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Preface to the September 2016 Issue

On July 15th, 2016, a coup attempt took place in Turkey against the government and following this, state of emergency was declared on July 21st, 2016. The opening article of this issue analyzes the on-going state of emergency in Turkey, as well as the authorities granted and actual measures taken by the state during this period.

The data protection section focuses on the exemptions in the Turkey's first Law on Protection of Personal Data, and compares these exemptions to the European Union's Data Protection Directive 95/46/EC also providing solutions in order to prevent authorities from violating constitutional rights.

The corporate law front evaluates share transfer restrictions in joint-stock companies, in addition to the shareholders' right to restrict share transfers.

The competition law front explores the recent judicial and administrative decisions. The 2nd Administrative Court of Ankara set forth an important precedent in the Turkish legal order for weighing the balance between the boundaries of discretionary power of administrative bodies and interest of counterparts that could be negatively impacted as a result of such administrative acts.

Finally, on the white collar irregularities front, this issue delves into the legislative developments in the anti-corruption realm in France and Germany.

This issue of the Legal Insights Quarterly addresses these and several other topical legal and practical developments, all of which we hope will provide useful guidance to our readers.

September 2016

Recent Developments

Legal Analysis on the Impact of the Post-Coup Attempt Dynamics on the Legal Landscape in Turkey

1. Background of the State of Emergency

On July 15th, 2016, a coup attempt took place in Turkey against the government. The attempt was spearheaded by a group within the Turkish Armed Forces that was allegedly organized under a council called the "Peace at Home" (*Yurtta Sulh Konseyi* in Turkish). The aforementioned council attempted to seize control over several main cities in Turkey such as Ankara, Istanbul, and elsewhere, but ultimately failed to gain control over the Turkish government. After the coup attempt in Turkey on July 15th, 2016, the Gülen Movement has been declared a terrorist organization by the Turkish National Security Council.

On July 21st, 2016, Recep Tayyip Erdoğan, the President of the Turkish Republic, declared a three-month state of emergency (*Olağanüstü hal* or shortly *OHAL* in Turkish), which will end on October 21st, 2016 at 01:00 if not extended, in order to introduce extraordinary legal and national security measures. State of emergency decision is published on the Official Gazette of July 22nd, 2016.[1]

According to the news, 1,577 university deans (faculty heads) have resigned upon request of the Council of Higher Education[2], two university rectors and 245 academicians in four universities have been taken into custody[3], and 21,000 teachers who work in the private sector and 21,538 teachers who work in state schools have been suspended.[4] Furthermore, 2,745 public prosecutors and judges (including two higher judicial judges member to the Constitutional Court) have been detained, including five members of the Supreme Board of Judges and Prosecutors ("HSYK") that have been stripped of HSYK membership and 140 members of Supreme Court of Appeals.[5] Twenty-five prosecutors have been appointed to take statements of 2,135 soldiers which are in Silivri (İstanbul) and Sincan (Ankara) penal institutions.[6] Since the coup attempt, more than thirty websites are reported to be blocked by the Telecommunications Communication Presidency ("TIB").[7] On August 3rd, 2016 Recep Tayyip Erdoğan stated that the government will close down TIB.[8]

2. Authorities State of Emergency Grants in General

The "state of emergency" is defined by the Constitution of the Turkish Republic. The most important authority given to the Minister's Council, which meets under leadership of the President, is to issue decrees by the power of law. It is not possible to claim unconstitutionality of these emergency decree laws and the Constitutional Court is not entitled to annul them. To avoid interruptions in the fight against terrorism within the context of the decrees in taking the required measures in the most speedy and effective manner, stay of execution orders cannot be ruled during the state of emergency period. Nevertheless, a stay of execution against such measures can still be ruled once the state of emergency period is over, if the conditions still exist.

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[1]http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2016/07/20160722.htm&main=http://www.resmigazete.gov.tr/eskiler/2016/07/20160722.htm

[2]http://www.yenisafak.com/gundem/tum-dekanlar-istifa-etti-2496985

[3]http://www.sozcu.com.tr/2016/egitim/4-rektor-aciga-alindi-tum-dekanlar-istifa-etti-1322970/ http://www.diken.com.tr/darbe-girisimi-harp-akademileri-lojmanlarina-operasyon-40-gozalti/

[4]http://www.npr.org/sections/thetwoway/2016/07/1/486358297/turkey-says-6-000-people-have-been-detained-after-failed-coup

[5]http://bianet.org/english/politics/176814-constitutional-court-supreme-board-of-judges-and-prosecutors-supreme-court-of-appeal-state-council-members-taken-into-custody

[6]http://www.diken.com.tr/darbe-girisimi-harp-akademileri-lojmanlarina-operasyon-40-gozalti/

[7]https://mappingmediafreedom.org/#/2629

[8]http://www.bbc.com/turkce/haberler-turkiye-36954952

The State of Emergency Law gives certain authorities to the government, including but not limited to; granting curfew, restricting meetings in public places, banning publication and distribution of the newspapers, magazines, brochures, books, posters, supervising all kinds of broadcasts (including verbal, written, visual, audio broadcasts), and to restrict or ban these broadcasts.

3. Specific Authorities Currently Granted with Decrees

The three months state of emergency is declared based on widespread violent acts targeting to abolish (i) democratic order and (ii) fundamental rights and freedoms.

The authorities and duties given by the State of Emergency Law are not directly applicable per se with the announcement of state of emergency and the government enacts decrees having force of law to enforce the aforementioned authorities and duties. Accordingly, the Council of Ministers issued three decrees having the force of law as of August 3rd, 2016. High ranking officials from Turkish government declared that the measures set forth by the state of emergency are preventive measures against Gülen Movement, and that they will not restrict fundamental rights and freedoms.[9]

(i) The Decree Having the Force of Law with number, "KHK/667" ("Decree No. 667"): This decree, which was published in the Official Gazette on July 23rd, 2016[10], designates the relevant principles and procedures regarding the measures to be taken against terrorism. It stipulates that certain private schools, charities, and other institutions linked with the Gülen community shall be closed down. Moreover, the decree authorizes to take necessary measures regarding the judicial body and public officials that have connection with the Gülen Movement.

(ii) The Decree Having the Force of Law with number, "KHK/668" ("Decree No. 668"): This Decree, which was published in the Official Gazette on July 27th, 2016[11], regulates the structure of some institutions and organizations, by saying that the members of Turkish Armed Forces (attached to the Decree No. 668) who are associated with the Gülen Community are removed from Turkish Armed Forces; that certain radio and television institutions, newspapers, journals, publishers attached to the Decree No. 668 are shut down; that law enforcement officers may conduct search and seizure on law firms with a warrant or with the Public Prosecutor's order in non-delayable cases, without the presence of the Public Prosecutor.

(iii) The Decree Having the Force of Law with number, KHK/669 ("Decree No. 669"): This Decree, which was published in the Official Gazette on July 31st, 2016[12], includes measures regarding public officials, the Gendarmerie staff and Turkish Armed Forces. The Decree No. 669 also states that companies with share capitals and cooperatives cannot request the postponement of bankruptcy during the state of emergency and that in the event of such request, the request shall be rejected.

4. Derogation From European Convention of Human Rights

Vice Prime Minister Numan Kurtulmuş issued a press release on July 21st 2016 stating that Turkey will derogate from European Convention on Human Rights ("ECHR") in accordance with its Article 15.[13] Derogation period will last three months from now.[14] Article 15 of the ECHR provides the Member States with the right to take measures derogating from their obligations under the ECHR, in public emergency situations. ECHR

[9] http://www.trthaber.com/haber/gundem/avrupanin-yanlis-tutumundan-vazgecmesi-gerekiyor-264240.html

[10] Please find the Turkish version of the Decree No. 667 at the URL address http://www.resmigazete.gov.tr/eskiler/2016/07/20160723-8.htm

[11] Please find the Turkish version of the Decree No. 667 at the URL address http://www.resmigazete.

[12] Please find the Turkish version of the Decree No. 667 at the URL address http://www.resmigazete.gov.tr/eskiler/2016/07/20160731-4.pdf

[13] http://www.imctv.com.tr/kurtulmus-avrupa-insan-haklari-sozlesmesi-askiya-alindi/

[14] https://zete.com/avrupa-insan-haklari-sozlesmesi-15-maddesi-cercevesinde-askiya-alinacak/

gives the opportunity for the parties to restrict certain fundamental rights and freedoms under certain circumstances. The exceptions, which cannot be suspended even during a state of emergency, are "right to life", "prohibition of torture", "no punishment without law" and "prohibition of slavery and forced labour".

As it is clearly stated in the ECHR, derogation is not a suspension of rights. It may bring certain limitations to the exercise of certain rights under certain conditions. On the other hand, Turkish Constitution provides broader exemptions compared to Article 15 of the ECHR, and shelters more fundamental rights and freedoms which may not be suspended even during a state of emergency. In addition, while derogating in accordance with Article 15 of the ECHR, international law and the international agreements that the Republic of Turkey is a party to, shall not be violated.

