ISSN 2147 – 558X

ELİG
GÜRKAYNAK
Attorneys at Law

LEGAL INSIGHTS QUARTERLY

September 2017 – November 2017

LEGAL INSIGHTS QUARTERLY

September 2017 – November 2017

Eylül / September, İstanbul

Yayın Türü / Type of Publication
Yerel Süreli / Local Periodical

ELİG Ortak Avukat Bürosu adına Yayın Sahibi, Sorumlu Müdür / Owner and Liable Manager on behalf of ELIG, Attorneys-at-Law

Av. Gönenç Gürkaynak
Çitlenbik Sokak No: 12,
Yıldız Mahallesi
Beşiktaş 34349,
ISTANBUL, TURKEY

Basımcı / Publisher
Detay Mat. San. Tic. Ltd. Şti.

ISSN 2147 – 558X

Preface to the September 2017 Issue

In this issue, the capital markets law section discusses certain changes that were introduced to the Communiqué on Debt Securities by the Capital Markets Board of Turkey.

On the competition law front, this issue explores, among other topics, the Turkish Competition Board's reasoned decision concerning whether the actions of the Turkish Pharmacists' Association and the Turkish Pharmacists' Association Commercial Enterprise constitute abusive conduct within the meaning of Article 6 of the Law No. 4054.

The labor law section reviews and discusses the changes that the Draft Law on Labor Courts may bring to the Turkish labor law landscape, particularly the change with regard to mandatory mediation.

The data protection law section sheds light on the changes that may come into effect due to the Draft Regulation on the Erasure, Destruction, or Anonymization of Personal Data and the Draft Regulation on the Data Controllers' Registry.

Finally, on the white collar irregularities front, this issue highlights the importance of having a compliance program, both for companies that are under the jurisdiction of the FCPA and also for those outside of it.

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 2017

Corporate Law

Types of Shares and Their Effects on the Rights of Shareholders

Introduction

Companies may issue different types of shares (*e.g.*, ordinary shares or privileged shares) and different rights can be attached to these distinct types of shares for a variety of purposes. This article aims to illustrate the two common types of shares issued by companies and the various rights that could be attached to them.

Ordinary shares may be defined as shares providing equal rights to the shareholders unless otherwise agreed and specified.

Privileges that may be attached to privileged shares under the Turkish Commercial Code ("TCC") are defined either as a right that is granted to the share for the dividends, liquidation shares, preemptive rights, voting rights and similar rights, or as a new type of share ownership which has not been previously prescribed by the TCC.

Conditions for Granting Privileges

The general principle for benefitting from the rights attached to the shares is the principle of proportionality, which states that the benefits must be in line with the ratio of the share of capital. Therefore, granting a privilege is considered to be an exception to the principle of proportionality, and there are certain conditions that must be fulfilled for granting privileges to shares in accordance with the TCC.

Privileges may only be granted by the articles of association. It has been regulated under the relevant provision of the TCC that certain shares may be assigned privileges by the initial articles of association or by amending the articles of association afterwards.

The subject matter and the scope of the privilege must be explicitly stated under the articles of association. Accordingly, the subject matter of privileged shares may comprise rights with management or property ownership characteristics, such as the right to vote, the right to be represented at the board of directors, the right to receive the dividend, right to receive the liquidation balance, and the right of preemption.

According to a decision of the Turkish Court of Appeals, a company's selection of the members of the board of directors among the shareholders who represent 50.5% of the shares under the articles of association shall not be considered as a privilege. A phrase such as "the shareholders which represent 50.5% of the shares" under the articles of association is considered to be too vague for determining the group of shareholders who hold the privilege.

Subject Matters of Privilege

The privileges may be granted as (i) a property ownership, (ii) a share, and (iii) the right to be represented at the board of directors.

(i) Privilege regarding property ownership

Privileges regarding property ownership may be granted in one of three ways: (1) privileges on the dividend, (2) privileges on the liquidation share, and (3) privileges on the right of preemption.

Furthermore, there are three ways that the privilege on the dividend may be granted: (1) receiving a higher share of the profit, (2) benefitting primarily from the dividend, and (3) cumulative privilege on the dividend.

Privilege on the liquidation share may be granted by providing preemptive rights with regard to the corporate estate upon the completion of the company's liquidation, prior to the holders of the ordinary shares.

In practical terms, privilege on the right of preemption may not be implemented frequently. However, it may be granted by amending the articles of association following the establishment of the company. Affirmative consent (*i.e.*, votes) of the shareholders who own 75% of the capital (or the representatives of such shareholders) must be obtained in order to grant the privilege on the right of preemption.

(ii) Privilege on the share

As per the TCC, the privileged shares may be assigned increased voting rights even though the shares have equal nominal value.

(iii) Privilege regarding the right to be represented at the board of directors

The right to be represented at the board of directors was not enumerated as a privilege according to the former Turkish Commercial Code No. 6762. Nevertheless, the right to such representation at the board has long been considered and treated as a privilege according to the precedents of the Turkish Court of Appeals. Hereinafter, the TCC regulates that privileges regarding the right to be represented at the board of directors may be granted to certain share groups and shareholders that constitute a defined group with specific characteristics or to minority shareholders, provided that this privilege has been established and regulated under the articles of association.

Comparison between Ordinary and Privileged Shares

As explained above in detail, a privileged share generally provides greater rights and benefits compared to the ordinary shares in terms of the following: (1) voting rights, (2) dividend payments, (3) dividend rate, (4) right to receive accumulated dividends from previous years, and (5) repayment of capital upon the liquidation of the company.

Additionally, as per the TCC, there exists a special mechanism for the protection of such privileges. According to the relevant provision of the TCC, in case a resolution regarding the amendment of the articles of association that infringes on the rights of the holders of the privileged shares is proposed by the general assembly of shareholders, such a resolution shall not be approved without the consent of the holders of the privileged shares, which must be obtained at a special meeting of the privileged shareholders.

Banking and Finance Law

Overview of Turkish Legal Requirements with respect to the Transfer of Loan Agreements Abroad

The transfer of loan agreements where the borrower or the guarantor is a Turkish public or private institution, or the Republic of Turkey, and which are extended by foreign banks and/or financial institutions to other foreign banks and financial institutions, may be subject to legal requirements under Turkish law.

In this section, our purpose is to address and explain the primary legal requirements under Turkish law in relation to this matter. We do not discuss any contractual issues concerning the transfer of loan agreements, such as possible contractual transfer restrictions or contractual requirements.

1 - Bank Operation License Requirement

If the transferee of a loan agreement is a foreign bank or financial institution, and this bank or financial institution will not engage in regulated banking activities in Turkey (including new lending and deposit taking activities), then the transferee bank or financial institution would not be subject to Turkish banking surveillance by the Banking Regulation and Supervision Agency ("BRSA"), as per the Banking Law No. 5411 ("Banking Law") and related legislation.

Therefore, the transfer of a loan agreement and the subsequent holding of the loan agreement by the transferee would not trigger a bank operation license requirement under Turkish law.

2 - Other Regulatory Requirements

As per the Capital Movement Circular of the Central Bank, dated 2 January 2002, ("Circular"), the Central Bank of the Republic of Turkey ("Central Bank") keeps the records of loans that are extended by foreign lenders to Turkish residents. In this regard, the Central Bank is notified, for recording purposes, of changes to such loans (*e.g.*, the lender of the loan or the repayment terms) that are made available by foreign lenders. Only banks or financial institutions that act as intermediary institutions are under an obligation to notify the Central Bank, and this obligation does not extend to the borrower or the lender. If the foreign lender changes, the Central Bank should be notified of such a change by the intermediary institution, in order to update the lender information in the Central Bank's records.

Additionally, in parallel to the Circular, as per Article 17 of the Decree No. 32 on the Protection of the Value of the Turkish Lira ("Decree No. 32"), a person residing in Turkey can borrow cash loans from foreign lenders, provided that such loans are drawn and utilized via Turkish banks or financial institutions. If the lender changes, the Central Bank must be notified of such change, in order to update the lender information in the Central Bank's records.

According to the Circular, loans borrowed from foreign lenders by Turkish public entities, including metropolitan municipalities, must be notified by the borrowers to the Undersecretariat of the Treasury ("Treasury"), General Directorate of Public Finance, within 30 days following the execution date of the loan agreement. Furthermore, according to Section III/Article 1.1.3 of the Circular, any (i) utilizations, (ii) repayments of principal and interest, (iii) as well as the payment of other fees, must also be notified to the Treasury within 10 days following the relevant transaction, by the borrower and the intermediary institution.

Furthermore, with respect to the loan agreements to which the Republic of Turkey is a party, the Treasury acts on behalf of the Republic of Turkey, and the loan agreement is signed directly by the Treasury. These loan agreements are then registered with the External Financing Information System maintained at the Treasury, in order to track in detail the foreign debts of the Republic of Turkey. Turkish law does not set forth a notification obligation for these agreements, as the Treasury is already directly involved in these transactions. However, in practice, the Treasury requires its written approval to be obtained for the transfer of relevant loan agreements to other banks or financial institutions.

In case the Treasury acts as the guarantor of the loan agreements which are entered into by public entities, such as municipalities or other local governments, public economic entities, entities whose capital is 50% or more state-owned, universities, funds, public entities with private budgets, administratively independent public entities, and investment and development banks, the borrowers of such loans should inform the Treasury of any lender changes within 30 days as of the date of the lender's change, in accordance with the Circular.

3 – Whether Such Exchanges of Information Breach Banking Confidentiality Obligations

According to the banking privacy principle set forth in the Banking Law, branches or liaison offices of foreign banks established in Turkey and other Turkish financial institutions must keep their customers' personal and account information confidential. However, considering that the loans under discussion are to be transferred, and since the lenders are not residing in Turkey, the banking privacy provisions of the Banking Law would not apply to the transferor in this case.

