products used for the nutrition and care of babies and to meet the needs of mothers during the breastfeeding period ("**concerned products**") originating in Thailand and China. Consequently, the Ministry decided to impose 26% and 12% anti-dumping duties, respectively.*

The investigation was initiated pursuant to a complaint lodged by a domestic producer alleging that the imports of the concerned products originating in Thailand and China were being exported to Turkey at less than their normal value, thereby causing material injury to the relevant Turkish domestic industry. In the absence of cooperation of the exporters/producers of the concerned products originating in Thailand and China, the Ministry made its determinations in the light of the facts available. Indeed, the Ministry calculated the dumping margin of the imports originating in Thailand and China were 33.11% and 23.67%, respectively.

The Ministry determined that (**i**) the imports of the concerned products were causing price undercutting and price depression, and (**ii**) the domestic industry's economic indices such as production, domestic sales, productivity, and capacity utilization rate demonstrated that the domestic industry was suffering from a material injury caused by the imports. The Ministry also adopted the lesser duty rule and thus decided to impose anti-dumping duties less than the dumping margins.

Adjusted Safeguards Defending the EU Steel Industry

As of 1 July 2020, the EC's safeguard package (EC Implementing Regulation No. 2020/894) in relation to imports of steel products is in place. The legal means are aimed at defending the EU steel industry in the current difficult times.

The EC reviewed and published its Implementing Regulation imposing definitive safeguard measures against the import of certain steel products, taking into account the circumstances caused by COVID-19. The review process is part of the safeguard policy initially introduced by the EC in July 2018 in order to prevent economic damage to EU steel producers. The adjustments, effective as of 1 July 2020, result from the second review initiated in February 2020.

The main changes are the following:

- to ensure a more stable flow of imports, country-specific quotas will be available on a quarterly as opposed to an annual basis,
- a new country-specific quota will be introduced for hot-rolled flat steel, and
- to ensure access to the EU market for smaller exporting countries, access to quota for countries that have previously exhausted their country-specific quota will be allowed only if there is a respective demand.

The EC will be monitoring carefully the steel market and import flows to ensure the effectiveness of the measures.

Turkey Increased Customs Duties on Agricultural Products

Through two Presidential Decrees published on 5 August 2020, Turkey modified customs duties and imposed new additional customs duties on the imports of certain agricultural products.

Through Presidential Decree No. 2818 ("**Decree No. 2818**"), the customs duties of certain agricultural products were modified. Decree No. 2818 came into force on 20 August 2020 and foresees that the customs duties on the imports of:

- garlic products are modified with rates ranging between 2% to 9.7%,
- hazelnut products are modified by 4%,
- banana products are modified with rates ranging between 7% to 72.9%,
- green tea products are modified by 7%,
- sunflower products are modified with rates ranging between 3% to 13.5%.

Moreover, through Presidential Decree No. 2819 ("**Decree No. 2819"**), which also came into force as of 20 August 2020, modified customs duties on imports of a wide-array of products such as yeast, chewing gum, caramel, throat drops, bread, corn flakes, pasta, and liquorice originating in the least developed countries, countries that benefit from special incentive schemes, developing countries, and other countries ranging between 4.3% to 20%.

The European Union, Turkey's Free Trade Agreement partners, Malaysia, Singapore, and Kosovo are exempted from the scope of Decree No. 2819, while Israel and Chile are partially exempted depending on the product.

Data Breach Notifications in Action

*On 19 August 2020 the Turkish Data Protection Authority ("**Turkish DPA**") received data breach notifications from the career platform Kariyer.net Elektronik Yayıncılık ve İletişim Hiz. A.Ş. ("**Kariyet.net**"), the food company Barilla Gıda A.Ş. ("**Barilla**"), the women's clothing company Penti Giyim Sanayi ve Ticaret A.Ş. ("**Penti**") and its subsidiaries, and a pharmacist, Rezzan Günday (Şimşek Pharmacy). All of them informed the DPA about unauthorized access to their systems. Such notification and announcement about data breaches are obligatory under the Turkish Personal Data Protection Law.*

Kariyer.net sent a data breach notification to the DPA in line with Article 12/5 of the Turkish Personal Data Protection Law that occurred on 10 August 2020 and spotted on 12 August 2020. It is noted that the unauthorized access to the systems had been alarmed by an employee, upon notification of one of the providers of Kariyer.net, stating that the information of 50,000 members had been uploaded to another website. After the inspection, the DPA was informed that e-mail addresses, user passwords, names, birth dates, phone numbers, profile pictures, and related location information of 40,955 people had been affected and data subjects can request information via stated channels.