Article 4 of the International Covenant on Civil and Political Rights ("ICCPR") is also another international agreement that needs to be considered during the state of emergency. In cases of public emergency which threaten the life of the nation and the existence of which is officially proclaimed, the States Parties to the present ICCPR may take measures derogating from their obligations under the present ICCPR to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion or social origin. Derogation from these fundamental rights and freedoms are not possible: (i) right to life, (ii) prohibition of torture, (iii) prohibition of slavery, (iv) prohibition to be imprisoned merely on the ground of inability to fulfill a contractual obligation, (v) prohibition to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed, (vi) right to recognition everywhere as a person before the law and (vii) right to freedom of thought, conscience and religion. Turkey is a contracting party to ICCPR. Therefore, rules set forth under ICCPR are also binding for Turkey, even during the current state of emergency.

Although it is not possible to claim unconstitutionality of these emergency decree laws themselves, lawsuits may be filed before the competent courts against all kinds of acts and measures taken within the context of the decrees. Legal remedies are available, including the right of individual application to the Constitutional Court.

Corporate Law

Share Transfer Restrictions in Joint-Stock Companies

Generally, shareholders who do not wish to have any outsider owning shares in the company, wish to restrict the share transfers in the company. Apart from the foregoing reason, there are also restrictions that are set forth under the Turkish Commercial Code No. 6102 ("TCC").

1. Transfer of Bearer Share Certificates

Under Turkish law, transfer of bearer shares cannot be restricted in any way. Thus, shareholders holding bearer share certificates may transfer such shares without any restriction. Transfer of bearer shares becomes effective for all parties concerned, upon the delivery of the bearer share certificates. Any restriction that may be set out under a shareholders' agreement would be a mere contractual obligation of the parties.

2. Transfer of Registered Shares

In principle, registered shares may also be transferred without limitations. Transfer is perfected by delivery of the possession of the endorsed share certificate to the transferee.

However, there are several exceptions to this rule. These are (i) restriction by laws, and (ii) restrictions which may be introduced through the articles of association of the company.

2.1. Restriction by Laws

Registered shares that are not fully paid-in may only be transferred subject to the approval of the company, unless the transfer takes place due to inheritance, division of inheritance, property regime between spouses, or foreclosure (Article 491, TCC). The phrase "approval of the company" is intended to mean a board of directors' resolution. The company may decline approving the transfer if the transferee's ability to pay (the outstanding capital commitment) is doubtful, and the security required by the company has not been provided by the transferee.

2.2. Restrictions which may be introduced by the Articles of Association

As per Article 492 of the TCC, the articles of association may provide that registered shares may only be transferred subject to the approval of the company. However, unlike the former Turkish Commercial Code No. 6762, the provisions of the articles of association restricting share transfers "without any cause" shall not be applicable anymore.

2.2.1. Unlisted Registered Shares

Article 493 of the TCC sets forth that the articles of association of a private company may restrict share transfers by providing causes of refusal, which are regulated under the TCC. The articles of association may include restrictions set out under the TCC, however, may not further restrict the conditions of transferability.

2.2.1.1. Grounds for Refusal

a. As per Article 493/1 of the TCC, the company may decline providing approval of a share transfer by putting forward a "significant cause" specified in the articles of association.

If provisions of the articles of association concerning the "composition of shareholders" justify not providing approval to the transfer in relation to the scope of the business of the company, or its economic independence, such shall constitute a significant cause for refusal of the share transfer.

In other words, causes of refusal need to be related to the scope of the business of the company and/or its economic independence. For example, a share transfer to a competitor may be restricted due to the economic independence of the company.

Likewise, being related to a certain family or a profession may also be considered as a significant cause in order for the company to restrict share transfers to persons not belonging to the family or the profession (*e.g.* a partnership among lawyers or architects).

However, a share transfer restriction which bans share transfer to foreigners would not be a significant cause and thus, such a restriction would not be enforceable under the TCC.

If the significant causes of refusal are not clearly stated under the articles of association, the company would not be able to refuse a share transfer based merely on general provisions of the TCC.

b. As per Article 493/1 of the TCC, the company may also decline any request of approval, by proposing the transferor to acquire her/his shares itself or for the account of other shareholders or third parties, at a fair value to be determined at the time of application.

In this case, the company does not need to have a significant cause of refusal in order to refuse a share transfer, provided such right of offer should be stated under the articles of association. The company will have the right to make such offer and acquire such sale shares itself, or for its shareholders, or any third party, and the transferor will be obliged to transfer its shares at a fair value even if the potential purchaser's offer is higher than the fair value.

The transferee may ask the commercial court of first instance where the principal office of the company is located, to determine the fair value of shares.

c. As per Article 493/3 of the TCC, if the transferee fails to explicitly declare that s/he is acquiring the shares on her/his behalf and account, the company may refuse to record the transfer in the share ledger.

If the company has doubts that the transferor is not acting on its behalf and account, it may request a written declaration for confirmation from the transferor and if the transferor refuses to give such declaration, the company is entitled not to record the share transfer in the share ledger.

d. If the shares are acquired through inheritance, division of inheritance, property regime between spouses, or foreclosure, the company may decline the approval of transfer only if it proposes to the acquirer to acquire the shares at fair value. In other words, in either of these cases the company may not introduce a significant cause to prevent the share transfer.

2.2.1.2. Consequences of Refusal

The ownership and all rights associated with the shares remain with the transferor as long as the approval for transfer is withheld.

If the shares are acquired through inheritance, division of inheritance, property regime between spouses, or foreclosure, ownership of the shares and all associated rights thereto are transferred to the transferee immediately yet the rights to participate and vote in the general assembly can be exercised upon the company's approval.

If the company fails to respond to the request for approval within three months of receiving such request, or the refusal is unfair, the approval shall be deemed given.

2.2.2. Listed Registered Shares

As per Article 137 of the Capital Market Code No. 6362 ("CMC"), it is not possible in public companies to refrain from registering with the share ledger the transfer of shares which are acquired as a result of a transaction realized through the exchange. In other words, there is no restriction to share transfers in listed registered shares. Articles 493 and 494 of the TCC shall apply to shares of these companies, which are not publicly traded

Capital Markets Law

Capital Markets Board's Recent Announcements on Share Repurchases

On July 21st, 2016, Capital Markets Board of Turkey ("Board") announced via a press release that certain limitations set out by the Board's Share Repurchase Communiqué, published on the Official Gazette of January 3rd, 2014 ("Communiqué"), shall not be applicable until the Board announces that they shall be applicable again.

On July 25th, 2016, a second press release was announced by the Board on the matter, stating that over 35 companies had declared that they would engage in share repurchase. The Board also detailed within the same press release which limitations shall and shall not be applicable regarding share repurchases. Our aim here is to provide information on the content and possible implications of the aforementioned two announcements of the Board.

1. Content of the Announcements

The first press release states that the publicly-traded companies, which did not already adopt a share repurchase program as per a general assembly resolution, could engage in share repurchase without being bound by any limitations, upon condition that they disclose this matter by way of publishing a Material Event Disclosure on the matter. The press release further states that the publicly-traded companies, which are currently engaged in a share repurchase

program as per a general assembly resolution already adopted, could engage in share repurchase without being bound by any limitations, upon conditions that they inform their authorized organs on the matter and that they disclose this matter by way of publishing a Material Event Disclosure thereon.

The second press release further details the first press release on the matter. Accordingly, the authorization principle and the limitations as to the total amount of shares, which could be repurchased, and the daily transaction amount shall not apply. Information as to what these are as per the legislation and regulation still in effect will be provided below.

The second announcement goes on to explicitly state that the publicly-traded companies, which currently exceed the 10% threshold (the current upper limit as to the total amount of shares, which could be repurchased), may engage in further repurchase of shares, that certain sub-clauses of Article 12 of Communiqué, regarding announcement requirements, shall not apply, and that the shares to be repurchased within scope of the announcements shall be repurchased only after adopting a board of directors resolution on the matter and disclosure thereof by way of publishing a Material Event Disclosure thereon.

2. What the Legislation and Regulation Currently in Force Rule

The most specific piece of regulation on the subject is the Communiqué. Article 5 of the Communiqué rules that the general assembly of a relevant company should authorize the board of directors of the said company for the relevant company to be able to adopt a share repurchase program, by way of approving the share repurchase proposal brought before the general assembly by the board of directors. Exceptions to such authorization and conditions under which the board of directors could act without an authorization are also stipulated within the same article.

Article 9 of the Communiqué stipulates that the nominal value of the repurchased shares cannot exceed 10% of the paid-in or issued capital including the previous repurchases.

Both of the aforementioned are in line with what is stipulated as per Articles 379 and 381 of the Turkish Commercial Code No. 6102 ("Code"). The said articles of the Code regulate these matters under the heading "Joint-Stock Companies", without making a distinction on whether they are publicly-traded or not.

The Communiqué also sets forth certain requirements with respect to the announcement of the share purchase program itself and its start and end dates (Article 12) and brings a limitation of 25% with respect to the transaction amount (Article 15).