Capital Markets Law

Major Changes regarding the Communiqué on Debt Securities

In the Official Gazette dated 18 February 2017, the Capital Markets Board of Turkey ("CMB") introduced certain amendments to the Communiqué on Debt Securities ("Communiqué"), and these amendments have entered into effect as of the publication date. In this article, we will briefly explain the content and discuss the implications of the most significant amendments made to the Communiqué, as follows:

- **"Financing bill" replaces "bill":** The terminology of the Communiqué has been modified by amending the term "bill" (*"bono" in Turkish*) as "financing bill" (*"finansman bonosu" in Turkish*). It appears that this change aims to diversify the bills, including precious metals bills.

- **Repayment in installments:** The CMB has regulated that financing bills and bonds (*"tahvil" in Turkish*) may be repaid to investors in installments until the maturity date, whereas they could previously be repaid in a lump sum on the due date.

- **Minimum nominal value requirement:** For private placements arising from domestic sales without a public offering, a minimum nominal value of TL 100,000/per unit has been introduced. Previously, there was no nominal value requirement. This is an extra condition that must be fulfilled, in addition to the limit of 150 maximum investors for private placements.

- **CMB powers strengthened:** The CMB has been granted the authority to make certain additional requests from the issuer, such as imposing restrictions on the qualifications of the investors and/or sale conditions, or shortening the term of the issuance document.

- With regard to the cancellation (in whole or in part) of debt securities whose sale has failed to reach the previous issuance ceiling, the CMB has been authorized to assess the cancellation upon the issuer's request.

- For the issuance of convertible and exchangeable bonds in Turkey without a public offering and for such an issuance abroad, the CMB has been granted the power to apply different rules upon the request of the issuer.

- **Authorized corporate body:** It has been regulated that, in the authorized corporate body resolutions (*i.e.*, general assembly resolutions or board of directors' resolutions) regarding the issuance of debt securities, the specific type of the debt securities should be explicitly indicated. Otherwise, the phrase "debt securities" is deemed and interpreted as "financing bond and bill." Therefore, if a company wishes to issue lease certificates or asset-backed securities, it is recommended that the company mentions this explicitly in the relevant resolution.

- **Information requirement for foreign debt securities:** Issuers will no longer be required to register their issuances of foreign debt securities with the Central Registry Agency (*"Merkezi Kayıt Kuruluşu" in Turkish*) ("CRA"). For debt securities to be issued abroad, the issuer is required to inform the Central Registry Agency and provide detailed information as to the debt instrument (*e.g.*, issuance amount, issuance date, ISIN code, due date, interest rate) in any case.

- **Financial statements are to be taken into account:** In order to calculate the issuance limit of debt securities, the following financial statements, which will be prepared in accordance with the relevant regulations and communiqués of the CMB, should be taken as a basis.

The foregoing terms can be duly adapted for companies that are subject to the "special accounting period."

Buyback of debt securities: Issuers may purchase their own bonds. Once purchased, the issuer may choose to resell, keep, or cancel these bonds. If an issuer wishes to purchase its own bonds outside the Borsa Istanbul, such transactions must be disclosed on the Public Disclosure Platform.

Application date for the issuance	Term of financial statements to be taken as a basis
1 January - 15 March	Last annual financial statements, (if there is none) 6-month period interim financial statements of the previous year
16 March - 15 August	Last annual financial statements
16 August - 31 December	6-month period interim financial statements of the relevant year

Competition Law / Antitrust Law

The Turkish Competition Board Published Its Reasoned Decision on the Investigation Conducted Against Aygaz Anonim Şirketi

The Turkish Competition Board ("Board") published its reasoned decision[1] on the investigation initiated against Aygaz Anonim Şirketi ("Aygaz"). Aygaz is active in the production, supply, distribution and delivery of liquefied petroleum gas ("LPG"), as well as the production and sales of devices and products that use LPG. Following a complaint that Aygaz had violated Turkish competition law by determining the resale prices charged by its dealers, the Board decided not to initiate a full-fledged investigation and chose to send an opinion letter to Aygaz pursuant to Article 9(3) of the Law No. 4054 on the Protection of Competition ("Law No. 4054").[2] The reasoned decision stated that there were some findings which might indicate that Aygaz and its wholly-owned subsidiary, Mogaz Anonim Şirketi ("Mogaz"), had engaged in resale price maintenance ("RPM"). Although the Board found the conduct in question to fall within the scope of Article 4 of the Law No. 4054, pursuant to the outcome of the on-site inspections and interviews, the Board determined that the object and effect of the relevant practices in the market had had limited presence and effect.

The Ankara 16th Administrative Court ("Administrative Court") annulled the Board's decision with its decision of 14 May 2015 (2013/1478 E., 2015/655 K.), on the grounds that the Board should have opened a full-fledged investigation against Aygaz in order to determine whether there had been a violation of the Law No. 4054, and should have reached a determination beyond any doubt by expanding the scope of its research and examination, and by evaluating the gathered information, documents, and evidence. Following the Administrative Court's decision, the Board initiated a full-fledged investigation to determine whether Aygaz had violated Turkish competition law by determining the resale prices of its dealers.

Subsequently, the Economic Analysis and Research Department ("Department") prepared an economic analysis report in relation to the sales prices of Aygaz dealers. The Department investigated whether Aygaz had dictated its dealers' prices and set them at the same level, and whether Aygaz had determined the resale prices of its dealers separately. The Department also carried out an analysis known as the "difference in differences" analysis, in order to determine how much the dealers' prices had been increased. As a result of its various analyses, the Department concluded that: (i) there was no indication of a vertical RPM strategy being used by Aygaz, and (ii) the results of the Department's analysis should be evaluated together with all the information and documents relating to the case, and a conclusion should be reached only after carrying out this thorough evaluation.

In addition to the Department's report, the Board also evaluated the market structures of the LPG and automobile gas markets, along with the Turkish Energy Market Regulatory

[1] 1The Board's decision numbered 16-39/659-294 and dated November 16, 2016.
[2] The Board's decision numbered 13-14/204-105 and dated March 13, 2013.

Authority's sectorial industry reports, as well as data obtained from the Turkish Statistical Institute.

In terms of the relevant geographic and product market definitions, the Board did not find it necessary to define the relevant markets, since the result of the investigation would not be affected by the possible relevant product and geographic market definitions.

The allegations against Aygaz with respect to the resale price of its dealers focused mainly on whether: (i) the resale price difference between Aygaz and Mogaz-branded stations were determined by Aygaz, and (ii) the resale prices of Aygaz-branded stations were determined by Aygaz. These allegations and the results of the investigation are discussed in detail below.

(i) The allegation that Aygaz determined the resale price difference between Aygaz- and Mogaz-branded stations:

In terms of determining the resale price difference between Aygaz and Mogaz-branded stations, the Board uncovered only one relevant document during its preliminary investigation, and stated that this particular document suggested that Aygaz could have interfered with its dealer's resale price in that case. However, no other document, information, or evidence that suggested that the resale price difference between Aygaz and Mogaz-branded stations was determined by Aygaz, or that Aygaz interfered with its dealers' resale prices, was discovered. Evaluating Aygaz's defense that its relationship with certain dealers was an agency relationship, the Board concluded that, although there were certain time periods during which the dealers had acted as agents, the dealer referred to in the relevant document (*i.e.*, the one found during the preliminary investigation) was indeed an independent undertaking during the time period in which the document was obtained. With regards to the time period during which the dealer had acted as an independent undertaking, the Board investigated whether Aygaz had dictated a price difference between an Aygaz dealer and a Mogaz dealer. The Board asserted that there was no other information, document, finding or evidence that could indicate that Aygaz had interfered with the resale prices of its dealers. Moreover, the Board concluded that Aygaz did not implement a direct or indirect RPM practice so as to introduce a price difference. The Board also declared that there was no evidence which indicated that Aygaz had built a mechanism to trace or track the dealers who did not comply with the prices recommended by Aygaz. The Board also added that no evidence had been found to substantiate the allegations that Aygaz had pushed, pressured, or punished dealers who did not comply with its suggested prices. The Board indicated that, in a competitive market in which prices change quickly and frequently, an undertaking who acted with the intention of setting and maintaining a price difference between dealers would be expected to build a strict mechanism to control, pressure, and penalize its dealers. Accordingly, the Board declared that a single document indicating that Aygaz might have determined a price difference in one instance would not be sufficient to conclude that resale price differences between Aygaz- and Mogaz-branded stations had been determined by Aygaz in general. The Board further stated that, even though it was determined that Aygaz had interfered with its dealers' resale prices, a practice which is directed against one specific dealer was (i) isolated, (ii) far from being systematic, and that, since the relevant dealer was active in Ankara, this practice would not have any considerable anti-competitive effect in the market in a broader sense. Furthermore, taking into account the nature and characteristics of the LPG market in Turkey (*i.e.*, a dynamic and emerging market), the Board asserted that it would be difficult for possible interference by Aygaz regarding the resale prices of its dealers to affect the competition in the market as a whole. Consequently, with respect to the allegations concerning whether Aygaz had determined the resale price difference between Aygaz dealers and Mogaz dealers, the Board stated that the information, documents and findings gathered and evaluated during its investigation were not sufficient to conclude that Aygaz had violated Article 4 of the Law No. 4054 through RPM practices.