Barilla sent a data breach notification to the DPA regarding an event that occurred on 12 August 2020. The breach had been caused by a cyber-attack, planting ransomware which blocks access to related files and disks, followed by a data extract amounting to 4 GB. The DPA had been informed that the data content and affected data subjects and groups have not been spotted yet.

Penti and its subsidiaries sent a data breach notification to the DPA regarding a ransomware attack that had occurred and was spotted on 31 July 2020. After the inspection, the Authority was informed that the identity, contact, and customer transaction information of 46,026 users, employees, customers, and potential customers of Penti and its subsidiaries had been affected and the inspections are continuing.

Rezzan Günday (Şimşek Pharmacy) sent a data breach notification to the DPA regarding an event that had occurred at least since October 2019 and been spotted on 11 August 2020. It is noted that the breach occurred by the actions of a former employee, gathering the national ID numbers of the patients via methods such as taking notes or photos and using "Medula System" over the "Repeat Prescriptions" application to supply drugs from other pharmacies. The DPA had been informed that the breach had been spotted upon inspections made after an incident of a patient who could not reach his/her drugs, and the statements of patients. The DPA had been informed that the sensitive information (disease information, reports, prescriptions), national ID numbers, phone numbers, patient status, and institution names (Social Security Institution etc.) of patients had been affected and the exact number is not yet identified. It is stated that the Public Prosecutors' Office has been informed.

Fulfilment of the Obligation to Inform: Clarification by the Turkish DPA

In June 2020 the Turkish DPA made a public announcement bringing more clarity to the obligation of data controllers to inform that is envisaged by the Turkish Data Protection Law and the Communiqué on the Principles and Procedures to be Followed in Fulfilment of the Obligation to Inform.

Obligation to inform is the responsibility of the data controllers; it is also a right of the individuals/data subjects whose personal information is being processed. It must be fulfilled irrespective of whether the data subject has granted explicit consent for processing the data or other personal data processing conditions.

The Turkish DPA has identified the following common violations of the Turkish Data Protection Law based on the evaluation of information and complaints:

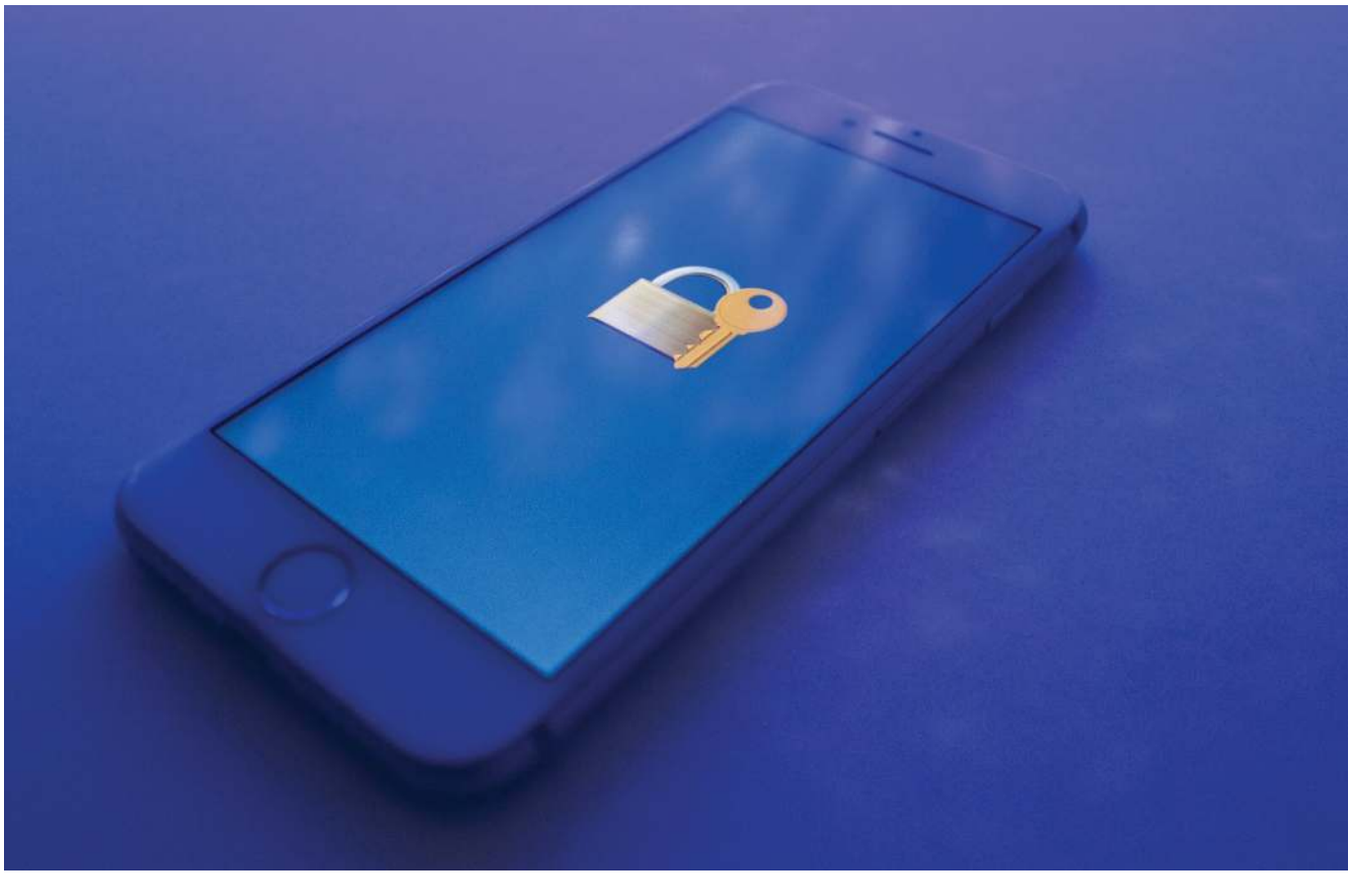
- The informing by the data controller is neglected or done at a later stage;
- The purposes of personal data processing are not limited, specific, or explicit to the processing activity – the statement that personal data may be used for other purposes in the future are included;
- The "Legal reason" and "Purpose of processing" are used as synonyms;
- Including unclear, complicated, ambiguous language in the texts used for informing data subjects;
- Naming informing texts "privacy policies" or "data processing policies" which are similar to the general data processing documents;
- Informing texts are not easily assessable to the data subjects; and
- Explicit consent for data processing and informing are presented together under the same title.

The Turkish DPA emphasizes that data controllers shall pay more attention to the following issues while implementing their obligation to inform:

- The burden of proof of the fulfillment of the obligation to inform belongs to the data controller;
- The obligation to inform shall be performed by the data control during the obtaining of the personal data from the data subject;
- The message shall include the identity of the data controller, the purpose of the data processing, to whom the data may be transferred and for which purpose, the method and legal reasons for the collection of personal data, and the rights of the data subject under the Turkish Data Protection Law;
- The data to be disclosed during the performance of the obligation to inform shall be specific, clear, legitimate, and limited to the purpose of the processing activity.
- Avoid using statements such as "data may be processed for other purposes that are likely to come to the agenda in the future";
- "Processing purpose" and "legal reasons" shall be included as separate elements in the message while performing the obligation to inform; and

Privacy policies and general data processing documents for the data controller shall not be used as informing texts.

