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LEGAL INSIGHTS QUARTERLY

December 2017 – February 2018

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Preface to the December 2017 Issue

We witnessed several significant regulatory developments this quarter in the Turkish legal landscape.

In this issue, the labor law section delves into the new Regulation Regarding Employees' Inventions, which regulates patent and utility model rights with respect to inventions made by employees, at higher education institutions, or in projects with public support. Further, this section discusses the long-awaited Law on Labor Courts No. 7036 which introduced a mandatory mediation process.

The litigation section sheds light on the validity of the standardized terms through a decision of the High Court of Appeals, where the Court found that the mere fact that one of the parties is weaker economically is not sufficient to deem a standardized term null and void.

On the competition law front, this issue explores, among other topics, the Turkish Competition Authority's Draft Amended Guidelines on vertical agreements, which aims to revise the Block Exemption Communiqué on Vertical Agreements No. 2002/2.

The real estate section discusses the last-minute changes made to the much debated New Zoning Regulation for Planned Areas (published on July 3, 2017), which is to be enforced as of October 1, 2017.

The data protection law section discusses the new Regulation on Erasure, Destruction or Anonymization of Personal Data, which applies to data controllers and sets out the principles and procedures pertaining to erasure, destruction and anonymization of personal data.

Finally, on the white collar irregularities front, this issue analyzes the foreign bribery enforcement actions taken by the US Department of Justice and the US Securities and Exchange Commission in 2017.

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.

December 2017

Corporate Law

Liability of Board Members in Limited Liability Companies

1. General

Limited liability companies are managed by their board of directors. As per the Turkish Commercial Code No. 6102 ("TCC"), the board of directors is composed of at least one director, who could be a Turkish or a foreign real person or legal entity, and who does not need to reside in Turkey. In case a legal entity is appointed as a director, it should then appoint a real person as representative, and such representative may also be a foreign or a Turkish citizen, and does not need to reside in Turkey.

At least one of the shareholders of a limited liability company should be appointed as the director with unlimited powers to represent and bind the company. Once this requirement is fulfilled, the board of directors may also appoint other persons to represent and bind the company on certain matters or limited to certain monetary thresholds.

2. Liability of the Board Members

In limited liability companies, the legal liabilities of board members are regulated under Article 553 of the TCC, which refers to the legal liabilities of board members of joint-stock companies. Article 644/1(a) of the TCC sets forth that the said article shall be applied to limited liability companies as well. Article 553 of the TCC indicates that, in case the directors violate their obligations arising from the law and the articles of association of the company by negligence, they shall be liable to (i) the company, (ii) shareholders, and (iii) creditors of the company.

The most important aspect of Article 553 of the TCC is that, in order for the director to be held liable, obligations arising from the law and the articles of association of the company should have been violated by the director through "negligence". Therefore, directors shall only be held liable under Article 553 of the TCC if they violate their obligations by intent or recklessness.

Moreover, according to Article 553/2 of the TCC, board members of limited liability companies who transfer a duty or an authority arising from the law, or from the articles of association of such companies, to others shall not be held liable for the actions and decisions of such persons, if they prove that they demonstrated sufficient care while choosing those persons assigned to such functions and powers. Having said that, the board members are also obliged to supervise and instruct, if necessary, those to whom the authorities of the board of directors are delegated. In any case, directors shall not be held liable for all actions of these persons, but they shall be liable for their actions that the directors could supervise.

3. Special Liability Conditions

Apart from the general legal liability rule, which is regulated under Article 553 of the TCC, there are several special liability conditions for the directors which are also regulated under the TCC:

1. Article 549 of the TCC regarding "documents and declarations being in contradiction with the law" indicates that the directors shall be held liable for the legal violations found in the documents if they are at fault,

2. Article 550 of the TCC regarding "false declarations concerning capital and awareness of payment deficiency" indicates that legal liability for the directors arises if they are at fault,

3. Article 551 of the TCC regarding "corruption in valuation of the capital in kind and enterprise to be acquired together with the capital in kind" indicates that legal liability may arise from losses that are the result of such illegal actions,

4. Article 574 of the TCC regarding "not taking necessary actions when the number of partners is down to one" indicates that directors may be held liable in case any losses result from the failure to fulfill the requirements with respect to registering and announcing such facts,

5. Article 622 of the TCC regarding "request of nullity and cancellation of general assembly resolutions with bad faith" indicates that the liability of the directors may arise for those who caused the losses,

6. Article 193 of the TCC regarding "the loss caused by the related person with the process of merger, split-off or conversion transactions" indicates that legal liability may ensue for the directors if the directors have participated in the transaction in any manner, and

7. Article 202 of the TCC regarding the "unlawful exercise of the control by the dominant company over the subsidiary" indicates that legal liability may arise for those who cause damage to the subsidiary.