(ii) The allegation that Aygaz had determined the resale prices of Aygaz dealers:

The Authority discovered several e-mail correspondences which, according to the Authority's interpretation, indicated that Aygaz employees had been exchanging information regarding dealers' resale prices and sharing plans for maintaining dealers' resale prices. Such documents led to the understanding that Aygaz had determined the resale prices of its dealers, and that there could be an agreement under which such prices had been applied in accordance with the relevant correspondence. In response to Aygaz's argument in its defense that two of the dealers concerned were its agents, the Board assessed the relationship between Aygaz and the two dealers in question, and concluded that, during the relevant time period, the two dealers had indeed been agencies of Aygaz. Therefore, the Board concluded that resale price maintenance practices concerning these two particular dealers could not be evaluated or punished under Article 4 of the Law No. 4054. With regards to the resale prices of the rest of its dealers, Aygaz argued in its defense that the dealers were free to determine their own resale prices, and that the correspondence in question related to Aygaz's supports and its updates in invoices when Aygaz discounts its prices, due to the margin-share system. To that end, the Board reviewed Aygaz's margin-share system to assess whether the alleged conducts constituted a violation of competition law. As a result of this review, the Board found that, within the LPG market, refineries and distributors set a maximum resale price according to the relevant regulations, and that the difference between the maximum resale price and the costs are shared between the dealer and the distributor. Such distribution arrangements are determined by an agreement between the distributor and the dealer. The Board came to the conclusion that, in terms of the allegations at hand, there was no information, document, or finding that indicated that Aygaz had determined the resale prices of its dealers, considering that: (i) the dealers could increase their prices up to the maximum limit or decrease their own profit margins in order to provide a discount, (ii) the dealers could contact distributors to ask for support in order to provide a higher discount due to the margin-share system, and (iii) there was no penalty or deterrence system applied to the dealers who did not comply with the prices.

In light of the foregoing, the Board decided that Aygaz had not violated Article 4 of the Law No. 4054, and therefore, the Board did not impose an administrative monetary fine on Aygaz.

The Turkish Competition Board's Decision on Turkish Pharmacists' Association Commercial Enterprise regarding Investigation on Article 6 of the Law No. 4054 on the Protection of Competition

The Turkish Competition Board ("Board") published its reasoned decision[3] on the investigation initiated against the Turkish Pharmacists' Association (*"Türk Eczacıları Birliği" in Turkish*) ("TEB") and Turkish Pharmacists' Association Commercial Enterprise (*"Türk Eczacıları Birliği İktisadi İşletmesi" in Turkish*) ("TEBII") on whether they had violated Article 6 of the Law No. 4054 on the Protection of Competition ("Law No. 4054"), by abusing their dominant position in the market for the "supply of pharmaceuticals from abroad" through their exclusivity practices and other actions.

As a result of the investigation, the Board decided unanimously to impose administrative monetary fines, amounting to 1.5% of TEBII's Turkish turnover generated in the 2015 financial year (which corresponded to TL 18,062,307.32), as it concluded that: (i) TEBII enjoyed a dominant position in the market for the supply of pharmaceuticals from abroad, and (ii) TEBII abused its dominant position in the market by entering into exclusivity agreements with suppliers.

In its decision, the Board determined that TEBII was in a commanding, highly powerful position in the market for pharmaceuticals

[3] The Board's decision numbered 16-42/699-313 and dated December 6, 2016.

procured from abroad. In addition, the Board found out that the Turkish Social Security Institution's ("SGK") refusal to enter into protocols with pharmaceutical warehouses constituted an entry barrier to the market. Furthermore, the Board indicated that TEBII had become the sole distributor in the market for pharmaceuticals supplied from abroad subsequent to (and in conjunction with) the Ministry of Health's revocation of the authorization previously granted to pharmaceutical warehouses for the same purpose. In light of these findings, the Board concluded that TEBII was in a dominant position in the relevant market. The Board then evaluated the agreements executed between TEBII and the companies that procured pharmaceuticals from abroad, in terms of their exclusivity. As a result of its evaluation, the Board determined that the agreements had either included exclusivity arrangements, or the procurers had been working exclusively with TEBII, and thus, there was *de facto* exclusivity in the arrangements.

Moreover, by also taking into account TEBII's dominant position in the market, the Board indicated that the pharmaceutical warehouses' opportunity to enter the market had decreased significantly, due to (i) TEBII's supply agreements with exclusivity provisions, and (ii) SGK's administrative actions. TEBII's exclusivity agreements were found to increase the market foreclosure, both actually and potentially, and they were also found to harm consumer benefits. Therefore, the Board decided that the documents in the case had sufficiently proved that TEBII's actions would lead to market foreclosure. Thus, the Board decided that TEBII had violated Article 6 of the Law No. 4054, by abusing its dominant position through exclusivity agreements with the companies that procured pharmaceuticals from abroad. For the calculation of the administrative monetary fine, the Board took into consideration the duration of the violation (which had lasted more than one year and less than five years), as well as aggravating factors, in accordance with Article 5(3)(a) of the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position ("Regulation"). In addition, the Board also took into account the encouragement by SGK as a public authority and deemed it as a mitigating factor as per Article 7(1) of the Regulation. Consequently, the Board determined that the ratio of the administrative monetary fine would be 1.5% of TEBII's Turkish turnover, generated in the 2015 financial year.

The Board also decided to task the Presidency of the Competition Authority with sending an opinion letter to the Turkish Ministry of Health and SGK for the promotion of competition in terms of the market for the supply of pharmaceuticals from abroad. The Board stated that SGK had adopted a discriminatory approach in favor of TEBII, and had refused to execute agreements with pharmaceutical warehouses, even in cases where the legislation allowed otherwise. The Board determined that promoting competition in the market for pharmaceuticals procured from abroad would ensure that patients would have alternative procurement sources and contribute to the provision of improved services in the market. Moreover, due to the ensuing price competition among supplier companies to provide the pharmaceuticals at the cheapest prices to SGK, SGK's financial burden in terms of pharmaceuticals procured from abroad would also decrease. The Board pointed out that, after the authorisation of the pharmaceutical warehouses, commission rates had decreased from 11% to 3.9%, despite the lack of competition among equals. The Board concluded that promoting competition in the market for foreign pharmaceuticals would indeed serve the public benefit.

The Turkish Competition Board Published Its Reasoned Decision on the Preliminary Investigation Conducted against Türk Telekomünikasyon A.Ş. and TTNET A.Ş.
The Turkish Competition Board ("Board") recently published its reasoned decision[4] on the preliminary investigation conducted against Türk Telekomünikasyon A.Ş. ("Türk

[4] The Board's decision numbered 17-06/53-20 and dated February 9, 2017.

Telekom") and TTNET A.Ş. ("TTNET"). This investigation was based on Ankanet Ses Veri İletişim Ticaret Ltd. Şti.'s ("Ankanet") allegations that TTNET had extended its subscribers' effective subscription periods by up to 48 months, by allowing customers who were in the last 6 months of a subscription package to switch to a different TTNET package without paying any early termination fees through its campaigns (particularly through one campaign titled, "Hafifleten Internet Kampanyası"). According to Ankanet, such campaigns led to an increase in TTNET's competitors' costs for gaining new subscribers from TTNET, as they would have to bear their potential customers' early termination fees. Ankanet also alleged that the relevant campaigns would result in below-cost prices for TTNET.

Türk Telekom is a commercial undertaking which offers fixed phone, mobile phone, data and internet-related and value-added services in Turkey. TTNET is established as the internet service provider ("ISP") of Türk Telekom Group. It is also authorized by the Information and Communication Technologies Authority ("ICTA") to operate within the fields of infrastructure operation services, cable-TV services, fixed phone services, virtual mobile network services, satellite communication services, and satellite platform services. Moreover, Türk Telekom is authorized by the Radio and Television Supreme Council ("RTSC") to provide services in the fields of cable broadcast platform operation and satellite broadcast platform operation. TTNET also provides pay-TV services through OTT (Over The Top), IPTV (Internet Protocol Television), and satellite technologies. Ankanet is also an ISP company, which offers fixed broadband internet services in Ankara through fixed wireless broadband access infrastructure.

In its assessment, the Board started out by defining the relevant product markets related to the wholesale and retail levels of the broadband internet services market. In this regard, and by referring to one of its previous decisions,[5] the Board stated that, even though mobile internet speeds and the related data consumption rates had increased due to the introduction of 4.5G technology, the mobile internet network still could not be considered as a substitute for fixed broadband internet services, and that the characteristics of the subscription packages for mobile and fixed broadband services are quite different from one another. In light of the above, the Board defined the retail level of the relevant market as "retail fixed broadband internet access services market," comprising DSL, cable, and fiber technologies. Furthermore, by once again making reference to its past decisions,[6] the Board defined the relevant product market related to the wholesale level as "wholesale fixed broadband internet access services.". Finally, the Board defined the relevant geographical market as "Turkey."

Subsequently, the Board evaluated the allegations put forth in the case file, and indicated that the relevant allegations should be assessed within the scope of Article 6(a) of the Law No. 4054 on the Protection of Competition ("Law No. 4054") (prohibiting abuse of dominance), which defines abuse of dominance as follows: "Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market." In this regard, the Board began its investigation by assessing whether Türk Telekom and TTNET were in a dominant position in the "wholesale fixed broadband internet access services market" and in the "retail fixed broadband internet access services market."

With regards to its assessment on the wholesale level, the Board made reference to its decision No. 13-71/992-423 and dated 19 December 2013, in which it had indicated that, due to Türk Telekom's significantly high level of market share, as well as several other factors, including (i) considerably high and costly investments made with respect to the access networks, which constitute sunk

[5] The Board's decision numbered 13-71/992-423 and dated December 19, 2013.