3. Effect of the Announcements

With the second announcement, the Board has announced that over 35 companies had disclosed by way of publishing Material Event Disclosures that they would repurchase shares. As stated above, the first Board announcement was published on July 21st, 2016 and the second on July 25th, 2016. Within four days, with a weekend inbetween, the number of companies disclosing that they would repurchase shares became 35. Other publicly available sources convey that this number is likely to increase. This being the case, there are fundamental legal issues arising as an outcome of the said announcements.

The first matter is that the basic principles of law require that a communiqué is only amended (or annulled) through another communiqué. From a legal perspective, a press release (or two or more, for that matter) would not suffice to halt the enforceability of a communiqué.

The second and equally, if not more, important matter is that such liberties, as introduced to the share repurchase regime via the press releases, are against the aforementioned

articles of the Code. Even if the Board had issued a communiqué bearing the same content as the relevant press releases, to accept such comminiqué as valid and enforceable could again be interpreted to be in violation of the basic principles of law, as such principles mandate that a communiqué should be in line with a law.

As for the second point we have put forward, it could be argued that Article 330 of the Code serves as a relaxing point. Article 330 of the Code rules with respect to the companies subject to specific laws that specific laws shall override the general provisions of the Code. That said, the official reasoning of the Code explicitly states that the "specific laws" shall mean specific laws and no other piece of legislation or regulation bearing weaker effect than laws.

4. What to Do Now?

From a purely legal perspective, the announcements could be claimed to bear no effect as it could be claimed that they have not been duly put in force and they are against the Code. That said, Board's relevant announcements suggest that the Board would highly likely not deem the share repurchases realized within scope of its announcements to be against the relevant legislation and regulation. Looking at the disclosures made so far and considering that such move of the Board could be deemed to be in the interest of the economic environment in general, markets seem to be finding Board's relevant announcements supportive of and promotive for the economic necessities of the time.

Competition Law / Antitrust Law

Promising New Ruling on the Limits of Administrative Bodies' Discretion Regarding the Right to Access to Information

The 2nd Administrative Court of Ankara (the "Court") annulled the Turkish Competition Authority's ("Authority") decision whereby the Authority dismissed the application of an undertaking ("Undertaking") requesting access to information contained in the Authority's file, based on Law No. 4982 on the Right to Access to Information ("Law No. 4982"), in an attempt to obtain information related to a pre-investigation process of the Authority that had been closed several years ago.

As background information, in Turkey, there are two different means of obtaining access to information in competition law related cases, namely: (i) a petition for requesting access to file on the basis of Communiqué No. 2010/3 of the Turkish Competition Board ("Board") related to the right of access to the file, bearing in mind that the scope of this Communiqué only covers on-going proceedings pursuant to its Article 8(3); (ii) a petition on the basis of the general "right to access to information" as guaranteed by Law No. 4982 for cases where the procedure has already ended (which therefore do not qualify as within the scope of Communiqué 2010/3). In the present case, as the Authority's pre-investigation had closed several years ago, the Undertaking introduced its request for access to information based on the general "right to access to information" as guaranteed by Law No. 4982.

The relevant request for access to information was filed to prepare the Undertaking's defence during an on-going lawsuit in which a purchaser of the Undertaking ("Purchaser") had filed against it, claiming that the Undertaking caused damages to the Purchaser by participating in anticompetitive agreements with other undertakings active in the same sector.

The Authority rejected the Undertaking's request for access to information and refused to communicate the requested information and documents.

Following the rejection of its application by the Authority, the Undertaking introduced an annulment action before the Court to contest the legality of the Authority's decision. Undertaking argued that the contested decision

lacks any legal basis since it does not provide an explicit reasoning as to why the communication of the requested information and document -- the trade secret excluded version of the communications -- is considered "inappropriate" under the scope of both Article 22 and Article 26 of Law No. 4982. Undertaking thus challenged the unlimited discretionary power that the Authority used in rejecting its application, which is argued as being contrary to the principles laid down under the provisions of Law No. 4982 and the standards of Council of Europe as well as the case-law of the European Union regarding the right to information.

In its judgment, the Court observed that access to a substantial part of the requested information and documents was rejected since they are considered within the scope of Article 26 (*i.e.* "information and documents that qualify as opinion, information note, proposals and recommendations which facilitate the execution of the activities of the institutions and organizations"). The Court stressed that the main principle provided in Law No. 4982 is the communication of the information and confidentiality is the exemption. Based on this principle, the Court considered that stating merely that the requested information is considered "internal documents" and dismissing the request without declaring any other reasoning does not comply with the purposes of Law No. 4982. The Court further underlined that the acceptance of the opposing view would equate to admitting that the communication of information and documents that are within the scope of the right to access to information according to Law No. 4982 can be refused solely on the basis of the administration's discretionary power and without stating any reasoning.

Concerning the Undertaking's remaining request that the Authority rejected due to "confidentiality of communication", the Court observed that the applicant's request does not relate to the content of any communication, but rather aims at obtaining factual information concerning the existence of certain communication between the Authority and the Purchaser. The Court also observed that the relevant information will be used within the scope of the right of defence on the on-going litigation.

Based on the foregoing, the Court concluded that the Authority's decision rejecting the Undertaking's application for access to information is contrary to Law No. 4982 and decided to annul the challenged decision of the Authority.

The judgment of the 2nd Administrative Court of Ankara has the merits to clarify the principles of requests for access to information in damages actions and to lay out the strict boundaries of the discretionary power that administrative authorities may use within the scope of the general legal principles and by providing a clear and sufficient reasoning in their decision in case they decide to reject the applications for access to information. The judgment of the Court could be regarded as an important precedent in the Turkish legal order for weighing the balance between the boundaries of discretionary power of administrative bodies and interest of counterparts that could be negatively impacted as a result of such administrative acts.

Ankara 15th Administrative Court cancelled Turkish Competition Board's Administrative Act

Plaintiffs, who are representatives of the Keskin İş Güvenliği, a company active in the workplace safety in the province of Bursa, have submitted a complaint to the Turkish Competition Authority ("Authority") on the grounds that the alleged conduct of 3M Sanayi ve Ticaret A.Ş. ("3M") is in violation of Articles 4 and 6 of the Law No. 4054 on the Protection of Competition ("Law. No. 4054"). These allegations comprised of (i) managing retail prices, (ii) allocating customers to distributors, (iii) discriminating amongst distributors, (iv) applying purchase target based discounts to its distributors and (v) using predatory pricing against its competitors.

In the ensuing preliminary investigation, the Turkish Competition Board ("Board") decided that 3M is not in a dominant position in the relevant market, and thereby, its conduct does not amount to a violation of Article 6 of the Law No. 4054. Furthermore, the Board stated that the following conduct could amount to a violation of Article 4 of Law No. 4054: (i) 3M's retail price maintenance with its distributor, namely Keskin İş Güvenlik Malzemeleri, (ii) allocation of Keskin İş Güvenlik Malzemeleri's customers pursuant to termination of its distributorship to other distributors, namely İstanbul Ticaret İş Güvenliği and Endüstriyel Ürünler Sanayi Limited Şirketi and Egebant, (iii) warning its distributors not to sell to other distributors' clients and warning a distributor named Nam, which is based in the İzmir province, not to sell products to the clients of İstanbul Ticaret and Egebant in the Bursa province, and (iv) applying different discount rates for Keskin İş Güvenlik Malzemeleri and Ekay Elektrik Kablo Aydınlatma Ticaret ve Sanayi Limited Şirketi compared to other distributers to put them in a disadvantageous position in the market.

The Board did not launch a full-fledged investigation. Instead, it decided that a letter should be issued to 3M ordering the undertaking to refrain from the abovementioned practices.

This decision of the Board was appealed to the 13th Chamber of the Council of State. The 13th Chamber of the Council of State quashed the decision of the Board which concluded not to launch a full-fledged investigation (30.11.2011, 2008/3117; 2011/5424). The Board, in compliance with the Council of State's decision, launched a full-fledged investigation to decide on the allegations of retail price maintenance, allocation of clients among distributors, discrimination among distributors and applying target oriented discounts to distributors (29.05.2013, 13-32/433-M). This investigation on whether 3M violated Article 4 of the Law No. 4054 resulted in a decision of no violation, and the Board concluded that there was no need to impose an administrative fine on 3M (25.06.2014, 14-22/46-203).

The plaintiffs brought the case before the administrative court for the annulment of the Board's decision. They claimed that 3M allocates geographical markets and clients to its distributors and discriminates between its distributors.

Ankara 15th Administrative Court (the "Court") concluded that (i) 3M set the retail price on a portion of sales, (ii) 3M allocated clients to distributors and posed restrictions on locations that distributors may make sales to, (iii) 3M applied lower discount rates to some of its distributors than the others and therefore the discounts lacked uniformity to the extent that it applied discounts on 35%, 40%, 43%, 45% rates to a distributor while applying a 5% discount to the plaintiff Keskin İş Güvenliği for the year of 2006, and that this situation amounts to a disadvantage in competition, (iv) an e-mail sent by an employee of 3M stated that the recipient distributor is recommended to use only 4% discount and this amounts to a violation of competition, (v) 3M allocated clients to other distributors once it terminated Keskin İş Güvenliği's distributorship and restricted clients to distributors and (vi) 3M intervened in the pricing of products sold by a distributor, to a customer in order to retain the client by setting the profit as 0.1 Turkish Lira, causing EKAY to suffer loses by setting the increase rate by 0.1 Turkish Lira since 3M's gross margin rate is usually around 56-58% rate. The products sold to this particular customer had a gross margin rate of -47%.

