

## Competition Authority Imposes Administrative Fine to Banks Operating in Turkey for Failure to Provide Information on Parent Companies Located Abroad

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### Introduction

As part of a preliminary investigation, the Competition Authority (TCA) requested information on trader chat room correspondences of financial institutions operating in Turkey and their parent companies located in the US and the UK. Some of the undertakings voiced some concerns regarding this request and consequently refrained from providing the requested information. The TCA, with its decision numbered 20-32/397-179 and dated 2 July 2020, imposed an administrative fine on these undertakings for failing to respond to information requests in due time.

### TCA's Requests for Information

On 17 January 2020, the TCA initiated a preliminary investigation, which is still on-going as of the date of this article, against a number of financial institutions operating in Turkey. The scope of the preliminary investigation included the undertakings' deposit, loan, foreign currency, bond, bill, stock, and brokerage services (the **Pre-investigation**). As part of the Pre-Investigation, the TCA performed on-site inspections on the premises of the investigated undertakings and served these undertakings two requests for information (the **RFIs**). The RFIs included, among others, a request for the Bloomberg and Reuters chat room correspondences of the employees of the investigated undertakings, as well as the traders employed by their parent companies located in the US and the UK. The scope of the RFI was limited to the top ten traders with the largest TRY quoted transaction volumes and for a period between 01.01.2018 – 17.01.2020.

### Undertakings' Responses

Following the RFIs, the majority of the investigated undertakings provided the requested information within the determined time limit. Some of the undertakings also requested time extension in order to obtain requested documents and presented them in a way that would not violate the relevant jurisdiction's laws and regulations (i.e. through redactions/anonymizations). The extension request of the undertakings found reasonable and approved by the TCA.

On the other hand, in response to the TCA's RFIs, five of the investigated undertakings refrained from providing the requested information on the grounds that:

- the UK and USA based traders' chat room conversations are not possessed by the Turkish entities but their parents and thus, they do not have access to such information;
- the RFIs should have been duly served to the relevant parent company in relation to the information stored in the parent company's servers located abroad;
- The conversations relating to FX trading activities do not effect Turkish markets, thus exceeds TCA's authority;

- The undertakings' obligations arising from the applicable legislation, especially from the General Data Protection Regulation (the **GDPR**), prevent them from sharing the requested information.

### TCA's Assessment on Notification Procedure

The TCA evaluated the undertakings' objections regarding the notifications made to the subsidiaries for the information held by the parents from four main perspectives: (i) the effect doctrine under Turkish competition law, (ii) the economic unity concept under Turkish competition law, (iii) the precedents of the TCA and the European Commission and (iv) the relevant provisions of the Turkish Commercial Code regarding the parent companies.

Accordingly, the TCA considered, among others, that:

- With reference to *Syndicated Loans* decision<sup>1</sup> and in line with the economic unity concept, the subsidiaries are under the obligation to produce the information held by its parent companies located abroad, to the extent that the requested information relates to conducts effecting Turkish markets.
- The European Commission's practice also acknowledges that notices can be served to the undertaking's branches or offices within the European Union.
- The European Court held that a notification is properly notified if it reaches the addressee and puts the latter in a position to take cognizance of it.
- The European Commission's note on the OECD meeting dated 30.11.2018 recognize that for undertakings that are not located in the European Union, the European Commission often sends RFI letters to their EU based subsidiaries.
- As per Article 195 and following articles of the Turkish Commercial Code, provisions for group of companies shall apply in case either the parent company or one of its subsidiaries is based in Turkey and accordingly parent company will be deemed as "merchant" within the meaning of the Turkish Commercial Code. Since each merchant is under the obligation to act as a prudent merchant, the subsidiaries receiving the RFIs should have notified their parent company and the parent company should have provided the relevant information to the TCA.

### TCA's Assessment on Possession of the Data

The TCA also refuted the undertaking's argument stating that the requested information are not possessed by them. The TCA purported that in line with the single-entity doctrine, undertakings cannot be released from their obligations by simply indicating that they do not possess the relevant data. The TCA then referred to European Commission's practice where it ruled that as long as the information is requested from an undertaking that falls within the EC's authority, the physical location of the document is of no importance.

### TCA's Assessment on Regulatory Obligations of the Undertakings

As to the undertakings' objections in relation to their regulatory obligations, the TCA acknowledged that the chat room conversations constitute personal data and the undertakings may struggle to find a balance between the TCA's requests and their privacy related obligations arising from the laws of other jurisdictions. In that respect,

<sup>1</sup> Turkish Competition Board's decision numbered 17-39/636-276 and dated 28 November 2017

the TCA considered that as long as the undertakings explain in detail which data are qualified as personal data, which laws will be violated if such data are sent without a redaction, and which data are blacked-out for this purpose, a redaction/anonymization that does not exceed the scope of the personal data can be deemed as appropriate by the TCA.

### TCA's Calculation of Administrative Fine

While the TCA considered parent companies and their subsidiaries as a single entity in terms of notification requirements, it calculated the administrative fines based on the domestic turnovers of the Turkish subsidiaries rather than the consolidated domestic turnovers of their parent companies. The TCA admitted that the domestic turnovers should have been calculated group-wise in accordance with its ordinary practice, which is also in compliance with the single-entity doctrine, but it stressed that there were technical difficulties to calculate the group-wise turnover. Accordingly, the administrative fines were calculated without taking into account the consolidated domestic turnovers of the respective parent companies.

### Conclusion

The decision clarifies the TCA's approach concerning the single-entity doctrine and demonstrates that the TCA considers the presence of a Turkish subsidiary/affiliate sufficient to initiate formal proceedings (including sending information requests) against an undertaking located abroad. The decision also sheds light on the TCA's position regarding data protection and other similar requirements arising from different laws.

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