[6] The Board's decision numbered 13-71/992-423 and dated December 19, 2013; and decision numbered 15-06/74-3 and dated February 5, 2015.

investments, (ii) the existence of significant administrative and legal barriers to network investments, (iii) the existence of high levels of economies of scope and scale, (iv) the lack of other ISPs' buyer power compared to Türk Telekom, and (v) Türk Telekom being deemed as an undertaking with efficient market power by ICTA, Türk Telekom was ultimately determined to be in a dominant position within the wholesale fixed broadband internet access services market. The Board found that since the date of its earlier decision (*i.e.*, 19 December 2013), there had not been any developments in the sector that could alter the Board's assessment as summarized above. Accordingly, the Board decided that Türk Telekom was still in a dominant position within the "wholesale fixed broadband internet access services market." With regards to the retail level, due to several factors such as, (i) TTNET's disproportionately high market share compared to its competitors, (ii) barriers to entry within the relevant market, (iii) low level of buyer power, and (iv) the evaluations and assessments made in previous Board decisions,[7] the Board decided that TTNET was in a dominant position within the "retail fixed broadband internet access services market."

Consequently, the Board proceeded to carry out its assessment regarding TTNET's campaigns that involve subscription durations and commitment periods. First, the Board indicated that, since ICTA had not declared TTNET to be an undertaking with efficient market power, TTNET's campaigns similar to the campaign titled "Hafifleten Internet Kampanyası" were, thus, not subject to ICTA's regulatory activities. However, the content, commitment periods, and prices of the campaigns in question were determined according to the competitive conditions within the relevant market. In this respect, the Board stated that, even though TTNET's competitors also offer campaigns and subscription packages similar to those offered by TTNET, since TTNET is in a dominant position within the "retail fixed broadband internet access services market," it is entrusted and encumbered with a set of obligations deriving from its dominant position within the framework of competition law. The Board asserted that, due to TTNET's vertically integrated structure, it may have the opportunity to use the wholesale internet service that it procures from the undertaking with which it is vertically integrated within the upstream market, for the purpose of selling the relevant service in the downstream market below cost or subsidizing its damages in the downstream market with its revenues from the upstream market (*i.e.*, margin squeeze theory). Moreover, the Board assessed the argument that lengthy commitment periods (such as the 48-month commitment period of the TTNET campaign in this case) may give rise to competition law concerns by way of increasing the costs imposed on its competitors in their pursuit of new customers and, therefore, lead to market foreclosure. In this regard, the Board indicated that, in line with the allegations under review in this case, its dual assessment would consist of evaluating the following: (i) TTNET's increasing its subscription commitment period to 48 months, and (ii) whether these campaigns gave rise to below-cost price applications in the retail internet services market.

With regards to the lengthy commitment periods and exclusivity terms, the Board carefully assessed the previous Commission decisions, as well as the Guidelines on the Assessment of Abusive Conduct by Undertakings with Dominant Position ("Guidelines"), and came to the conclusion that the following criteria had been taken into consideration, by both earlier decisions and the Guidelines, for the purposes of evauating long-term exclusivity agreements in terms of market foreclosure: (i) the ratio of the dominant undertakings' sales that is derived from exclusivity agreements to the total sales in the market, (ii) the duration of the exclusivity agreement, (iii) the general competitive outlook in the relevant market, particularly with regards to entry barriers, and (iv) the existence of efficiency justifications which contribute to the welfare of the consumers.

[7] The Board decisions numbered 08-65/1055-411 and dated November 19, 2008; and numbered 13-71/992-423 and dated December 19, 2013.

With regards to the question of whether the TTNET campaigns under review gave rise to below-cost pricing in the retail internet services market, the Board indicated that the relevant analysis can be performed within the framework of margin squeeze theory (that is, a kind of below-cost pricing), in light of the fact that TTNET, which is in a dominant position within the downstream market, belongs to the same economic entity as Türk Telekom, which is itself in a dominant position within the upstream market. Furthermore, the Board declared that, in its decisional practice and literature, the common competition law concern regarding long-term agreements with exclusivity and margin squeezing features is whether a large portion of the market is foreclosed to the competitors due to the foreclosure effects of such agreements on the customers. Therefore, in order to determine whether or not TTNET had engaged in a margin squeeze maneuver through the relevant campaigns, the Board conducted a revenue-cost analysis for the campaign in question and examined the effects of this campaign on the relevant market. Following its analysis, the Board stated that it had found no evidence suggesting that TTNET had applied below-cost prices by taking advantage of either (i) its dominant position in the retail fixed broadband internet access services market, or (ii) the fact that it is part of the same economic entity as Türk Telekom. The Board further stated that it had found no evidence suggesting that TTNET had applied margin squeezing between the downstream and upstream markets, which could not be matched by its competitors. As a result of its analysis regarding the effects of TTNET's campaign in the relevant market, the Board determined that the number of subscribers who had switched their subscription packages as a result of the "Hafifleten Internet Kampanyası" campaign (and other proactive campaigns) was limited during the period under review, and that the portion of the market that was closed to competition as a result was not broad or extensive enough to arouse competition law concerns. Therefore, the Board concluded that the lengthy commitment periods in the TTNET campaign under review did not lead to market foreclosure.

In light of the evaluations above, the Board did not find it necessary to initiate a full-fledged investigation concerning the allegations against TTNET.

The Turkish High State Court Annulled the Turkish Competition Board's Decision on the Export Ban

The Turkish High State Court ("High Court") has recently rendered its decision in which it reviewed the Turkish Competition Board's ("Board") decision[8] regarding the allegations that Roche had violated Articles 4 and 6 of the Law on the Protection of Competition ("Law No. 4054") by way of engaging in anti-competitive agreements and by its refusal to supply its products to the complainant.

The background of the Board's decision, which has been appealed to the High Court, can be summarized as follows: The complainant, Corena, a pharmaceutical warehouse, alleged that the export ban in the Sales Agreement that was concluded between Roche and various pharmaceutical warehouses for the distribution of Roche products ("Agreement") violated Article 4 of the Law No. 4054. Moreover, the complainant also claimed that Roche had prohibited pharmaceutical warehouses from selling Roche products to Corena.

In its evaluation of the allegation regarding the export ban, the Board stated that the export ban may be evaluated under Article 4 of the Law No. 4054, as the ban would be considered as a resale condition for the goods and services in question. In this regard, the Board determined that it was important to ascertain whether the restriction in question had any effects on the Turkish market within the scope of Law No. 4054. Following its evaluation, the Board concluded that the export ban in the Agreement only concerned the sales of Roche products outside of Turkey, and thus determined that it did not have any effects on the Turkish market. Accordingly, the Board held that the complainant's allegation

[8] The Board's decision numbered 10-44/785-262 and dated June 17, 2010.

regarding the export ban requirement in the Agreement fell outside the scope of the Law No. 4054.

As for Corena's other allegation (*i.e.*, that Roche had prevented other pharmaceutical wholesalers from selling Roche products to Corena), the Board stated that there was not sufficient evidence to conclude that Roche had forced the wholesalers not to supply Corena with Roche products. The Board also determined that the complainant had failed to provide adequate information with regards to the potential effects and the magnitude of Roche's alleged conducts. Therefore, the Board held that there wasn't sufficient evidence to substantiate Corena's claims. Moreover, the Board also noted that the complainant's uncooperative approach and its lack of collaboration during the pre-investigation process had raised doubts concerning the merits of its allegations. As a result of the foregoing findings and considerations, the Board decided not to initiate a full-fledged investigation against Roche.

Corena subsequently appealed the Board's decision to the High Court. Following their review of the case, the High Court's investigating judge and the prosecutor concurred in their opinion and decided to reject the complainant's application, as they concluded that the Board's decision did not constitute an infringement of competition law. However, the High Court disagreed with the opinions of the investigating judge and the prosecutor in its evaluation of the complainant's allegations. In fact, the High Court stated that it was evident that Roche's actions (which formed the basis of Corena's allegations) had an effect on the Turkish market. Furthermore, the High Court declared that the evidence put forth by Corena in the annex to its complaint petition had not been sufficiently examined by the Board, and that the Board should have investigated the claims more thoroughly instead of deciding not to launch a full-fledged investigation. Consequently, the High Court annulled the Board's "no-go" decision regarding Corena's allegations. Following the High Court's ruling, the Board has recently announced on its website that it has initiated a full-fledged investigation in this matter against Roche.[9]

Although the High Court did not provide concrete explanations or expound on how export bans would have an effect on the Turkish market, its judgment is nevertheless significant, as it may introduce a new front and open up new investigative paths, thus expanding the Board's established precedents on export bans.

Labor Law

The Amendments Introduced by the New Draft Law on Labor Courts

The long-awaited Law on Labor Courts ("Draft Law") has been drafted, approved by the Judicial Commission of the Grand National Assembly of Turkey, and finally introduced to parliament, waiting to be enacted. The Draft Law contains numerous amendments and brings substantial changes to the current Law on Labor Courts No. 5521 ("LLC"). Mandatory mediation is inarguably one of the most remarkable and attention-grabbing reforms; however, it is not the only amendment that deserves notice and close examination.

The first article of the Draft Law stipulates that the purpose of the Draft Law is to regulate the organization, authorization, jurisdiction, and the procedural elements of the labor courts, and aims to revoke the first article of the LLC. The preamble of the Draft Law suggests that the necessity to ease the workload of labor courts in Turkey is a matter of paramount importance, which needs an immediate solution, considering that more than six hundred thousand labor lawsuits are pending before labor courts of first instance, and, likewise, more than two hundred thousand appeals are pending before the Court of Appeals as of 2015.