Accordingly, the Court quashed the decision of the Board on the ground that the Board was wrong in finding the evidence to be inadequate. The Court elaborated that there were adequate evidence to impose a fine on 3M since it appeared that 3M clearly violated Article 4 of the Law No. 4054. Thereby, the

Court cancelled the Board's administrative act (17.12.2015, Case No.: 2014/1947; Decision No.: 2015/2403).

The importance of this case is that whilst the administrative courts normally review the Board's decision with regards to procedural grounds, the Court (i) cancelled the Board's administrative act through reviewing the case substantially in terms of competition law and (ii) indirectly stated that the Board should impose an administrative fine on 3M.

The Board Published its Short-Form Decision on the Investigation Conducted against Yemek Sepeti

The Turkish Competition Board ("Board") announced on its official website the short-form decision on Yemek Sepeti Elektronik İletişim Tanıtım Pazarlama Gıda San. ve Tic. A.Ş. ("Yemek Sepeti", meaning the Food Basket), a Turkish online meal ordering platform, where the Board decided to impose a fine on the relevant company (09.06.2016; 16-20/347-156). Yemek Sepeti is the first ruling in the Board's decisional practice where MFC clauses have been held to violate the provisions of Law No. 4054.

The Board's short-form decision is related to the investigation initiated against Yemek Sepeti on March 18th, 2015 (decision no. 15-12/161-M) to scrutinize as to whether Yemek Sepeti is violating Articles 4 and 6 of the Law No. 4054 by practices attempting to exclude its competitors from the market through de facto exclusivity applications and "most favored customer" or "MFC" clauses contained in the agreements concluded between Yemek Sepeti and the restaurants that are members of Yemek Sepeti's online platform.

During the investigation, Turkish Competition Authority ("Authority") examined whether Yemek Sepeti prevented the restaurants from applying better/ different conditions (such as price, discount, promotion, menu content, payment options, delivery region and limit) on rival platforms, preventing the marketing of rival platforms, offering promotions to restaurants in return for not working with rival platforms and its Joker application (offering major discounts to the customers for a 15 minute period for ordering from certain restaurants) as a result of MFC practices.

As a result of its evaluation, the Board has concluded that Yemek Sepeti holds a dominant position in the online meal order-delivery platform services market. The Board has further decided that preventing restaurants from offering better/different conditions to rival platforms through MFC practices creates exclusionary effects in the relevant market and thus constitute an abuse of dominant position within the scope of Article 6 of Law No. 4054.

Allegations concerning Yemek Sepeti's violation of Law No. 4054 through preventing the marketing of rival platforms, offering promotions to restaurants in return for not working with rival platforms and the Joker application have been rejected by the Board.

As a result, the Board concluded that Yemek Sepeti has violated Article 6 of Law No. 4054 through its MFC practices and thus decided to impose an administrative fine on Yemek Sepeti in the amount of TL 427,977.70 (approximately EUR 130,000). The Board has further decided that Yemek Sepeti shall (i) end any kind of MFC practices that prevent competing platforms to offer better/different conditions, (ii) revise the agreements concluded between Yemek Sepeti and the restaurants by clearly providing that restaurants may offer better/different conditions to other online meal ordering-services platforms and that they are not obliged to reflect these conditions to Yemek Sepeti; and (iii) submit the revised agreements to the Authority within 120 days following the notification of the reasoned decision.

The Board Published the Reasoned Decision on the Preliminary Investigation Conducted against Türkiye Petrol Rafinerileri A.Ş.

Turkish Competition Board ("Board") published the reasoned decision (16.03.2016; 16-10/159-70) on a preliminary investigation against Türkiye Petrol Rafinerileri A.Ş. ("TÜPRAŞ") based on Akaryakıt Ana Dağıtım Şirketleri Derneği's ("ADER") allegations that TÜPRAŞ's turnover premium system, within the framework of its 2016 Fuel Sales Applications that will be applied to undertakings conducting distribution activities within the fuel sector based on their diesel fuel purchases from TÜPRAŞ, would further strengthen the current positions of the biggest four or five distributors within the distribution market, where profit margins are relatively low. Furthermore, it is also alleged that the gradual premium system determined with wide ranges would give rise to discrimination amongst the distributors and, consequently, the exclusion of the mid and low level distributors from the market.

In its assessment, the Board defined the relevant product market as the fuel wholesale market and, without conducting an analysis on dominance, it concluded that TÜPRAŞ is in a dominant position within the relevant market based on the previous Board decisions and assessed TÜPRAŞ's turnover premium system subject to the case at hand.

The Board found that TÜPRAŞ's 2016 Fuel Sales Applications subject to the allegations included a gradual turnover premium system where the grades are determined pursuant to the annual demands and remain stable throughout one year. The Board stated that in the scope of abuse of dominance, the anticompetitive effects of rebate systems are categorized under exclusion and discrimination and separately analyzed TÜPRAŞ's relevant applications under the foregoing categories.

With regards to the exclusionary effects of TÜPRAŞ's applications, the Board found that the turnover premium implemented by TÜPRAŞ would not produce such effects as nearly half of the fuel demands within the market are supplied by imports, and TÜPRAŞ is the only source of local production.

With regards to the discriminatory effects of TÜPRAŞ's applications amongst the distributors active in the downstream market, the Board made the following assessments: (i) The premium system grants flexibility to customers as even though it is retrospective and progressive, the customers are allowed to benefit from the higher grade if they exceed the purchase amount or move to the lower grade in case their purchase amount is deficient, (ii) The premium system is not personalized but standard, targeted, transparent and consists of quantity discounts that are granted under equal conditions and objective amounts to all customers. Furthermore, the relevant system is not designed based on the distributors' specific qualities, but designed according to the characteristics of the commercial transaction. Therefore, the premium system will not produce anticompetitive exclusionary effects amongst the distributors, (iii) The premium system is principally implemented for the evaluation of the excess fuel production capacity generated as a result of the investments realized by TÜPRAŞ, nearly half of the current fuel demands within the market are supplied by imports and a large portion of the demand will still be supplied by imports after the relevant capacity increase, and there are no restrictions imposed on the imports by the distributors, (iv) In consideration of the premium system's structure, where the grades are initiated from relatively low tonnages within reason (*i.e.* 10,000 tons). The lowest premium rate (*i.e.* 1.75%) corresponds to purchases between 10,000-100,000 tons and the highest premium rate (*i.e.* 3%) corresponds to purchases of 1,500,000 tons and above. Even though the premium rates are increased with 0.25% grades, for each additional 0.25% increase, the purchase amount increase is continually escalating, and therefore, in line with decrease in the marginal yield of the premium system, the results would be in favor of the small and mid-scale distributors. In addition to that, the Board determined that almost 99% of the distributors benefit from the premium system.

In light of the above, the Board decided that TÜPRAŞ's abovementioned turnover premium system is not deemed an abuse of dominance. Ultimately, the Board refrained from initiating a full-fledged investigation.

The Board's foregoing TÜPRAŞ decision sets out significant parameters and considerations for the application of turnover premium rebate systems by undertakings in a dominant position. Indeed, pursuant to the Board's assessment, the turnover premium systems that are not personalized but standard targeted, transparent, granted to all customers under equal terms and objective amounts and where economies of scale are taken into consideration along with the balance of nondiscrimination amongst the undertakings active in the relevant market, are considered to be in line with Law No. 4054. However, it is clear that the Board will continue to evaluate such premium systems on a case by case analysis.

Labor Law

Recent Changes in the Labor Law and Turkish Labor Institution Law

Law on Amendment of the Labor Law and the Turkish Labor Institution Law ("Amendment Law") was published in the Official Gazette dated May 20th, 2016 and No. 29717 and came into force as of its publication date.

The Amendment Law provides a definition and scope for the temporary employment relationship, role of the private employment agencies while establishing temporary employment relationships and employment on a telecommuting basis.

(i) Establishment of Temporary Employment Relationships through Private Employment Agencies

Activities for finding jobs for employees had been allowed for private agencies by the previous changes in the labor legislation, however without the authority to establish temporary employment relationships. Now, after the Amendment Law entered into force, establishing temporary employment relationships are allowed for private agencies as well.

Basically, the Amendment Law enables private employment agencies to conduct intermediary activities for establishment of temporary employment relationships. Temporary employment relationship is defined under Article 7 of the Labor Law. Such definition is now elaborated by the Amendment Law for the purpose of protecting employees' rights and entitlements which may be damaged in practice after private employment agencies become entitled to conduct activities to establish temporary employment relationships. Pursuant to this amendment, temporary employment relationships shall be established by execution of two written agreements separately, one being an "employment agreement" to be signed between the employee and the agency and the other one being a "procurement agreement for temporary employment" to be signed between the agency and the employer.