Banking and Finance Law

Self-Reporting in Turkish Banking Law

The Banking Law No. 5411 ("Banking Law") and the relevant secondary legislation set forth various self-reporting mechanisms for the banks operating in Turkey. We aim to focus on whether such self-reporting becomes mandatory in cases where banks detect non-compliance within their organizations. Such self-reporting is not universal, and the requirements vary with respect to the parties that are subject to these self-reporting rules and to the matters that trigger the self-reporting requirements.

There are two main actors who are under an obligation to self-report: (1) the banks (sometimes along with the relevant members of staff), and (2) the independent auditors. While the obligation of the independent auditors is broader with regard to subject (*i.e.*, a violation of the Banking Law or the relevant bank's articles of association triggers their self-reporting obligation), the relevant obligation with respect to the banks is stipulated for a finite and enumerated list of subjects.

Article 33 of the Banking Law stipulates that if an independent bank auditor detects any issues that may endanger the continued operation of the bank or any evidence demonstrating that the bank managers (*"yöneticiler"* in Turkish) have violated the Banking Law or the bank's articles of association, then the independent auditor should inform the Banking Regulation and Supervision Agency ("BRSA") accordingly. The scope of the term "manager" has been broadly envisaged in Article 3 of the Banking Law to include the heads and members of the board of directors, the auditing committee and the credit committee of a bank, the general manager, the deputy general manager, the authorized signatories, the regional managers, the branch managers and the managers of the units employed within the central head office organization (*i.e.*, headquarters) of the bank. Accordingly, if a bank's independent auditor notices an irregularity and takes the view that a certain act triggers her obligation to inform the BRSA, this might be a disclosure point for her as a violation of the Banking Law. The obligation to notify the BRSA as per the foregoing should be considered to fall on the independent auditor, and not the bank.

Article 25 of the Banking Law shifts this reporting obligation in certain cases on to the bank (and, in the present case, the relevant staff member). It stipulates that the grounds or reasons for why a general manager and/or its deputies have left their office(s) shall be conveyed to the BRSA within 7 days of such member(s) of staff leaving their office(s).

Article 26 of the same law sets forth that persons who fail to comply with the requirements set out in subparagraphs (a) (which is mainly about being solvent), (b)

(which is primarily about not having a significant ownership stake in or control over banks that have been transferred to the Savings Deposit Insurance Fund), (c) (which is mainly about not having a significant ownership stake in financial institutions before they have been transferred to the Savings Deposit Insurance Fund), and (d) (which primarily concerns being subject to certain penalties set out under the Turkish Criminal Code) of Article 8, shall not be employed as a general manager, deputy general manager, or as an authorized signatory at the banks. The same article further stipulates that the banks should immediately relieve such relevant persons from these managerial positions and also remove their signatory authority.

Additionally, Article 38 of the Banking Law sets forth the requirement to submit consolidated financial reports, and the Regulation Regarding Activity Reports of Joint Stock Companies renders it mandatory that joint stock companies state in their activity reports whether they or the members of their board of directors were subject to any administrative or judiciary sanctions during the time covered by the report. Article 10(4) of the Regulation Regarding Procedures and Principles of Banks' Activity Reports to be prepared by Banks requires the banks to submit their activity reports to the BRSA within 7 days following their publications.

In summary, except for the limited number of circumstances listed above, banks are not subject to mandatory self-reporting rules with respect to cases where they detect non-compliance within their organizations.

Capital Markets Law

Significant Amendments Recently Introduced by Borsa Istanbul on the Listing Directive

Borsa Istanbul A.Ş. ("BIST") has introduced a number of significant amendments on the Listing Directive on July 31, 2017.

Easy entrance to the Star Market: Star Market listing requirements have been amended and, as per such amendment, part of the listing requirements for the Star Market and its groups (Group 1[1] and Group 2[2]) have been softened, provided that the applicant companies meet certain conditions.