Furthermore, the LLC has a tangled history that reaches back to the 1950s, having gone

[9] The Board's decision numbered 17-19/306-M, which was announced on the Turkish Competition Authority's official website on 6 July 2017.

through seven amendments, and yet, it still seems to be outdated in certain aspects. For example, some of the articles are no longer applicable (*e.g.*, Articles 9 and 10), whereas some of the procedures they regulate are not compatible with the requirements set forth under the current Civil Procedure Law No. 6100 ("CPL"), which governs and regulates the judicial process.

Having said that, the principal amendment and the key change brought by the Draft Law is the introduction of mandatory mediation. According to Article 3 of the Draft Law, in cases of compensation claims raised by employees or employers based on individual or collective labor agreements and for reinstatement lawsuits, it is mandatory for the parties to submit their case to a mediator before filing a lawsuit. However, it is important to note that mandatory mediation does not cover or apply to the pecuniary and non-pecuniary damages that may arise from occupational illnesses and work-related accidents.

According to the Draft Law, in mandatory mediation cases, the mediator will be appointed either by the mediation office from a prepared list of mediators, by the commissions to be formed, or by the parties themselves.

The essential duties of the mediator are as follows: (i) informing the parties about mediation meetings, (ii) applying the best efforts possible to communicate with the parties in order to help them reconcile and reach a resolution to the matter, (iii) informing the mediation office as soon as the meeting is concluded, (iv) taking meeting minutes at the end of each negotiation session, and (v) sending those minutes to the mediation office.

According to the Draft Law, the mediator shall conclude the negotiations within three weeks, and this period may be extended for one week by the mediator in certain cases and particular circumstances.

Another significant change which may be introduced to the labor law landscape by the Draft Law concerns the scope of disputes over which the Labor Courts have jurisdiction. According to Article 5 of the Draft Law, disputes between journalists under Law No. 5953, shipmen under Law No. 854, the employees, the employers and the representatives of the employers, subject to the service contracts under Labor Law No. 4857 and Code of Obligations No. 6098, fall under the jurisdiction of the Labor Courts. Comparing the Draft Law provisions to the LLC, we observe that the gist of the amendment is to significantly widen the range of labor law disputes that will be heard by the Labor Courts.

All in all, whilst the fundamental development that the Draft Law introduces to labor law practice in Turkey is the mandatory mediation requirement, various other amendments will also be implemented, aiming to lessen the workload of the judiciary and to clarify their work range and the limits of their jurisdiction.

Litigation

The Court of Appeals Clarified the Admissibility of Relying on Oath as Evidence in Civil Proceedings where Evidence List does not Include "Oath"

Oath is accepted as evidence according to the rules of Turkish civil procedural law, even though the term itself is not defined by the Law on Civil Procedure No. 6100 ("Law No. 6100"). Scholars define oath as oral statements made by the parties confirming accuracy or denying the claims about a certain event related to the dispute. By relying on an oath, a party asks the counterparty to testify under oath about a certain event in order to prove its case. An oath is considered and treated as conclusive evidence under the Law No. 6100. Therefore, after an oath takes place in accordance with the required procedure, the facts of the event that the oath relates to are deemed to be proven.

When the repealed Law on Civil Procedure No. 1086 ("Repealed Law") was in force, the Court of Appeals stated its opinion that, in civil proceedings, the parties could rely on oath as evidence, and that the courts could ask the parties whether they were willing to rely on oath as evidence, even in cases where the evidence list did not specifically include "oath," but instead included a phrase such as "miscellaneous evidence" or "all kinds of evidence." After the Law No. 6100 came into effect, certain civil chambers of the Court of Appeals still followed the aforementioned approach with respect to this issue; however, certain others developed or adopted a different approach, which will be explained below.

Article 194(2) of the Law No. 6100 provides that "The parties are required to expressly state the evidence that they rely on and which event is to be proven by each evidence." Moreover, Article 119(1)(e) of the Law No. 6100, which governs and regulates the contents of lawsuit petitions, provides that a lawsuit petition must indicate which event will be established and proven by which piece of evidence. These provisions were only introduced to Turkish civil procedural law with the Law No. 6100; in other words, the Repealed Law did not contain such provisions. Certain civil chambers of the Court of Appeals have concluded, based on these provisions, that the parties are obliged to specifically include "oath" in their evidence lists in order to be able to ask the counterparty to testify under oath if need be during the proceedings, and that merely mentioning "miscellaneous evidence" or "all kinds of evidence" in their evidence lists is insufficient and does not confer the right to rely on oath as evidence.

Due to the conflicting approaches of the various chambers of the Court of Appeals on this matter, this issue has been brought before the General Civil Assembly on the Unification of the Precedents of the Court of Appeals ("General Civil Assembly"), which rendered its decision No. 2015/2 E. and 2017/1 K. on 3 March 2017, unifying the divergent precedents and practices. In this decision, the assembly concluded that, in civil proceedings, merely including "miscellaneous evidence" or "all kinds of evidence" in the evidence list is not sufficient to give the right to rely on oath as evidence. In the same vein, the assembly declared that the courts cannot remind the relevant party of the option to rely on oath as evidence either.

The General Civil Assembly justified its decision by explaining that Articles 194(2) and 119(1)(e) of the Law No. 6100 oblige the parties to clearly explain which piece of evidence will be used to prove which particular event; therefore, a party that fails to specifically indicate "oath" as evidence in its evidence list cannot be granted the right to rely on oath in the ensuing proceedings.

On the other hand, it is worth noting that the General Civil Assembly was not unanimous in its decision and that it had members who did not agree with this ruling. These dissenting members argued that, by mentioning and including "miscellaneous evidence" or "all kinds of evidence" in the evidence list, the parties demonstrate their willingness to rely on every type of evidence, including an oath, which are available in civil proceedings. Nevertheless, the majority was not persuaded and did not agree with or adopt this approach.

As a result, following the General Civil Assembly's decision, it is no longer possible to rely on oath as evidence in civil proceedings if the evidence list does not indicate "oath" specifically, but instead merely mentions "miscellaneous evidence" or "all kinds of evidence." Surely, this new rule is applicable for the cases that are adjudicated under the Law No. 6100.

Pharmaceutical Law

Developments in the Healthcare Industry: Introducing the Draft Regulation on the Registration, Traceability and Tracking of Medical Devices

On 16 June 2017, the Turkish Medicine and Medical Device Institution ("Institution") published the Draft Regulation on the Registration, Traceability and Tracking of Medical Devices ("Draft Regulation") on its website.[10]

The Draft Regulation provides certain principles regarding the tracking system for

[10] See at http://www.titck.gov.tr/Duyurular/DuyuruGetir?id=3025

medical devices, which is described in Article 4 as "the online system which allows the registration, traceability and tracking of products in the scope of the Medical Device Regulation, the Regulation on Active Implantable Medical Devices, and the Regulation on In Vitro Diagnostic Medical Devices, and which is used for registration procedures regarding legal or real persons that manufacture, import, export and sell these products, importers' real or legal person representatives, if any, and institutions." In a nutshell, the system revolves around the registration and notification obligations of the manufacturers and importers and, in return, the recording obligations of the Institution.

The main issues and subjects addressed under the Draft Regulation are as follows:

- Notification and Recording

As per Article 5 of the Regulation, titled "General Principles," the Institution is responsible for keeping all kinds of records related to medical devices, including records related to the sale of such medical devices, as well as information and records concerning real or legal persons and their representatives who manufacture, import, export, sell, distribute, or repair medical devices.

For this purpose, the Institution collects information, records and documents from manufacturers (or, if the manufacturers reside outside of Turkey, from their representatives) regarding their company and their medical devices. If such documents expire and are not renewed in due time, then these records /registries are put on hold (*i.e.*, suspended) by the Institution, and the registration of new devices governed by these documents is prohibited, and production/importation notifications are also not allowed.

This system also functions as a hub for manufacturers who wish to connect with potential dealers for the distribution of their registered devices. Such direct connections between manufacturers and dealers are not subject to the Institution's approval and do not require its consent.

- Registration Procedures

Article 6 of the Draft Regulation sets forth the registration requirements. According to Article 6, the following requirements should be fulfilled when seeking registration: (i) real or legal persons should be engaged in commercial activities, (ii) system users should possess an electronic or mobile signature, and (iii) information and documents that may be requested by the Institution as per the guidelines (to be published) should be procured and submitted to the Institution.

Information and documents regarding medical devices that are requested by the Institution will also be uploaded to the registration system and will be available for all users to see, in line with the principles that will be explained and detailed under the Institution's guideline(s). To that end, users will have to ensure that such information and documents are kept up-to-date at all times.

- Principles as to Traceability and Tracking

Principles regarding the traceability and tracking of medical devices are set forth and regulated under Article 7 of the Draft Regulation.

Article 7 specifies that the guiding principle is to trace and track medical devices beginning from their introduction to the market and continuing until the end of their commercial life cycle. In this regard, importers, manufacturers and related parties should notify the Institution about the importation, production and transfer/movements of medical devices, in accordance with the Institution's soon-to-be-published and future guidelines.

Article 7 indicates that the Institution will also prepare guidelines with respect to notification requirements regarding medical devices' usage processes, surveillance, auditing and warning systems for medical devices, as well as procedures relating to the traceability and tracking of medical devices.

- Sanctions

Parties who fail to comply with the system requirements enumerated in the Draft

Regulation will face certain sanctions, as listed in Article 9, which range from the suspension or cancellation of the company's registration to sanctions that are listed under the Law Regarding the Preparation and Application of the Technical Legislation on Products, which include administrative monetary fines up to TL 250,000 (approx. EUR 60,000).

Data Protection Law

Circumstances in which the Grounds of Data Processing Are No Longer Valid

On 29 May 2017, the Personal Data Protection Authority ("DPA") published the Draft Regulation on the Erasure, Destruction or Anonymization of Personal Data ("Draft Regulation") on its official website, and invited public comment on the relevant secondary legislation. The Draft Regulation was open for public comment until 12 June 2017, and the DPA is currently in the process of finalizing the text.