Per the said amendment, temporary employment relationships can be established under the following circumstances:

- In case of maternity leave or part-time work after giving birth, military service or suspension of employment agreement due to any other reason,
- Seasonal agricultural labor,
- Home services,
- Temporary works which are not considered as daily business of the employer,
- Employment that is deemed to be urgent, relating to job security or arising from conditions that considerably affect production,
- Significant increase of employer's work load,
- Seasonal increase of work load.

Article 17 of the Turkish Labor Institution Law is also amended with the Amendment Law. This provision regulates the principles of permits and authorizations of private

employment agencies, as well as administrative fines to be imposed in case agencies conduct their business without duly obtaining required permits.

Article 19 of the Turkish Labor Institution Law is changed by the Amendment Law as well. Per this amendment, private employment agencies cannot benefit from employees who are seeking jobs, again for the purpose of protecting employees' rights and entitlements. Therefore, service fee for intermediation services will be paid by the employer.

(ii) Telecommuting

Amendment Law also amends Article 14 of the Turkish Labor Institution Law and introduces the concept of "employment on a telecommuting basis". As per Article 14, telecommuting is a written employment relationship in which the employee performs his/her works at home or out of office via telecommunication devices. This article also regulates the equal treatment for employees working on a telecommuting basis. Consequently these employees cannot be treated differently because they work on a telecommuting basis.

Litigation

Changes in Appellate Review System

The current Law on Civil Procedures ("LCP") No. 6100 entered into force on October 1st, 2011, but the new appellate procedures introduced by the Law No. 5235 on September 26th, 2004 and repeated in the LCP had not entered into force, because regional courts of justice ("RCJ") had not yet been established and were not operational. Now finally, on July 20th, 2016, regional courts of justice have become operational, allowing the new appellate procedures to enter into force. This has changed the one-tier appellate review system constituted by merely the appellate review of Court of Appeals into a two-tiered appellate review system where appellate review will be conducted by RCJ before review in the Court of Appeals.

1. The Main Difference in Post-Judgment Proceedings

As mentioned above, the new system has brought a two-tiered appellate review system. The main difference in this new system is that a new tier, namely appellate review to be conducted by RCJ, has been added to the appellate review system before the final appellate review in the Court of Appeals. In this respect, the rule is now that decisions in courts of first instance are to be reviewed by the RCJ (instead of Court of Appeals), and the RCJ's rulings on courts of first instance's decisions are to be reviewed by the Court of Appeals, save for certain exceptions.

(i) Courts of First Instance's Decisions Subject to Appellate Review by the RCJ

According to Article 341 of the LCP, decisions of the courts of first instance that can be appealed by parties are as follows: (i) indefinite and ultimate decisions and (ii) interim decisions given further to preliminary injunction requests together with provisional seizures. These decisions are subject to objection before the RCJ within 2 (two) weeks after service of the decision. Apart from the types of decisions indicated in this paragraph, no decision of courts of first instance can be appealed before the RCJ.

That said, decisions having a monetary value below TL 2,190 cannot be subject to appellate review by the RCJ regardless of whether or not they fall under the aforementioned scope. On the other hand, there is no limitation for courts of first instance's decisions that do not concern monetary value.

(ii) RCJ Decisions Subject to Appellate Review by Court of Appeals

The LCP regulates decisions that cannot be subject to appellate review per the numerus clausus principle under Article 362, and therefore, any decision that does not fall under the scope of Article 362 can be subject to appellate review.

Decisions set forth under Article 362 which cannot be appealed are as follows:
a) Decisions relating to a monetary value of TL 25,000 or less,
b) Decisions rendered by courts of settlement as stated in Article 4 of the LCP,
c) Decisions relating to jurisdiction,
d) Decisions rendered with respect to ex parte proceeding,
e) Decisions relating to correction of civil registry (save for paternity lawsuits),
f) Decisions to transfer a lawsuit file due to legal or factual restraint,
g) Decisions relating to temporary legal protections.

2. Upcoming Legal and Need-to-Know Proceedings

The right to appeal courts of first instance's decisions before the RCJ through the new appellate system is granted to all parties of a lawsuit. The lapse of time to request for appellate review before the RCJ is 2 (two) weeks after service of the respective decision from the court of first instance, provided that the legal requirements mentioned above are met.

Furthermore, a petition requesting appellate review must be submitted to the respective court of first instance since the court has the authority to either accept or reject such petitions. However, in case such petitions are rejected, the petitioner also has the right to request appellate review on the rejection decision within 1 (one) week after service thereof.

Additionally, if one party of a lawsuit is entitled to resort to the RCJ while the counterpart is not, the latter's ability to do so will depend on whether or not the other party is resorting to the RCJ. In other words, if one party duly requests an appellate review from the RCJ, the other party may make an appellate request afterwards even though the abovementioned 2 week legal period is over. As per Article 366 of the LCP, the same goes for appellate review of the Court of Appeals.

On a final note, jurisdiction of the RCJ cannot be changed or amended through contracts, meaning that agreements on jurisdictional power of the RCJ are null and void.

3. Structure of the RCJs

Per Article 26 of Law on Establishment, Duties and Powers of First Instance Courts and Regional Courts of Justice No. 5235, the RCJ consists of the following divisions: (i) presidency, (ii) board of presidents (constituted by the presidents of chambers and the RCJ itself), (iii) chambers, (iv) public prosecutor office of the RCJ, (v) commission of justice of the RCJ and (vi) directorates.

So far, only 7 RCJs have been established and operational since July 20th, 2016, which are as follows:

a) Ankara RCJ (Responsible for 19 cities, with 27 civil and 17 criminal chambers)
b) İstanbul RCJ (Responsible for 9 cities, with 37 civil and 23 criminal chambers)
c) İzmir RCJ (Responsible for 8 cities, with 17 civil and 15 criminal chambers)
d) Antalya RCJ (Responsible for 6 cities, with 12 civil and 11 criminal chambers)
e) Samsun RCJ (Responsible for 9 cities, with 7 civil and 6 criminal chambers)
f) Gaziantep RCJ (Responsible for 15 cities, with 17 civil and 17 criminal chambers)
g) Erzurum RCJ (Responsible for 15 cities, with 6 civil and 5 criminal chambers)

4. Conclusion

The new system brings a two-tiered appellate review procedure into Turkish legislation. Accordingly, decisions of courts of first instance can no longer be appealed directly before the Court of Appeals, as the RCJ is now the first stop for appellate review, followed by the Court of Appeals' review to the extent that it is admissible by the LCP.

Internet Law
Legal Aspects of Throttling

In some cases, a video displayed at a video sharing website or a photo from one of the websites providing social networking service or an application downloaded to a smartphone or just an article from a news portal website might not be reviewed as the internet connection might be extremely low to upload or download any content. The reason might be the throttling that the user's internet service provider possibly applies. Throttling means the intentional slowing of internet services, applications or content by internet access providers ("ISPs").

Recently Turkey became a target of many terrorist attacks in certain intervals. Right after one of these recent terrorist attacks which occurred at Istanbul Ataturk Airport on June 28th, 2016 and left at least 41 people dead and 230 people wounded, people were not able to download or upload any content due to the slowness of the internet connection speed in Turkey. Following the terrorist attack, many users had experienced difficulties on access to the hosting platforms and were unable to view or broadcast any content which were actually available on the internet. Although there was no legal restriction on the internet services that people tried to use and share content through, they still could not access the contents as the request sent by the user has been technically timed out or the connection was too slow and the contents were not able to be accessed properly. These difficulties raised the discussions of whether there has been throttling for these services in Turkey.

Net neutrality is the purpose that Europe has been discussing to achieve for quite some time, to determine the standards and to enable free movement of internet and data around Europe. As a result of a need in net neutrality, ISPs are expected not to throttle their users' internet connections and intentionally slow access to the websites and applications or any other internet services.

The idea behind net neutrality is that ISPs, as a principle, should treat all the data that the users upload or download over the networks equally, without making discrimination in favor of particular applications, websites or any other internet related service to protect the future of open internet. Throttling, and particularly bandwidth throttling which is one of the most frequent kind of throttling that we face in our daily life becomes a disputed issue especially in Turkey.