Previously, the applicant companies were required to satisfy the following conditions of Group 1 or Group 2, as the case may be:

	Star Market Group 1	Star Market Group 2
Profit realized according to the annual financial statements of the previous years audited by the independent auditors	Last 2 years	Last 2 years
Equity/share capital ratio in the recent financial statements audited by the independent auditors	Over 0.75	Over 1

Following the amendment, the applicant companies may be listed in the Star Market pursuant to the decision of the BIST, such a decision is to be made by taking into account the companies' projections as to their activities, financing structures, and how they will utilize the public offering incomes, and provided that they meet the following conditions:

[1] The other conditions for Star Market Group 1 are as follows: (i) the market value of the shares offered to the public should be in the minimum amount of TL 250,000,000, (ii) the total market value should be in the minimum amount of TL 1,000,000,000, and (iii) the ratio of the nominal value of the shares offered to the public to the share capital should be 5%.
[2] The other conditions for Star Market Group 2 are as follows; (i) the market value of the shares offered to the public should be in the minimum amount of TL 100,000,000, (ii) the total market value should be in the minimum amount of TL 400,000,000, and (iii) the ratio of the nominal value of the shares offered to the public to the share capital should be 10%.

(i) Having operating profits as per the latest annual or relevant interim period financial statements audited by the independent auditors;

(ii) Having an equity/share capital ratio over 0.5 as per the latest annual financial statements audited by the independent auditors;

(iii) Conducting the public offering through the sale of the existing shares together with the issuance and sale of new shares.

For the calculation of the companies' operating profits, the BIST is also allowed to take into consideration the amortization and redemption amounts of the companies that do not necessitate cash outflows.

In addition to the foregoing, the following significant amendments were also introduced on the Listing Directive:

1. New market for the shares of investment companies: The investment companies' issued shares for qualified investors may be traded on the Qualified Investors Market rather than the Collective and Structured Products Market. Previously, the shares of the investment companies were traded only on the Collective and Structured Products Market.

2. Simplified listing procedure for structured products: Structured products (*e.g.*, fund participation shares, real estate certificates, *etc.*) other than investment company warrants and certificates are directly listed, without being subject to any assessment by the BIST, upon the approval of the offering circular/issuance document by the Capital Markets Board ("CMB") and the realization of the sale. Such an implementation system did not exist prior to the amendment.

3. Determination of the applicable market for structured products: The listed warrants, certificates, other structured products (*e.g.*, real estate certificates) and fund participation shares issued through a public offering are traded on the Collective and Structured Products Market. Furthermore, the ones issued for qualified investors are traded on the Qualified Investors Market. Such an implementation mechanism did not exist prior to the amendment.

4. New requirement for real estate certificates: With regard to the listing of real estate certificates, obtaining a prior opinion from the BIST has become a requirement before the approval phase of the offering circular/issuance document by the CMB. Previously, the listing of real estate certificates was not subject to any assessment by the BIST.

5. Exceptional listing procedure for the Turkish Sovereign Wealth Fund ("TSWF"): The capital market instruments, issued by the TSWF ("Türkiye Varlık Fonu Yönetimi A.Ş"), its sub-funds and other companies incorporated or authorized by the TSWF, are directly listed and traded without requiring any prior decision or processing by the BIST. Such an implementation mechanism did not exist prior to the amendment. This amendment will accelerate the listing procedure for the TWSF's capital-market instruments.

Competition Law / Antitrust Law

The Turkish Competition Authority's Draft Amended Guidelines on Vertical Agreements

The Turkish Competition Authority ("Competition Authority" or "Authority") has announced on July 20, 2017, on its official website, that its "Draft Guidelines on Vertical Agreements" ("Draft Guidelines"), which aims to revise the Block Exemption Communiqué on Vertical Agreements No. 2002/2 ("Communiqué No. 2002/2") and the Guidelines on Vertical Agreements ("Guidelines") has been made available for public notice and comment.

The Draft Guidelines includes newly introduced regulations and/or amendments with regard to: (I) agency agreements, (II) online sales, and (III) most-favored nation

(*i.e.*, customer) ("MFN") clauses in order to eliminate inconsistencies in the existing legislative framework and to meet the needs of the evolving market conditions in the modern economy.