The Draft Regulation is based on Articles 7 and 22 of the Law No. 6698 on the Protection of Personal Data ("DP Law"). Article 22 authorizes the DPA to draft secondary legislation related to the DP Law. As a general rule, as promulgated under Article 7 of the DP Law, in the event that the reasons for which the personal data are processed cease to exist or are no longer valid, personal data should be erased, destroyed or anonymized by the data controller *ex officio*, or upon the request of the data subject, regardless of whether the personal data has been processed in accordance with the DP Law and other relevant legislation. Moreover, as per Article 138 of the Turkish Criminal Code, when the data controller fails to destroy or erase personal data in cases where personal data processing is against the law and in breach of the good faith principle, the data controller may be sentenced to a prison term of 1-2 years. Therefore, this obligation may have criminal consequences and it is critical to understand the circumstances in which the "grounds of data processing are deemed to be no longer valid."

As per Article 5 of the Draft Regulation, the necessary conditions for processing personal data cease to exist or are deemed not to be fulfilled, in the particular circumstances set out below:

(i) In case of an amendment or abolition being made to the provisions in the relevant legislation that constitutes the basis of personal data processing,

(ii) Where there is no agreement between the parties, where the agreement is invalid, or where the agreement is automatically terminated, in case of termination or revocation of a contract,

(iii) Where the underlying purpose of personal data processing ceases to exist,

(iv) Where personal data processing is against the law and in violation of the good faith principle,

(v) If the data subject withdraws its consent, where the personal data processing can only be carried out subject to the condition of explicit consent,

(vi) Where the data controller accepts the data subject's request regarding deletion, erasure or anonymization of personal data within the scope of their rights under Article 11 of the DP Law,

(vii) Where a complaint is submitted to the DPA and such complaint is approved by the DPA, in case the data controller denies the data subject's request for the erasure or destruction of their personal data,

(viii) Where there are no conditions that could justify the retention of personal data for an extended period of time, after the maximum required period for the retention of personal data has already elapsed or expired,

(ix) Where the conditions requiring the processing of personal data as per Articles 5 and 6 of the DP Law cease to exist.

If any of the conditions above is met, then the data controller is required to erase, destroy or anonymize personal data on its own, or upon the request of the data subject, as per Article 5 of the Draft Regulation. Therefore, it should be emphasized that the data controller does not need to receive the data subject's request in order to initiate the erasure, destruction or anonymization process, and that the data controller may start the process of erasure, destruction, or anonymization on its own initiative, in order to avoid falling afoul of the regulations or inadvertently engaging in any illegal activities within the scope of the foregoing provisions.

Definitions of erasure, destruction, or anonymization were also promulgated under the Draft Regulation, as explained below:

(i) According to Article 8 of the Draft Regulation, the erasure of personal data wholly or partially achieved by automatic means is defined as the process of rendering the relevant personal data inaccessible to the relevant users and unusable in any way or by any means.

(ii) According to Article 9 of the Draft Regulation, the destruction of personal data is defined as rendering the entire physical filing/archiving medium, wherein information is stored and which is capable of data storage, irrecoverable and unusable.

(iii) Finally, as per Article 10 of the Draft Regulation, anonymization is defined as rendering personal data anonymous in such a way that it cannot be related to or associated with an identified or identifiable real person, even through the process of matching such data to other data.

In conclusion, the Draft Regulation—which is not yet in effect and may be subject to change—provides, in its current published state, insight and guidance on the erasure, destruction and anonymization of personal data. In order to avoid criminal consequences, data controllers need to establish strong internal processes and procedures to monitor the conditions and purposes of processing personal data, and adjust their data processing practices to the requirements of the new regulations as necessary.

Draft Regulation on the Data Controllers' Registry

The "Draft Regulation on the Data Controllers' Registry" ("Draft Regulation") was published on the official website (www.kvkk.gov.tr) of the Data Protection Authority ("DPA"), and the DPA opened it to public comment between 5 May 2017, and 20 May 2017. The Draft Law is not yet in effect and may be subject to various changes before it finally comes into effect.

The purpose of this Draft Regulation is to establish the Data Controllers' Registry, which will be publicly available, under the supervision of the Data Protection Board. Furthermore, the Draft Regulation seeks to determine the procedures and principles concerning the registrations to be made with the Data Controllers' Registry and to ensure their implementation, according to the Law No. 6698 on the Protection of Personal Data ("Law No. 6698").

The basic principles that the Draft Regulation introduces may be listed as follows:

(i) The Draft Regulation sets forth a registration obligation, which is also governed by and regulated under the Law No. 6698. According to Article 5 of the Draft Regulation, before processing any personal data, data controllers will be obliged to register with the Data Controllers' Registry.

It's worth noting that, according to the same provision, data controllers who reside outside of Turkey will also be obliged to register with the Data Controllers' Registry through a data controller representative. The Draft Regulation differs significantly from the Law No. 6698 on this point. Designation of a data controller representative is not an obligation imposed under the Law No. 6698, and that law implies that the designation of a data controller representative is entirely optional; whereas the Draft Regulation renders the designation of a data controller representative mandatory. Furthermore, according to the Draft Regulation, a designated data controller representative must be "a legal entity residing in Turkey or a citizen of the Republic of Turkey."

The registration obligation imposed on foreign data controllers by the Draft Regulation also differs significantly from EU regulations. For instance, under current EU data-protection laws, the registration obligation only arises for entities which are established in a member state, or which make use of equipment located in a member state for data processing purposes. On the other hand, the Draft Regulation imposes this obligation on all data controllers residing outside of Turkey, without providing any exceptions or exclusions or limiting it based on certain criteria, which would mean that every data controller in the world, regardless of where they may be located, will be obliged to register with the Data Controllers' Registry, if the Draft Law comes into legal force in its current form.

(ii) The Data Controllers' Registry will be publicly available and the Data Protection Board will have the authority to determine the scope of its public availability and dissemination.

(iii) The information that will be required to be disclosed to the Data Controllers' Registry during the registration process will be predicated on the inventory of personal data being processed.

(iv) The information submitted to the Data Controllers' Registry and subsequently published in the Data Controllers' Registry will be taken as the basis for determining the extent of the obligation of the data controller to provide information to the data subject, to respond to the claims and requests of the data subject, and to determine the scope of the explicit consent given by the data subjects.

(v) Data controllers will be responsible for ensuring that the information submitted to the Data Controllers' Registry and published in the Data Controllers' Registry are accurate, up-to-date, and in accordance with the law. Registration with the Data Controllers' Registry will not remove or negate any other liabilities or obligations imposed on the data controllers under the Law No. 6698.

(vi) Article 16 the Draft Regulation sets forth some exemptions to the foregoing requirements. According to Article 16, data controllers will not be obligated to register some of their activities (*e.g.*, processing of personal data that is necessary for the prevention of a crime or for assisting crime investigations, or processing of personal data that is made public by the data subject) with the Data Controllers' Registry.

Similarly, Article 17 of the Draft Regulation stipulates certain exemption measures determined by the Data Protection Board. However, the exemption of certain data controllers from the obligation to register with the Registry by the Data Protection Board (based on the objective criteria set out under this secondary regulation) does not exempt such data controllers from their additional obligations under the Law No. 6698.

(vii) The data controllers' interactions with the Data Controllers' Registry will be conducted through "VERBIS" ("Data Registration Information System") which is an information system that will be used by the data controllers to apply to and register with the Data Controllers' Registry and to carry out other actions related to the Data Controllers' Registry. VERBIS can be accessed through the internet, and the system will be established and administered by the DPA.

(viii) The maximum time period established for processing personal data, which is presented to and published in the Data Controllers' Registry by the data controllers, will be taken into account for determining the scope of the obligation of the data controller to erase, destroy or anonymize personal data, as per Article 7 of the Law No. 6698.

The DPA opened the Draft Regulation to public comment, obtained the views and comments of the relevant players and stakeholders in the sector, and now continues its work on finalizing the Draft Regulation. In light of the foregoing explanations, it is clear that the Draft Regulation needs certain amendments before it comes into effect, in order to be in line with the Law No. 6698 and current EU practice.

Internet Law

Safety Stamp Era in E-Commerce

The Communiqué on Safety Stamp and Notification Obligation in E-Commerce ("Communiqué") has been published in the Official Gazette on 6 June 2017. The Communiqué entered into force on the same date.

The Communiqué aims to establish the procedures and principles relating to the safety stamp to be used in e-commerce activities and provides certain provisions regarding the safety and service quality standards to be applied to intermediary service providers and to service providers who are willing to obtain (and interested in acquiring) the safety stamp. The Communiqué sets out the application and cancellation procedures, the conditions that must be satisfied to obtain the safety stamp, as well as the duties and obligations of the safety stamp providers.

The Communiqué has been enacted on the basis of Article 11 of the Law on the Regulation of Electronic Commerce ("Law") and Article 16 of the Regulation on Service Providers and Intermediary Service Providers in Electronic Commerce ("Regulation"). Accordingly, the terms defined in the Communiqué are consistent with the terms defined both in the Law and the Regulation. The Communiqué also introduces new terms specifically for the purposes of this Communiqué, such as "secure socket layer," "safety stamp," and "safety stamp providers."

According to the Communiqué, "safety stamp" describes an electronic mark to be provided to service providers and intermediary service providers who comply with the minimum requirements regarding the standards of safety and service quality. It should be noted that acquiring this safety stamp is entirely optional. Therefore, the requirements and obligations set forth in the Communiqué only apply to those service providers who are willing to fulfill its requirements in order to obtain the safety stamp certifying their safety and security, and the safety stamp providers who will be authorized to issue this safety stamp.