Cross-Border Data Transfers: Turkey in Difficulty Determining Countries with Adequate Protection



*In July 2020 the Turkish DPA published its decision regarding data transfers abroad, resulting in an administrative fine of TRY 900, 000, for non-compliance with Article 9 of Personal Data Protection Law No. 6698 ("**KVKK**"). The main takeaway from the decision is that reliance on the Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data ("**Convention 108**") is insufficient for the determination of countries with adequate protection regarding cross-border data transfers.*

Following a complaint filed by a data subject against a data controller, a company operating in the automotive industry, concerning cross-border data transfers with regards to marketing activities, the Turkish DPA evaluated both the complaint and the data controller's response within the response. The company stated that, in sum, in compliance with the legal grounds stated in Article 9 of the KVKK:

- explicit consent of the data subjects for data transfers abroad had been obtained;
- the usage of the web-based software used by the company for the transfer of the personal data abroad had been necessary for legitimate interests;
- customer information, marketing, and contact information had been transferred excluding sensitive information;
- from the point of view that Convention 108, to which Turkey is also a party, is an international agreement, it shall be taken into account as the discussed subject was related to a fundamental right;
- the assessment of a country with adequate protection may only be subject to debate for a non-signatory country; and
- all data transfer had been conducted with all technical and administrative measures.

As the result of the evaluation, the Turkish DPA stated that the transfer of the personal data abroad is governed in Article 9 of the KVKK, and the alternative methods for cross-border transfers stated in the related article were mentioned in Article 5/2 and 6/3, underlining the need for the existence of adequate protection in the foreign country to which the data to be transferred or written commitment, followed by the permission of Turkish DPA, in the event when the country lacks protection.

Considering the articles stated above, it was decided that being a party to Convention 108 on its own is not sufficient for determining the countries with an adequate level of protection. In addition, the Turkish DPA had not yet published a list of the countries with adequate protection, and only being a party would not automatically mean that the other parties are to be deemed countries with adequate protection. It was also stated that Convention 108 does not prevent countries from establishing domestic regulations prohibiting data transfers in certain situations; thus, the transfer abroad relying on Convention 108 was not found to be in accordance with the stated provisions of Article 9 of the KVKK. In addition, the Turkish DPA decided the data controller was to destroy the personal data that had been transferred unlawfully and to notify the Turkish DPA regarding the execution. In the end, the data controller company was imposed a fine of TRY 900,000 (approx. EUR 142,630) for failing to comply with the obligation "to prevent the unlawful processing of personal data."

Unfair Price Assessment Board in Fight for Fair Prices in Turkey

*The Unfair Price Assessment Board (the **"Board"**) that was established following introduction of Law No. 7244 on Reducing the Effects of the Novel Coronavirus (**COVID-19**) Outbreak on Economic and Social Life and Amendments to Certain Acts ("Act No. 7244") in May 2020, has been quite active in addressing complaints regarding the fair prices in various sectors.*

Out of 1251 complaints submitted to the Board, 60 undertakings have been subjected to administrative fines totaling TRY 3.1 million. Regarding the sector of activity of the companies subject to such administrative fines, 25 are related to wholesale vegetables and fruit, 19 - to staple food products, 5 - to mask fabrics, 4 - to surgical masks, 4 - to bread maker, 2 - to hair clipper and 1 - to disinfectant.

The examination and defense process in relation to 519 complaint applications continues.

Background information. The scope of the Board's authority is outlined in Article 1 of the Regulation on Unfair Price Assessment Board (**"Regulation"**) as tackling exorbitant prices and stockpiling activities, during state of emergencies, disasters, economic fluctuations, and other emergencies.

As per article 3 of the Regulation, the Board is merely authorized to supervise and tackle the exorbitant price increases in product and services that are required for basic needs of the public. The Board is entitled to:

- take the necessary measures to protect the market balance and consumers against exorbitant price increases and stockpiling activities and to ensure the implementation of these measures,
- inspect and examine exorbitant price increases and stockpiling,
- impose administrative fines on the manufacturers, suppliers and undertakings that operate in retail level which are found to be in violation of the rules that prohibit exorbitant pricing and stockpiling activities,
- determine the principles and rules regarding exorbitant price increases and stock piling activities, and
- perform other duties assigned by the Ministry of Trade concerning exorbitant price increases and stockpiling activities.

The Regulation also brings a new system named as "system for complaints", i.e. an electronic system to be created by the Ministry of Trade for the purpose of receiving complaints from applicants, who can be either legal entities or natural persons, about stockpiling activities and exorbitant price increases of manufacturers, suppliers and undertakings that operate in the retail level.