Throttling may appear in different ways. One of them is the throttling due to network protection. In this type of throttling, the ISP aims to hinder end users' access to protect from spams or viruses in order to protect the network. This type of throttling also appears as congestion management. In some cases, ISPs apply traffic management tools to manage congestion on the connection for their services to continue. This action allows ISPs to reduce the data amount which they need to process and thus enables them to make savings since producing data costs. Another type of throttling is the data cap. Some of the ISPs may provide their internet services based on a data cap. Once the user reaches to the relevant data cap that the ISP and the user agreed on, the ISP may apply throttling in order to prevent overuse of internet service and to prevent charging the user for extra prices as data caps provide price signal to the user in order to inform him/her that s/he already reached out to the relevant data cap. This limit of the cap is the fair use limit that the ISP has determined in their policies. This type of throttling is a technical throttling through a contract. Another type of throttling is the one applied to a particular content or application. This type of throttling usually occurs on the particular content or an application that throttling is decided to be applied on such as child profile. For instance, a parent may request from the agreed ISP to slow his/her child's internet speed to adult websites. Lastly, as also indicated above, the most frequent type of throttling is the bandwidth throttling where the ISP reduces the speed of the internet connection in order to hinder its user to access

any content or website which is actually available but the user may not be able to access due to the internet connection speed. For instance, in Comcast Corp. v. FCC case, two non-profit advocacy organizations Free Press and Public Knowledge, filed a complaint with the Federal Communications Commission ("FCC") stating that Comcast's actions violated the FCC Internet Policy Statement, particularly the principle indicating that the consumers are entitled to access the lawful internet content of their own choice and to run applications and use services of their choice. These last two types of throttling were especially discussed in Turkey particularly after the terrorist attacks.

Throttling is actually a way of slowing access to the internet, without requiring a legal ground, through the decisions given either by the administrative authorities or the ISP's themselves. Authority to throttle the internet connection is not provided by the laws and particularly bandwidth throttling should be deemed violating certain fundamental and constitutional rights. Although there is no decision rendered by the courts with respect to throttling, this action may raise significant issues as to the prevention and violation of freedom of information and speech even if the connection is not entirely banned. Bandwidth throttling prevents the end user to use his/her internet connection properly and access the contents although it appears that they have Internet connection. The throttlings are actual access bans that apply to entirety of websites, such as social media platforms, without a court decision which in fact is not regulated under Turkish law. The Constitutional Court considers access banning entirety of a website, even with a court order, violating freedom of expression and accordingly information, and against the Constitution. By way of analogy, the throttlings should also be deemed against the Constitution, since they violate the freedom of expression and accordingly information as well, this time without even obtaining a court order.

Data Protection

Exemptions Regulated under Turkish Data Protection Law

The Law No. 6698 on Protection of Personal Data ("DP Law") which came into force on April 7th, 2016 is applicable to real persons whose personal data is processed and to the real persons and legal entities that process such data, wholly or partly, by automatic means and, if the data is part of a data filing system, by non-automatic means. Therefore, the general scope of the DP Law is wide, similar to the European Union's Data Protection Directive 95/46/EC ("EU Directive").

Article 28 of the DP Law regulates the exemptions to which the DP Law does not apply. The DP Law does not apply in cases where personal data are processed (i) by real persons in the course of activities that are completely personal or related to the family members living in the same household; provided that the personal data is not shared with third parties and the data security obligations are fulfilled and complied with, (ii) for purposes of research, planning or statistical operations after being anonymized with official statistics, (iii) for artistic, historical, literary or scientific purposes or within the scope of freedom of speech; provided that national defense, national security, public safety, public order, economical safety, privacy of private life or personal rights are not violated and the processing does not constitute a crime, (iv) within the scope of preventive, protective and intelligence activities for national defense, national security, public safety, public order or economical safety, (v) with respect to investigation, prosecution, trial and execution procedures by judicial organs or executive authorities.

For instance, the statistics of "people living in Istanbul who use smartphones", where the data is anonymized by the Turkish Statistical Institute, may be an example for the exemption

"processing personal data for research, planning or statistical operations and such data is anonymized with official statistics". If the data is anonymized for statistical purposes and the data subjects are not identifiable, the DP Law should not apply to aforementioned type of processing personal data.

The exemptions in the DP Law differ from the EU Directive in that, they provide national defense, national security, public safety or within the scope of preventive, safety and informative activities for economical safety, as the grounds for exemption. The activities regarding public safety, defense, security of Member State or the activities of the state in the area of criminal laws fall outside the scope of the EU community law, and processing of personal data that is necessary to safeguard the economic well-being of a Member State does not fall within the scope the EU Directive where such processing relates to security matters of the Member State. Therefore, this provision is not in full compliance with the EU Directive in this respect.

Even though national defense, national security and public safety's objective might be deemed legitimate to be used as exemption of the DP Law, this should be explained in detail and the limitations should have been prescribed by the DP Law. Keeping the scope of exemptions broad might result in violation of Article 20 of the Turkish Constitution as well as Constitutional Court decisions where the privacy of private life and protection of personal data are protected as basic human rights. To prevent such violations, amending these exemptions in a way to limit the scope of exemptions would be necessary, in a similar way to the data protection legislations of the EU Member States. Data protection laws of EU Member States provide exemptions from some of the EU Directive's provisions in matters of: (i) national security and defense; (ii) the prevention, investigation, detection and prosecution of criminal offences; (iii) the protection of data subjects and the rights and freedom of others. For similar reasons, the following obligations may be lifted: (i) obligation to inform the data subject about processing his/her personal data; (ii) duty to reveal certain data processing operations to the data subject; the right of the data subject to access his/her data; (iii) the right of access to statistical or research data; (iv) obligation to ensure basic principles of good data management.

Therefore, exemptions regulated under the DP Law should be narrowed down to the specific rights and they should not be used as a "general exemption rule". For example, personal data may be exempted from the non-disclosure provisions if the disclosure is aiming to protect national security. However, "national security" should not be a general exemption legal basis within data protection legislation.

Even though the DP Law was regulated based on the provisions within the EU Directive, there are some points which must be examined and clarified in order to avoid the aforementioned conflicts with the EU Directive. In other words, the exemption on the applicability of the DP Law, which was drafted under the paragraph (c) of Article 28 (1) grants excessive rights by means of the wide exemptions granted to governmental authorities. For example, if personal data are processed by public institutions and organizations "which are authorized by law within the scope of their preventive, protective and intelligence activities for national defense, national security, public safety, public order or economical safety", such as police forces, the DP Law would not be applicable. However, the data may be also processed in a way that it is not related with the legal grounds of "national defense, national security, public safety, public order or economical safety". Therefore, this provision excludes certain governmental authorizes to comply with data protection measures.

Telecommunications Law

Amendments to the Authorization Regulation in Electronic Communication Sector

Companies, which intend to provide services within the scope of electronic communication, are authorized by Information and Communication Technologies Agency ("ICTA"). This authorization is stipulated under the Authorization Regulation Regarding Electronic Communication Sector ("Authorization Regulation") which is based on Electronic Communication Law No. 5809.

According to the press release published by ICTA, most of the companies declare zero tax amounts and do not provide services, even though they are authorized by ICTA. ICTA also states that some companies are not located at their headquarters and that they do not fulfil their obligations to their customers, that there are approximately 650 companies which are currently authorized and that most of those companies are not providing services for years.

ICTA, based on the foregoing reasons, made the following amendments on the Authorization Regulation in order to protect the rights of the consumers:

(i) For authorization, the companies shall have a certain amount of capital. With this amendment, the companies will be prevented from pulling out from the market and providing low quality service to their members, or from failing to comply with their responsibilities towards the state institutions due to economic weakness.

(ii) Before giving authorization, the companies shall be examined at their headquarters in order to confirm whether they comply with the conditions or not.

(iii) The authorized companies will establish call centers in order for consumers to convey their problems.

(iv) The companies which provide communication services and work in line with the regulations will be supported. This amendment is made for incentive purposes.

(v) The authorizations of the companies which do not comply with the regulations will be cancelled.

The Regulation Concerning the Amendment on the Authorization Regulation Regarding Electronic Communication Sector is published on the Official Gazette on June 11th, 2016 and entered into force at the same date.

Board Decisions of ICTA

In parallel with the Authorization Regulation, ICTA held two board decisions on March 31st, 2016 and June 10th, 2016.

(i) Some significant amendments made to notification form and application form regarding the right of use. The scope of the information and the documents requested from the companies is expanded. The companies which are authorized with unlimited right of use are obliged to submit the aforementioned documents before October 11th, 2016, whereas the companies which provide common use radio services are obliged to submit them before December 30th, 2016.

The authorizations of the companies which do not submit those documents will be cancelled per se.

(ii) The companies which currently provide GMPCS Mobile Telephone Services, infrastructure services, virtual mobile network services, Internet services, guidance services and satellite communication services shall establish the technical infrastructure in order to meet the requirements set out under several laws, including the Law No. 5651, until September 19th, 2016.

The companies which will be newly authorized on these services should establish the aforementioned technical infrastructure in two months following the date of authorization.

The authorizations of the companies which do not establish this technical infrastructure will be cancelled.

Regulation on Calling Line Identification

Regulation on Calling Line Identification which enters into force at the same time with The Regulation Concerning the Amendment on the Authorization Regulation Regarding Electronic Communication Sector also includes significant provisions which aim to reduce the number of consumer complaints.

(i) With this regulation trademark, name or slogan of a third party cannot be used as an SMS title. The messages which the sender cannot be identified (such as SMS with the title of "insurance", "bank", "cargo") cannot be sent. SMS messages shall only be sent with their own names, titles or trademarks of the senders.