(I) With regard to the agency agreements, the Draft Guidelines includes an amendment in terms of non-compete obligations in such agreements. In this regard, the Draft Guidelines refers to Paragraph 14 of the current Guidelines, which adopts a "rule of reason" approach with regard to non-compete obligations in the agency agreements. The Draft Guidelines states that such clauses would only be considered within the scope of Article 4 of the Law No. 4054 on the Protection of Competition ("Law No. 4054") if they were to lead to market foreclosure effects in the relevant markets. The Draft Guidelines indicates that such an approach contradicts the basic framework of the Law No. 4054.

To that end, in order to eliminate this inconsistency, the Authority contemplates amending the relevant provision under Paragraph 14[3] of the Guidelines as "this provision falls under Article 4 of the Law," instead of "this provision may fall under Article 4 of the Law." By doing so, the Draft Guidelines suggests the non-compete obligations incorporated in the agency agreements to be unequivocally considered to fall within the scope of Article 4 of the Law No. 4054, irrespective of whether such clauses in the agency agreements lead to any foreclosure effects in the relevant markets.

(II) In terms of online sales, the Draft Guidelines points out the necessity of providing specific provisions regarding online sales under the Turkish competition law regime, and aims to harmonize the current legislative framework with the approach adopted by the European Commission. To that end, the Draft Guidelines proposes to incorporate provisions regarding online sales under Paragraphs 25, 26 and 27 of the Guidelines. In this regard, it should be noted that the new provisions contemplated to be introduced by the Draft Guidelines would comply with the provisions regarding online sales in the European Commission's Guidelines on Vertical Restraints.

The new provisions in the Draft Guidelines include the following: (i) restrictions with regard to online sales that exclude the relevant agreement from block exemption (*i.e.*, hardcore restrictions for online sales), (ii) conditions that may be stipulated for websites to be utilized as sales channels, and (iii) provisions regarding online sales in the selective distribution systems.

(III) MFN clauses have recently been scrutinized by both the European Commission and the Turkish Competition Board due to the increasingly widespread utilization of electronic channels in trade activities. Therefore, indicating that this new trend necessitates specific regulations, the Draft Guidelines introduces provisions with regard to MFN clauses. In general, the Draft Regulation evaluates MFN clauses under the "rule of reason" approach. In this regard, it proposes to: (i) include a provision in Paragraph 19 of the Guidelines regarding resale price maintenance, and (ii) incorporate a new sub-section regulating the assessment of MFN clauses under the Turkish competition law regime in Section 9.5.2 of the Guidelines. The Draft Guidelines indicate that MFN clauses do not give rise to the same consequences in each case and, therefore, such clauses should be evaluated on a case-by-case basis by thoroughly analyzing various factors, such as: (i) the position of the parties and their competitors within the relevant market, (ii) the purpose of the MFN clause placed in the relevant agreement, (iii) the specific characteristics of the relevant market and the MFN clause in question.

[3] The complete version of the amended provision reads as follows: "However, non-competition obligations, including those related to the period following the termination of the agreement, concern inter-brand competition and may lead to anti-competitive effects if they create a foreclosure effect in the relevant market where the contracted goods and services are being sold; as a result, this provision falls under Article 4 of the Law."

In this context, it may be claimed that the new provisions regarding MFN clauses are highly significant, as they will provide vital guidance for the evaluation of MFN clauses under the Turkish competition law regime.

The Turkish Competition Board Unconditionally Approves the Transaction Concerning the Acquisition of Sole Control over Vive B.V. by Toyota Industries Europe AB

The Competition Authority announced, on its official website, the Board's reasoned decision[4] of unconditional approval regarding the transaction concerning the acquisition of sole control over Vive B.V. ("Vive") by Toyota Industries Europe AB ("Toyota Europe"), which is controlled by the Toyota Industries Corporation ("TICO") ("Transaction"). Through this Transaction, TICO will ultimately gain sole control over Vive and its subsidiaries, including Vanderlande Industries Holding B.V. ("Vanderlande").

Although the parties contended that the Transaction would not affect any relevant markets in Turkey, given that the parties' activities in Turkey do not overlap horizontally or vertically, the Board nevertheless determined that the Transaction would lead to a "conglomerate" concentration, due to the fact that the activities of the parties are complementary or substitutes for each other. Thus, this decision is one of the rare cases in which the Board reviewed the effects of a conglomerate concentration.