Absence of a lawsuit related to the matter is a precondition for making an application via the system of complaints.

The Board's inspections may be conducted upon complaints or on the Board's own initiative. The manufacturers, suppliers and undertakings that operate in retail level shall be granted a period for submitting their pleas, which shall commence from the date of the inspection conducted and be not less than ten days; it may be extended for up to ten days once only.

Decisions taken by the Board shall be implemented by the Ministry of Trade. The Ministry may announce the decisions of the Board in order to inform and enlighten the public and to protect the economic interests of the parties in the relevant markets.

The administrative fines to be imposed by the Board on the relevant undertakings are set at the following levels:

- in case of exorbitant pricing - between TRY 10,000 and TRY 100,000 and
- if it is determined that any of the market participants has been engaged in actions that cause scarcity in market, distort the market balance and free competition or prevent consumers from accessing goods - between TRY 50,000 and TRY 500,000.

In setting up the amount of fine the Board shall take into account the severity of the unlawful conduct and the context of unfairness; the type, size of the relevant undertaking and the sector it operates in; the benefit that relevant undertaking gained from the exorbitant price increase or stockpiling, and previous violations/fines.

FROM ACTECON

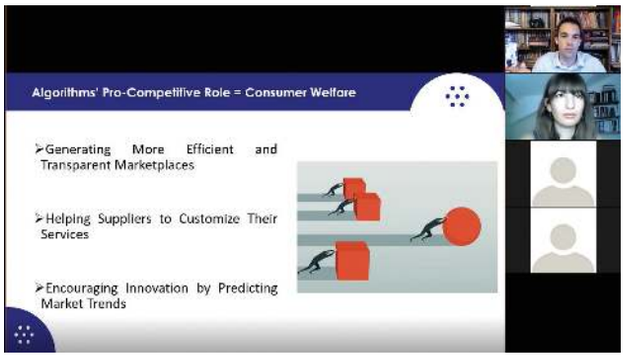




New office

ACTECON team has moved to a new (no less beautiful) office at
Çamlıca Köşkü - Tekkeci Sokak
No:3-5 Arnavutköy - Beşiktaş
34345 İstanbul – Turkey

EVENTS

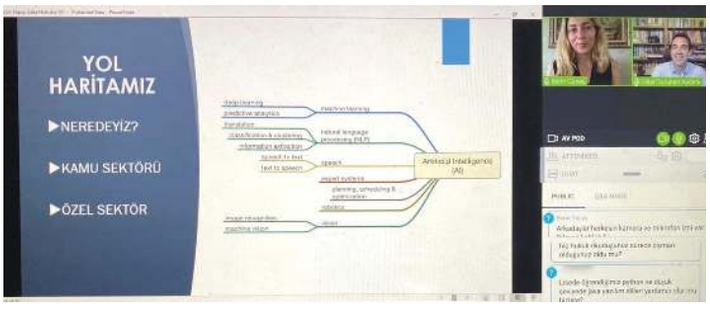


Evaluating Algorithms' Role Within the Scope of Competition Law

Our associate Celal Duruhan AYDINLI, together with our trainee Damla ÇELEN made a presentation on 21.08.2020, titled "*Evaluating Algorithms' Role Within the Scope of Competition Law*" *in Legaltech/Fintech Group* seminar series organized with the joint efforts of ELSA Ankara, ELSA Pisa and ELSA Heidelberg.

Artifical Intelligence Law 101

Our associate Celal Duruhan AYDINLI made a presentation titled "Artifical Intelligence Law 101" in ELSA Turkey Law Academy event organized by ELSA Turkey.