(ii) According to the press release of ICTA, one of the biggest issues regarding unauthorized commercial electronic messages is the determination of the company sending the message. With this new regulation, a code will be added to the end of the messages in order to identify the company. Accordingly, the fines will be imposed more effectively by the authorized authorities.

(iii) The companies have 6 months to comply with this regulation.

The foregoing amendments aim at protecting the rights of the consumers and separating the authorized companies which are active from the non-active ones.

Pharmaceutical Law

Updates from Pharma Practices: Guidelines on Applications for Scientific and Product Promotion Meetings

In Turkey, all activities pertaining to the promotion of medicinal products are performed in accordance with the rules under the Regulation on Promotional Activities of Medicinal Products ("Regulation") and surveilled by the Turkish Medicines and Medical Devices Agency ("Agency"). Recently, on June 30th, 2016, the Agency has published the new Guidelines on Applications for Scientific and Product Promotion Meetings ("Guidelines") on its website. Upon the publication of the Guidelines, the Guidelines on Applications for Scientific and Product Promotion Meetings published on May 27th, 2016, has been abrogated.

The Guidelines, while outlining the general rules as to the applications, set forth the detailed liabilities imposed on license holders for organizing scientific and product promotion meetings.

To that end, here we will outline the highlights that the Guidelines have introduced.

(i) Scientific meetings

In addition to the regulations under Article 7 of the Regulation, the Guidelines introduced that:

- scientific meetings which would last less than four hours can be supported by a single license/permit holder and can be organized on a "one-day/daily" basis,

- national and international scientific meetings organized by national and international associations, health institutions, universities, trade bodies of surgeons/dental surgeons /pharmacists, to which the Ministry of Health and healthcare professionals are members and which last more than four hours, must be supported by at least two companies/corporate groups manufacturing the related product,

- for international scientific meetings limited to world and continental congresses and for surgical trainings and training programs initiated in training research hospitals within the country as well as university hospitals within and outside the country, the "two-supporters" condition specified above, would not be sought,

- in case the scientific meeting is related to product promotion and is organized /supported by license/permit holder's foreign representative/license holder, license/permit holder can only support the spokespersons,

- it is prohibited to promote products during scientific meetings organized/supported by a single license/permit holder. Also, for these meetings, while it is allowed for them to use their corporate logos for the meeting, license/permit holders cannot realize honorarium payments to spokespersons and cannot provide organizing associations /institutions with a booth attendance and satellite symposium support.

In addition to the foregoing, the Guidelines impose that scientific meetings can only be supported by way of (i) scientific meeting general sponsorship, (ii) participant, satellite spokesperson and (iii) satellite symposium support and booth attendance payment. Descriptions as to "scientific meeting general sponsorship", "participant and spokesperson support", "satellite symposium" and "booth attendance support" are also included under the Guidelines.

(ii) Product promotion meetings

As per the Guidelines, product promotion meetings are organized only by license/permit holders in order to promote their products to surgeons, dental surgeons and pharmacists. Meetings for demonstration of products to other healthcare professionals are considered within the scope of product promotion meeting. Product promotion meeting can be organized on a "daily" basis in a way to last less than four hours.

The Guidelines also bring certain limitations /prohibitions as to product promotion meetings, namely;

- product promotion meetings can only be organized by license/permit holders. These meetings cannot be organized with associations or other institutions in return of donations,

- these meetings cannot target students of healthcare professional training faculties or graduate schools.

(iii) Information to be provided for organizing and supporting meetings

The Guidelines list the information to be submitted to the Institution for organizing and supporting the meetings. Information required for both meetings seem to be in parallel with one another. In this respect license/permit holders will have to provide the Institution with the information such as name, location and dates of the meetings as well as the name of the organizer agency and payments to be made to spokespersons.

(iv) Organizational changes and cancelations

- Meeting cancelations: Cancelation of scientific and product promotion meetings should be notified priorly to the Institution by way of submitting an official written letter.

- Location changes: Location changes of scientific and product promotion meetings should be notified to the Institution at least three days prior to the meeting date, by way of submitting an official written letter.

- Date changes: For scientific meetings, the Guidelines oblige license holders to apply to the Institution for cancelation of their current application and make a new application for the re-scheduled date of the meeting. However, for product promotion meetings, it is deemed sufficient to notify the Institution at least five days before the meeting date through an official written letter and request permit for a later date.

Real Estate Law

Judicial Partition of Property – Partition Suit under Turkish Civil Law

Under Turkish Law, where a group of individuals share ownership in an asset, a situation of joint-ownership arises. While Article 688 of the Turkish Civil Code ("TCC") deals with the notion of joint ownership (*paylı mülkiyet* in Turkish), Article 701 TCC deals with the concept of tenancy in common (*elbirliği ile mülkiyet* in Turkish).

The most significant difference between joint ownership and tenancy in common regimes is how the ownership is distributed throughout the property. In joint ownership regime, owners have their defined pieces of property whereas in tenancy in common, each owner has a part of ownership in each piece of the property. Although it is possible to buy a property through joint ownership or tenancy in common regimes, in practice, inheritance is one of the most common reasons that leads to a tenancy in common regime. As such, tenancy in common (as well as joint ownership) is considered to be one of the most complex property regimes which may give rise to a number of problems in practice with regard to its partition. Since both tenancy in common and joint ownership can be subject to partition lawsuits, this article will jointly refer the two ownership types as "joint ownership".

Joint-owners of a property can make a request for partition at any time, pursuant to Article 642 and 698 of TCC. It is important to note that such a request is not subject to any temporal limitation. Pursuant to Articles 698-699 of TCC, in case joint-owners fail to proceed with partition by means of agreement, a partition suit allows the transition from common ownership to individual ownership.

Particular attention must be paid to the unique procedural rules which govern the suit of partition due to its *sui generis* nature. This article will (I) discuss the procedural rules applicable to the partition suit, (II) lay out the impediments that limit the right to bring an action for partition, and (III) consider the possible legal outcomes of a partition decision.

1. Rules of Procedure and Practical Considerations

Pursuant to Article 4 of the Turkish Code of Civil Procedure ("TCCP"), as a general rule, the Civil Courts of Peace have authority over partition proceedings regardless of the monetary value of the lawsuit.[1] The courts of the place where the immovable property in dispute is situated are competent pursuant to Article 12. The subject-matter of the suit of partition takes the form of any type of immovable property and the rights thereof, subject to joint-ownership.

It is important to note the partition suits have a *sui generis*, double-sided nature. The double-sided – *actio duplex* – nature of partition proceedings has a number of legal consequences. First of all, the action is brought by an owner or a group of owners who request partition against the owner or group of owners who refuse partition. In other words, subjective partition is not an option; all owners must be party to the lawsuit. Second, the partition decision is equally applied to all parties to the proceedings and gives rise to the same legal consequences for all. Third, all parties possess the same rights and obligations with regard to the proceedings. For instance, the defendant's requests regarding the partition method should also be taken into account in addition to the claimant's requests.[2] Similarly, all parties contribute to litigation costs and attorney fees in accordance with their amount of shares, since there is no winning or losing party in these suits. Lastly, while the general rule under Turkish law of civil procedure is that waiver by the claimant has the effect of a finalized judgement, solely the claimant's waiver in a partition suit does not preclude the counter-party from resuming the proceedings.[3]

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[1] Y6.HD 13.07.1954 199-3740.
[2] HGK 30.01.1991 520/11.
[3] Y6.HD. 16.10.1995 – 9599/9863; Y6.HD. 12.2.1996-1099/1285

2. Impediments to Bringing an Action for Partition

There are certain situations where it is not possible to bring an action for partition of a jointly-owned property. Such impediments can be divided into two categories. These are (i) legal transactions and (ii) statutory limitations. It is not possible to bring a partition suit while an agreement for the continuation for the joint-ownership concluded between the parties, remains in force. The same goes for an agreement providing amicable partition. That said, such agreements can limit the request for partition for 10 years utmost. A number of statutory provisions such as provisions related to condominiums may also constitute impediments. For example, as per Article 7 of the Law on Property Ownership No. 634 ("LPO") in case the property is subject to condominium regime or construction servitude (*kat irtifakı* in Turkish), elimination of joint ownership cannot be requested.

It is important to note that a party to a partition suit cannot request partition of a section of the property.[4] During partition, fixtures (*bütünleyici parça* in Turkish) of a property will also be added to the value and the court will order the sale of these fixtures. That said, if they belong to one of the owners, then the owner of the fixture will receive an equalization payment.[5]

3. Possible Legal Outcomes of a Partition Decision

During a suit for partition of a jointly-owned property, parties may agree on how they wish to divide the property. In the absence of such an agreement, it is up to the competent Civil Court of Peace to bring the ownership to an end, which can take 2 forms: partition in kind (also including the possibility to establish a condominium regime) and partition by sale.