Article 5 of the Communiqué enumerates the minimum requirements for obtaining the safety stamp. Article 5 stipulates that any transaction that involves personal data and payment information should be carried out with the home secure sockets layer ("SSL") on the desktop or mobile website, and with SSL in the mobile application.

Service providers who wish to obtain a safety stamp should also plan and set up their processes in accordance with the relevant laws and regulations, and should also implement the appropriate measures to deal with and manage content that can negatively affect children's physical, mental, moral, psychological and social development characteristics. In addition, service providers should offer or provide their customers with the opportunity to receive information about their orders, such as the stock, content, usage, warranty (if any), technical support, cargo, delivery time, and the details of who will provide these services, along with visual content that makes it possible for customers to understand these matters. Service providers should also offer or provide information with respect to who will provide the service, as well as the scope and duration of the service subject to e-commerce. According to the same provision, in order for the customer to obtain information or to submit a complaint about their orders, service providers should provide contact information. Finally, if the service providers wish to obtain the safety stamp, they should not have been convicted of a crime specified in Article 5 of the Communiqué.

Applications for the safety stamp should be submitted directly to the safety stamp providers by the service providers and the intermediary service providers. The required documents should be submitted according to Article 5 of the Communiqué, as explained above. Following the submission of an application, a report will be prepared by the safety stamp provider to determine whether the service provider is complying with the conditions set out in the Communiqué. If the applicant has fulfilled the conditions set forth in the Communiqué and the report is favorable to the applicant, then the application will be approved and the safety stamp will be provided. If not, the applicant will be granted a period of thirty days to fulfill the missing conditions (*i.e.*, the conditions that it has failed to satisfy).

Once granted, the safety stamp should be displayed on the main page of the service provider or the intermediary service provider's electronic commerce environment, according to Article 6 of the Communiqué. Safety stamps can also be displayed or put on pages other than the home page.

Article 9 of the Communiqué governs, regulates, and delineates the scope of the authority of the safety stamp providers, such as the authority to determine whether or not the service providers are complying with the conditions set out under the Communiqué, to audit the service providers following a complaint, and, at least once a year, to take the necessary measures to prevent the misapplication or misappropriation of the safety stamp and to notify the relevant authorities and the Ministry of Customs and Trade ("Ministry") of matters uncovered during their inspections which may require judicial or administrative sanctions. The obligations of safety stamp providers are set forth and regulated under Article 10 of the Communiqué. According to Article 10, safety stamp providers are required to carry out the suspension or cancellation of the safety stamp when necessary, to audit the service providers and intermediary service providers, and to prepare the activity reports to be submitted to the Ministry. Safety stamp providers should submit an annual report to the Ministry (by the end of March each year), and this report should include the material set forth and described in the Communiqué.

This Communiqué is expected to amplify e-commerce transactions and foster the development of e-commerce activities in Turkey by establishing a safe and secure e-commerce environment, while also aiming to provide a swift and cost-efficient dispute resolution mechanism with respect to e-commerce transactions.

Real Estate Law

The New Zoning Regulation for Planned Areas

Turkey's main regulation with respect to zoning for planned areas, Type Zoning Regulation for Planned Areas ("Old Regulation"), will now be replaced by the new Zoning Regulation for Planned Areas ("Regulation"), published in the Official Gazette of 3 July 2017. The Regulation shall be effective as of 1 October 2017 (except for the Provisional Article 3 which enters into force on the publication date of the Regulation), providing companies with a 3-month adaptation period to adjust their operations and bring them in line with the Regulation.

The Regulation has sparked a certain amount of controversy. Several civil society organizations in Turkey have alleged that the Regulation will cause significant problems for the construction sector and for architects, and that the sector's field experience and practical knowledge were not reflected in the Regulation. Below are some of the most important changes and novelties introduced by the Regulation:

(i) The Regulation sets forth and clarifies the definitions of certain terms that were used in the old Regulation, but lacked a clear definition under the previous law, such as: (1) atrium, (2) yard, and (3) preliminary project (*"avan proje" in Turkish*).

(ii) One of the most significant changes brought into effect by the Regulation is the abolishment of studio apartments, which are defined as dwellings that consist of one main room and one bathroom. Pursuant to Article 5(25) of the Regulation, every single detached dwelling must consist of at least: (1) one living room, (2) one bedroom, (3) one kitchen or cooking area, (4) one bathroom or washing area, and (5) one toilet. Pursuant to Article 29(1) of the Regulation, the minimum net area of these rooms will be as follows: (1) living room, 12.00 m^2; (2) bedroom, 9.00 m^2; (3) kitchen or cooking area, 3.30 m^2; (4) bathroom, 3.00 m^2; (5) toilet, 1.20 m^2. Another difference between the Old Regulation and the Regulation is that, pursuant to the Article 29(4) of the Regulation, if the built-in kitchen and the living room and the bathroom and the toilet area are designated to occupy the same space, then the size of that space must be at least equal to the sum of the minimum area requirements set forth for each individual room.

(iii) Previously, nurseries , playgrounds and child-care units whose total area was less than 750 m^2 and which did not have a commercial purpose, would not be included in the calculation of the floor area *("emsal" in Turkish)*, as long as such nurseries and child-care units did not exceed 5% of the total floor area. With the Regulation, only up to 75 m^2 of nursery areas and child-care units which (i) do not have a commercial purpose, and (ii) are situated in basement or ground floors, will be excluded from the calculation of the floor area. The Regulation has imposed similar restrictions on other specific areas, such as leisure facilities or prayer rooms.

While the representatives of various stakeholder groups deemed this change to be restrictive and not beneficial to the public, the government has argued that this revision was necessary in order to prevent businesses from circumventing the law by including prayer rooms, balconies, *etc*., in their project plans, and thus extending the area on which they could build their houses. Furthermore, the Regulation declares that the sum of all such areas that are excluded from the floor-area calculation, but that are nevertheless allowed in the zoning regulations, cannot exceed 30% of the total floor area of the plot.

(iv) According to the Regulation, a project contract signed with the project owner should include a provision with regard to the transfer of the copyright of the intellectual and artistic work related to the project. If there is no project contract or there is no such provision in the contract, then the project owner will be deemed to have waived his copyright regarding the intellectual and artistic work, pursuant to the Law on Intellectual and Artistic Works No. 5846.

Anti-Dumping Law

Trade Protection Instruments: Turkey's Safeguard Investigation on Toothbrushes

In line with the World Trade Organization's ("WTO") announcement,[11] published on its website on 3 May 2017, the Turkish Ministry of Economy ("Ministry") has initiated a safeguard investigation on toothbrush imports on 22 April 2017, and notified the WTO of its investigation, in accordance with Article 12.1(a) of the Agreement on Safeguards.[12]

[11] See at https://www.wto.org/english/news_e/news17_e/safe_tur_03may17_e.htm

[12] Article 12.1(a) of the Agreement on Safeguards specifies that, "A Member shall immediately notify the Committee on Safeguards upon:
(a) initiating an investigatory process relating to serious injury or threat thereof and the reasons for it, (…)"

In Turkey, the Communiqué No. 2017/2 ("Communiqué") announcing the initiation of the investigation was published in the Official Gazette on 22 April 2017.

- The product subject to the investigation

The product subject to the investigation is "toothbrushes, including dentures," which is currently classified in the Turkish Customs Tariff Schedule under 9603.21.00.00.00 customs tariff code.

- The reasons for the initiation of the investigation

As explained in the Ministry's notification to the WTO,[13] the investigation was initiated upon an evaluation and assessment of a safeguard petition from the domestic toothbrush industry, and on the basis of the evidence and information contained therein.

Upon evaluation of the currently available information at hand, the Ministry determined that there had been an increase in imports of toothbrushes, both in absolute terms and relative to domestic production.

Furthermore, the Ministry stated in its notification that, "The information currently available shows a trend of decreasing profitability and a declining market share for the domestic industry, while inventories are increasing at the same time. Furthermore, even though consumption is growing, production and sales of domestic products have barely increased."

- Who are the interested parties?

As per Article 5 of the Communiqué, those parties who have completed and provided the application form attached to the Communiqué ("Application Form for the Interested Party") to the Ministry within 20 days after the publication date of the Communiqué (*i.e.*, 22 April 2017), are accepted and acknowledged as interested parties in the investigation.

- Procedure

The Ministry has provided a Username and Password to those who have sent in the application form, in order for them to be able to access the "Online Questionnaire for the Interested Party." Interested parties were required to fill out the online questionnaire within the 30-day period following the initiation of the investigation. All correspondences with the Ministry must be made in Turkish.

Lastly, interested parties have the right to request a hearing before the investigating authority, by way of including this request in their application form.

- Failure to cooperate

As per Article 9 of the Communiqué, in cases in which an interested party does not provide the necessary information within the prescribed time limits or impedes the investigation, the investigation may be concluded and its ruling finalized on the basis of the available facts. If an interested party supplies false or misleading information to the investigating authority, such information will not be taken into account in the investigation.

- What is a safeguard investigation?

Safeguard and surveillance investigations are one of the trade protection instruments[14] designed to guard against injuries to domestic

[13] A copy can be accessed at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=236083&CurrentCatalogueIdIndex=0&FullTextHash=&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True

[14] Trade protection instruments consist of anti-dumping, anti-subsidy and safeguard and surveillance investigations.

industry. Safeguard and surveillance investigations are conducted in line with the principles set forth under the Regulation on Surveillance Applications in Imports and the Regulation on Safeguard Measures in Imports.