The Board referred to Paragraph 9 of the Guidelines for the Assessment of Non-Horizontal Mergers and Acquisitions ("Non-Horizontal Mergers and Acquisitions Guidelines"), which defines conglomerate concentrations as transactions between the suppliers of products that are complementary or weak substitutes for each other, or products that are in the same product range. Moreover, by referring to Paragraph 90 of the Non-Horizontal Mergers and Acquisitions Guidelines, the Board stated that, in conglomerate concentrations, the relationship between the parties is neither horizontal (*i.e.*, as competitors in the same relevant market) nor vertical (*i.e.*, as suppliers or customers). As per the information provided within the merger control filing, the Board resolved that TICO's balanced forklifting trucks and material handling activities, including storage equipment, were complementary to Vanderlande's industrial automation processes. Furthermore, the Board pointed out that Bastian Solutions Inc. ("Bastian"), which TICO is planning to acquire by way of a separate transaction, was also active in the industrial automation processes market.

In this respect, the Board defined the relevant product markets as the "industrial automation processes market" and the "production and sales of equipment for material handling market."

The Board then referred to Paragraph 91 of the Non-Horizontal Mergers and Acquisitions Guidelines, which states that conglomerate concentrations rarely lead to the creation or strengthening of a dominant position that results in a significant reduction of competition in the relevant markets. The Board stated that the parties' market shares in Turkey and the competitive landscape of the relevant markets should be taken into account in order to evaluate the possibility of the realization of unilateral and coordinated effects.

The Board ultimately found that the parties' market shares in Turkey did not indicate a dominant position in either of the two relevant product markets, and thus, decided that the markets did not possess a structure that would lead to exclusionary behaviors or coordinated effects.

The Board also stated that, in terms of conglomerate mergers, market foreclosure is realized through unilateral conducts in the form of tying, bundling and other exclusionary behaviors.

[4] The Board's Vive B.V. decision, dated 06.04. 2017 and numbered 17-12/143-63.

The Board concluded that certain products offered by TICO in the market for the production and sales of equipment for material handling were complementary to Vanderlande's products in the industrial automation processes market in Turkey. That being said, the Board nevertheless decided that the Transaction would not pose a risk of significantly reducing competition in either of the relevant product markets that are complementary to each other, given that TICO has a low market share in the market for the production and sales of equipment for material handling in Turkey.

Furthermore, the Board reviewed the complementary nature and substitutability of the products and services offered by Bastian and Vanderlande. Although the Board found that there was a complementary and weak substitutability link between Bastian's and Vanderlande's products and services, it also took into consideration the following relevant facts: (i) Bastian's activities were geographically focused on the United States of America, and (ii) Vanderlande did not have a market share in Turkey that could be deemed risky based on the structure of the market. Accordingly, the Board concluded that the Transaction would not result in the creation or strengthening of a dominant position through any unilateral or coordinated effects.

The Board also emphasized that factors such as incentive and capability (especially capability) are critically important in the realization of market foreclosure. The Board found that the market shares of the Transaction parties and the market structures of the two relevant product markets would not bestow sufficient market power or the capability to foreclose the market on the Transaction parties. Consequently, the Board decided that the Transaction did not raise any competition law concerns, given that the merged entity would not have the market power to foreclose the market. Accordingly, the Board decided unanimously to grant its unconditional approval to the Transaction.

The Competition Board Concluded Its Preliminary Investigation Concerning Excessive Pricing Allegations

The Turkish Competition Board (the "Board") published its reasoned decision[5] on the preliminary investigation regarding the allegations that Viessmann Isı Teknikleri Ticaret A.Ş. ("Viessmann Isı") had violated Article 6 of the Law on the Protection of Competition ("Law No. 4054") by abusing its dominant position in the spare-parts market for Viessmann-branded combi boilers through excessive pricing.

Viessmann Isı is the exclusive distributor of Viessmann-branded products within Turkey, and is solely owned and controlled by Viessmann Holding International GmbH. Viessmann Isı distributes Viessmann-branded heating and cooling products, and also provides after-sales services. In defining the relevant product market, the Board first examined the heating-cooling sector and then focused on combi boilers and their spare parts, as the allegations revolved around the excessive pricing of the spare parts for Viessmann-branded combi boilers. The Board found that Viessmann-branded combi boilers were differentiated substantially from other brands in terms of their technological properties, the quality of their components and materials, and the testing and quality-control mechanisms that were employed during the R&D process. Consequently, the Board found that the substitutability of Viessmann-branded combi boilers was substantially limited. In line with these findings, the Board defined (i) the relevant product market as "the spare-parts market for Viessmann-branded combi boilers," and (ii) the relevant geographic market as "Turkey."