(a) Partition in Kind

It is sufficient that only one of the parties requests partition in kind for effect to be given to such request. In that case, the court must first establish whether the conditions for partition in kind are fulfilled (Article 699/2 TCC) with regard to the features of the property, such as its surface area, characteristics, number of joint-owners and number of shares, the features of agricultural estates, *etc*. In case it is established that partition in kind would cause considerable loss in the value of the property, the court will be precluded from ordering partition in kind. Furthermore, it is not possible for a portion of the property to be left under joint-ownership.[6]

Where it is established that partition in kind is possible, if there are imbalances between the value of each tenant's resulting personal property, a balance may be established by transfer of monetary consideration between parties. It is crucial to emphasise that, throughout the entire partition procedure, the court must take into account both the claimants' and the defendants' requests regarding the manner in which partition is to be effected and the allocation of various portions of the succession amongst right-holders.[7]

Pursuant to Article 10 of the LPO, where a joint-owner requests the establishment of a condominium regime on a jointly-owned property, the court must determine whether such a partition is suitable with regard to the characteristics of the property in question, *i.e.* the structures which constitute the immovable property are duly completed following their architectural project and each of the independent sections must be favourable to individual use.[8] The court can order the

[4] HGK 05.06.1996 E. 1996/6-350 K. 1996/450
[5] Y6.HD. 16.1.1996- 12816-194
[6] HGK 05.06.1996 E. 1996/6-350 K. 1996/450
[7] HGK 08.02.1995 182/48
[8] Y18.HD 09.02.2006 2005/10996 E 2006/774 K; Y18.HD 09.06.2005 2005/3934 E 2005/6070 K.

party requesting condominium to provide the necessary documents in order to prove the suitability of the immovable property in question. An expert assessment can be ordered by the court. If it appears that the property is suitable for condominium, a transition from joint-ownership to condominium is effected by the court after submission of the documents stated in Article 12 LPO, and independent sections are allocated to the parties after equalising the shares thereof.

(b) Partition by Sale and Allocation of the Sale Value

It has been long accepted in light of Article 699 of the TCC that partition in kind is preferred over partition by sale. If it appears that partition in kind is not possible or could result in the considerable devaluation of the jointly-owned property, the court must order partition by sale of the property (Article 699 of TCC). Parties may unanimously agree for the sale to take place exclusively amongst the joint-owners.

The partition suit is a legal action which ensures an equal protection of the rights of all owners of the property. Due to its unique, *actio duplex* nature, this suit has a sui generis nature. This article attempted to set out the fundamentals of the partition suit, as well as shed light on its most topical aspects.

White Collar Irregularities

Recent Developments in the Anti-Corruption Regulations in France and Germany

Since the enactment of the Foreign Corrupt Practices Act ("FCPA") on 1977, USA has been leading the international fight against corruption. FCPA sets forth a standard for other jurisdictions in its extraterritorial and rigorous enforcement of its rules and regulations against corruption. In addition, OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions ("Convention") has been another push force in the field, obliging its signatories on a global scale to strengthen their laws to fight international corruption. Following the US leadership and acting under the awareness raised by the Convention on the issue, recent years witnessed legislative developments from many countries which sought more effective ways of fighting corruption. This article will focus on two of the most recent legislative updates in the arena of fighting corruption, namely, the developments in France and Germany.

France

Throughout the years, many French companies faced with FCPA related allegations and sanctions. Alstom, Total SA and Technip SA are the three French companies, which are in the ten largest FCPA enforcement actions list.[1] All three companies agreed to pay more than $300 million to settle the FCPA charges. In addition, Transparency International's Exporting Corruption Report of 2015 criticizes French anti-corruption law because of lack of enforcement of the foreign bribery offence.[2]

France has a new law reform regarding anti-corruption matters on the way. The new law is called Sapin II, named after the Minister of Finance, who introduced the new law to the Council of Ministers of France. Before delving in the reforms that will be enacted with the new law, we hereby briefly mention current anti-corruption regulations of France to provide an overview. Currently, the Penal Code regulates both passive and active bribing of national and foreign officials. Gift giving and facilitating payments are also sanctioned under French Penal Code. The French law only applies to its citizens or businesses incorporated in France in foreign countries, if these acts are punishable under the legislation of the country, where the crime

[1]http://www.fcpablog.com/blog/2016/2/19/heres-our-new-top-ten-list-with-vimpelcom-landing-sixth.html
[2]http://www.transparency.org/exporting_corruption/France

was committed. This is a much criticized aspect because it prevents the application of the anti-corruption regulations on French citizens in a foreign country in case they perpetrate the crime of bribery of foreign public officials.

What are the main reforms in Sapin II?

Sapin II is a reformatory law bearing traces of FCPA and United Kingdom Bribery Act ("UKBA").

As mentioned above, the most criticized regulation of the French law *i.e.* the impediments with regard to the enforcement of crime of bribery of foreign public officials will not be applicable once Sapin II is in force. The requirement, which demands that the conduct can only be punishable in France, unless it is punishable in the country, where the conduct was committed, will be abrogated. One of the most important reforms proposed by the Sapin II is the obligation to have anti-corruption compliance programs for companies with more than 500 employees and have an annual gross profit exceeding EUR 100 million in order for them to detect and deter irregularities. These compliance programs should integrate the below elements:

(i) A code of conduct depicting the anti-corruption policy of the company, including what to do and what to avoid,
(ii) A whistleblower system,
(iii) A regularly updated risk assessment for the ever-changing corruption risks,
(iv) Reviewing clients and third parties from an anti-corruption perspective,
(v) Internal and external accounting controls in order to identify the irregularities in the books and records of the company,
(vi) Anti-corruption training for employees and managers,
(vii) A policy regarding the disciplinary actions for the employees, who are engaged in the illicit activity.

Incompliance with the above-mentioned compliance program obligations can give rise to liabilities for the executives and managers of the incumbent companies. These individuals and also the company may be sentenced to pay penalties and injunctions may be imposed.

In terms of the enforcement authority, Sapin II proposes the establishment of a brand-new anti-corruption agency. Currently, Service Central de Répression de la Corruption ("Service") is the authority to deal with the anti-corruption matters whose originally vast powers were reduced and which was put in a more passive position through court decisions. The agency will have supervisory authority on companies such as to control the implementation of a compliance program.

Unlike the Service, which did not have the authority to investigate or prosecute, the proposed agency is aimed to be more involved in the enforcement and have the authority to conduct investigations and impose sanctions.

Protecting whistleblowers is indispensable for obtaining vital information regarding possible wrongdoings within a company. Sapin II proposes banning retaliation against whistleblowers. Currently there is discussion as to whether a system awarding whistleblowers, similar to the system in US, should be legislated.

In addition to the sanctions that are already in place, Sapin II proposes harsher sanctions both for individuals and companies. The entities will be obligated to implement a compliance program and the agency will control the implementation.

Whether the reforms should set up a system for Deferred Prosecution Agreements ("DPAs") is an issue much debated in France. Although a first draft of the Sapin II contained provisions setting out a DPA system, the relevant provisions were subsequently removed since they were not deemed to be in the best interest for justice.

With this new law the French anti-corruption regulations are aimed to be more up-to-date and deterrent against national and international corruption.

Germany

According to Transparency International's Exporting Corruption Report, Germany has an active enforcement of anti-corruption laws. Under German law, active and passive bribery and also bribery of foreign officials are prohibited. Similar to Turkish law, German law does not recognize criminal liability for companies. Instead, companies are held civilly liable. In recent years, Germany reformed its anti-corruption regulations in several aspects and the new law entered into force in 25 November 2015. With this law (i) the scope of foreign official has been extended, (ii) changes regarding private sector has been made and (iii) reforms for money laundering have been enacted.

German Law against Corruption, which entered into force in late 2015, regulates that European Officials too, will now be considered as German officials within scope of corruption crimes. This means that even if a certain official may not be a German citizen, the German Law against Corruption will apply to them nevertheless. In addition, with the new law foreign officials who accept bribes can be prosecuted in Germany. Further, German law now can be applied to offences committed by a German citizen abroad or by European public officials who have their office in Germany.

Another change was in the private sector. Previous law did not cover the private sector bribes that were evaluated to be outside the scope of market competition. Following the enactment of the new law, private to private bribery now includes cases where accepting or giving any benefits without the business owner's consent leads to a breach of duty. Accordingly, accepting or giving any benefits during the scope of a business without the business owners' consent is prohibited and disruption of market competition is not a requirement.

The new law introduced reforms regarding money laundering too. Before the new law, it was not a crime for a person to launder money in the context of their own crimes. The new law criminalizes this offence called "Self-money laundering". In addition, the new law extends the catalogue of relevant predicate offences (such as accepting and giving bribes in the scope of commercial businesses) for money laundering.

Conclusion

Although legislative documents such as the FCPA or the Convention set out the basics for how to fight international corruption, there is not a pre-defined formula for establishing framework for the most effective fight against corruption. Once the minimum thresholds are met (such as criminalizing foreign bribery, establishing a form of liability for legal persons etc.) each jurisdiction is free to fill its own legislative and enforcement gaps. Within this scope, France and Germany are the latest countries to increase their efforts to fight corruption. Much like the legislators who work to ameliorate their legislations for fighting corruption, companies active / headquartered in France and Germany should also be vigilant about these legislative developments and adapt to the changing environment.

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