A safeguard investigation aims to determine whether increased imports of a particular product cause, or threaten to cause, serious injury to a domestic industry.

As specified on the WTO's website:[15] "A WTO member may take a safeguard action (*i.e.*, restrict imports of a product temporarily) only if the increased imports of the product are found to be causing, or threatening to cause, serious injury."

White Collar Irregularities

The Importance of Having a Compliance Program

With the increase in the number of anti-corruption cases and the sky-rocketing fine amounts that the US Department of Justice ("DOJ"), the US Securities and Exchange Commission ("SEC") and other governmental authorities around the world have imposed in recent years, the importance of compliance as a concept and as a practice has increased exponentially. Today, many large companies either have an established compliance program, or aim to have one in the future. One of the most significant advantages of a compliance program that springs to mind is that compliance programs are necessary for fostering a culture of compliance, and that they help to detect and deter misconduct within a company. However, this is not the sole reason why many companies across the world are dedicating substantial resources to their compliance programs. This article seeks to illuminate these and other concrete benefits of compliance programs for companies both within and outside of the Foreign Corrupt Practices Act ("FCPA") jurisdiction, in addition to explaining what types of compliance programs best qualify for the concrete and extensive benefits.

(I) When the FCPA Applies: Compliance as a Mitigating Factor

A compliance program provides numerous benefits to a company—it helps to create and foster a compliance culture, and it detects and deters irregularities within the company. With that said, the most tangible benefit of a compliance program for those companies subject to FCPA jurisdiction is that an effective compliance program can qualify as a mitigating factor for reducing an FCPA fine. In addition, enforcement authorities may take the existence of a compliance program into account when considering whether to prosecute (or decline to prosecute) a case or enter into a plea agreement with the corporation under investigation. Therefore, compliance programs not only act as mitigating factors, they are even part of the prosecutorial calculus that may allow the company to evade a criminal judgment in the first place. Many legal documents and guidelines recommending the establishment of a compliance program also advise that such a compliance program needs to be a fully functioning, effective one, and not just a "paper program." A paper compliance program could be characterized as one with a well publicized anti-corruption policy, but where the company has a de facto policy of ignoring the policies outlined in the compliance documents and pressuring its employees to engage in unethical behavior, while the upper management looks the other way. Furthermore, a company that has an anti-corruption policy but that has not established any other components of a proper and effective compliance program could also be viewed as a "paper program", which looks good on paper, but is not effective or functional in the real world.

[15] See at https://www.wto.org/english/news_e/news17_e/safe_tur_03may17_e.htm

According to the Principles of Federal Prosecution of Business Organizations[16] ("Principles"), prosecutors should consider, among other factors, "the existence and effectiveness of the corporation's pre-existing compliance program"[17] when determining whether to bring charges or negotiate plea agreements with a corporation. According to the Principles, when evaluating a compliance program, the prosecutors should ask the following three questions: (i) How well is the compliance program designed? (ii) Is it applied sincerely and in good faith? (iii) Does it work? The prosecutors should determine whether a compliance program is only a "paper program" or an effective one designed, implemented, reviewed, and revised appropriately.[18] In a similar vein, the U.S. Sentencing Guidelines ("Guidelines") also advise that the existence of an effective compliance and ethics program can be considered as a mitigating factor when organizations are being sentenced. The SEC's Seaboard Report,[19] which lists the criteria that the SEC takes into consideration when determining whether to take any enforcement action or to bring reduced charges against a company, lists the existence of compliance programs among its criteria.

A benchmark case in which the enforcement authorities declined to prosecute a corporation, largely due to its existing compliance program, is the 2012 Morgan Stanley case. According to the DOJ's press release, even though Morgan Stanley's former managing director for its real-estate business conspired with others to enrich himself and a Chinese official, the DOJ declined to prosecute Morgan Stanley. This was because, *"Morgan Stanley maintained a system of internal controls meant to ensure accountability for its assets and to prevent employees from offering, promising or paying anything of value to foreign government officials. Morgan Stanley's internal policies, which were updated regularly to reflect regulatory developments and specific risks, prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions and employment. Morgan Stanley frequently trained its employees on its internal policies, the FCPA and other anti-corruption laws. Between 2002 and 2008, Morgan Stanley trained various groups of Asia-based personnel on anti-corruption policies 54 times. During the same period, Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times. Morgan Stanley's compliance personnel regularly monitored transactions, randomly audited particular employees, transactions and business units, and tested to identify illicit payments. Moreover, Morgan Stanley conducted extensive due diligence on all new business partners and imposed stringent controls on payments made to business partners."*[20]

At the opposite end of this scale is the VimpelCom case of 2016. VimpelCom was fined $397 million by the US authorities for conspiring to violate the FCPA.[21] The DOJ heavily criticized VimpelCom's compliance program and its operation in the deferred-prosecution agreement that was entered into between the parties:[22]

(i) VimpelCom had no Chief Compliance Officer ("CCO") at the time it entered the Uzbek market,

[16] USAM § 9-28.000 (2008).
[17] USAM § 9-28.28.300 (2008).
[18] USAM § 9-28.800 (2008).
[19] U.S. Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (2001).

[20] https://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required
[21] https://www.justice.gov/opa/pr/vimpelcom-limited-and-unitel-llc-enter-global-foreign-bribery-resolution-more-795-million
[22] http://fcpa.stanford.edu/fcpac/documents/4000/00315.pdf

(ii) When a CCO was finally appointed, the junior executive selected for the position had no background in compliance and was not given any staff or support,
(iii) VimpelCom had no dedicated compliance function until 2013, and the CCO only became a senior management position in 2014,
(iv) VimpelCom had little to no anti-corruption compliance program for the duration of the conspiracy; in fact, VimpelCom's only anti-corruption policy was summarized and encapsulated in two paragraphs within VimpelCom's code of conduct,
(v) FCPA training for employees was inadequate and performed in an ad hoc manner during the course of the corruption conspiracy,
(vi) As the DOJ stated in the deferred-prosecution agreement, "In short, rather than implement and enforce a strong anti-corruption ethic, VimpelCom sought ways to give itself plausible deniability of illegality while proceeding with business transactions known to be corrupt."[23]

(II) Outside FCPA Jurisdiction - The Benefits of a Compliance Program

Even for companies that are not subject to FCPA jurisdiction, having a compliance program is becoming increasingly more important. In recent years, many governments have adopted legislation that either introduces compliance programs as a defense for corruption offenses[24] or establishes their existence as mitigating factors.[25] Even the B20 Cross-Thematic Group on Responsible Business Conduct & Anti-Corruption advised G-20 governments to recognize the compliance efforts of the private sector.[26]

Moreover, even if a company is not under FCPA jurisdiction, it may still conduct business with and have commercial ties to other companies that do fall under FCPA jurisdiction. Finally, companies that do fall under FCPA jurisdiction may require a local company with whom it does business to maintain a compliance program for self–protection purposes, when doing business outside the US. Therefore, establishing a robust compliance program may be an excellent way for a company to distinguish itself from its competitors. Global companies are mindful of their reputation and the FCPA risks that they may confront. In fact, third-party due diligence is one of the essential elements of an effective compliance program. Thus, a local company that wishes to enter into a business relationship with a global company may be one step ahead of its competitors if it proves that it does have a compliance program in place, even though it does not fall within FCPA jurisdiction

(III) Conclusion

There are numerous benefits to establishing and sustaining a robust compliance program: companies may be able to get plea agreements instead of criminal judgments, they may use the compliance program as a mitigating factor when fines are imposed, and compliance programs may even qualify as defenses in corruption cases. Furthermore, compliance programs detect and deter wrongdoings within the company, and they may confer competitive advantages, particularly to local companies who aim to do business with a global company. However, companies wishing to enjoy these advantages should not lose sight of one crucial fact: Effective compliance programs comprise more than just a code of conduct, and "paper programs" may not fool enforcement authorities.

23 Ibid.
24 "In Spain, a recent amendment to the Spanish Criminal Code (SCC) has introduced an affirmative defense of compliance.", Spain: New Affirmative Compliance Defense, (19 June 2017, 22:20), http://www.traceinternational.org/blog/136/Spain_New_Affirmative_Compliance_Defense
25 "(...) the enforcer will take into account the 'existence of internal mechanisms and procedures of integrity, audit and incentive for the reporting of irregularities, as well as the effective enforcement of codes of ethics and codes of conduct within the organization' (free translation)", Art. 7, VIII of the Brazilian Clean Companies Act, http://fcpacompliancereport.com/2015/03/compliance-programs-under-the-brazilian-clean-companies-act/ (last visited 16 July 2017).

26 https://www.b20germany.org/fileadmin/user_upload/documents/B20/b20-ctg-rbac-policy-paper.pdf

ELİG

GÜRKAYNAK

Attorneys at Law

ELIG, Attorneys-at-Law is an eminent, independent Turkish law firm based in Istanbul. The firm was founded in 2005.

ELIG is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations.

Our legal team consists of 70 lawyers. We take pride in being able to assist our clients in all fields of law. Our areas of expertise particularly include competition law, corporate law, M&A, contracts law, white collar irregularities and compliance, data protection and cybersecurity law, litigation and dispute resolution, Internet law, technology, media and telecommunications law, intellectual property law, administrative law, real estate law, anti-dumping law, pharma and healthcare regulatory, employment law, and banking and finance law.

As an independent Turkish law firm, ELIG collaborates with many international law firms on various projects.

For further information, please visit www.elig.com.

ELİG
GÜRKAYNAK
Attorneys at Law

Çitlenbik Sokak No: 12 Yıldız Mah. Beşiktaş 34349, Istanbul / TURKEY
Tel: +90 212 327 17 24 • Fax: +90 212 327 17 25
www.elig.com