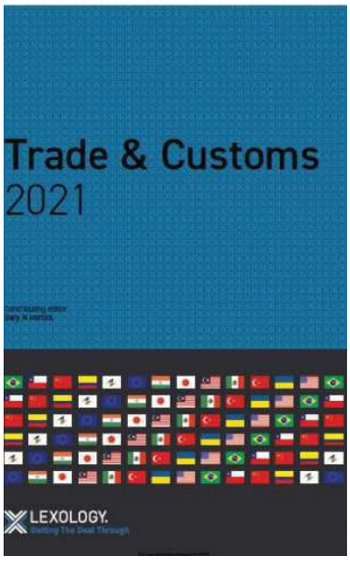


Istanbul Forensic Informatics Laboratory Project Training Program

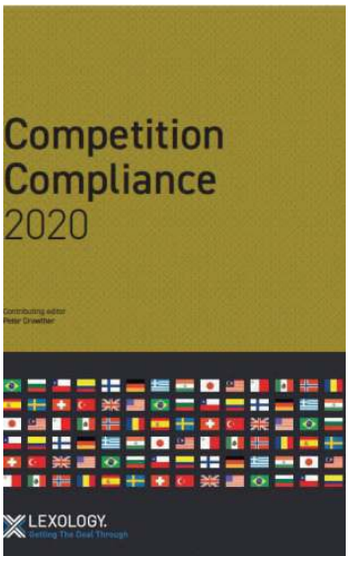
On 17th of August, our managing partner Bahadır BALKI, together with our associate Celal Duruhan AYDINLI conducted a concentrated training module titled, Protection of Personal Data in Light of Recent Developments in Istanbul Forensic Informatics Laboratory Project training program.

ACTECON's latest publications (https://www.actecon.com/en/news-articles)

Trade & Customs 2021- Turkey Chapter Lexology



Competition Compliance 2020- Turkey Chapter – Lexology



Google Removes Display of Its Shopping Unit in Turkey

Google Shopping

ACTECON

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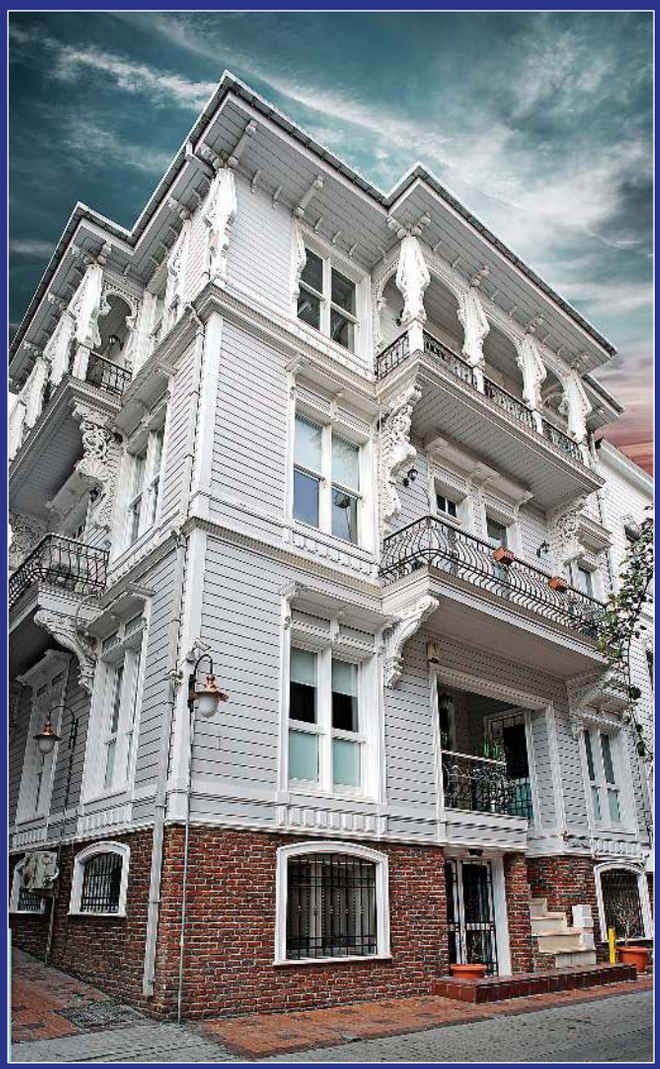

ACTECON is a corporately-governed firm combining competition law, international trade remedies and regulatory affairs. We offer effective strategies from law & economics perspective, ensuring that strategic business objectives, practices, and economic activities comply with competition law, international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