In its assessment, the Board first examined whether Viessmann Isı was in a dominant position in the relevant product market. Considering that (i) spare parts for Viessmann-

[5] The Board's Viessmann Isı decision, dated 15.05.2017 and numbered 17-16/223-93.

branded combi boilers were not substitutable (except for some of its parts), and that (ii) Viessmann Isı was the sole and exclusive distributor of Viessmann-branded products, the Board determined that Viessmann Isı held a dominant position in the relevant product market, and then proceeded to analyze whether it had abused its dominant position by way of excessive pricing.

Before delving into the merits of the case, the Board initially reiterated its position with regards to excessive pricing. The Board first defined "excessive price" as "the price determined consistently and significantly above the competitive level as a result of the undertaking's market power." The Board then examined the US antitrust practice and the EU competition law approach regarding excessive pricing, and found that there was a consensus among those competition authorities in favor of not intervening in cases where the market is expected to correct itself in the short or medium term.

In line with the foregoing analysis, the Board acknowledged that intervention with respect to excessive pricing could lead to certain downsides and negative effects, such as deterring new entries into the relevant market, decreasing the motivation and incentives for investment and innovation, and leading to a risk of legal error by competition authorities in terms of calculating what should be inferred as an "excessive price." Accordingly, the Board emphasized that, in order to deduce abuse of dominant position through excessive pricing, certain market conditions, such as (i) market shares and concentration levels within the market, (ii) barriers to entry and expansion (including legal barriers, capacity restrictions, economies of scope and scale, absolute cost advantages, exclusive access to key inputs, well developed distribution and sales networks, incumbent firm's position and network effect, and strategic barriers such as long-term strategic effects), and (iii) buyer power, should also be taken into account.

Therefore, the Board concluded that determining a price that (i) would not be charged in a competitive market, and (ii) would be well above the economic value of the product/service offered, would be considered as excessive pricing in terms of competition law.

Subsequently, the Board conducted a two-step economic value test including the following: (i) a comparison between the actual prices and actual costs of the products, and (ii) a comparison among the prices of competing products. The Board stated that the objective in comparing the actual prices and costs was to estimate the profitability of the relevant undertaking. In order to determine the "reasonable" profit margin, the Board referred to its past practice,[6] where it had evaluated profit margins in terms of excessive pricing. The Board observed that, although it takes the notion of economic value and the price comparisons into consideration in its assessment of excessive pricing, its decision ultimately hinged more on the second prong of the test (*i.e.*, comparing the prices of competing products) than the first prong of the test (*i.e.*, a comparison of the actual prices and actual costs of the products).

Accordingly, the Board applied the two-step economic test for Viessmann Isı by comparing the profit margins of the bestselling spare parts for Viessmann-branded combi boilers from 2014 to 2017. The Board noted that the profitability of the spare parts (particularly gas valves) had increased in 2017 relative to the previous year. However, the Board then stated that the increase in profitability would have been substantially lower if other fixed and variable costs of the undertaking had been taken into consideration. Moreover, bearing in mind that the domestic producer price index had increased 28% between 2014 and 2017, the Board determined that the profitability of spare parts for Viessmann-branded products

[6] See The Board's Belko decision, dated 06.04. 2001 and numbered 01-17/150-39; MTS decision, dated 26.05.2006 and numbered 06-36/462-124; Biletix decision, dated 01.03.2007 and numbered 07-18/164-54; Tüpraş decision, dated 17.01.2014 and numbered 14-03/60-24, and Congresium decision, dated 27.10.2016 and numbered 16-35/604-269.

(except for gas valves) was reasonable. With that said, the Board asserted that, since the sales of gas valves were only a small part of the overall sales of the company, Viessmann Isı was not likely to achieve monopolistic profits through the sale of gas valves.

In the second prong of the test, the Board compared the prices of Viessmann-branded spare parts with the prices of competing products from other companies. The Board found that Viessmann had sold most of its spare parts (except for gas valves and water flow switches) for lower prices than those offered by Vaillant (its competitor in the same market segment), whereas its prices were higher than those offered by Bosh/Buderus (its competitor in the lower market segment). Furthermore, the Board declared that the primary market (*i.e.*, the combi boilers market) should also be taken into account while evaluating the allegations with respect to excessive pricing in the spare parts market. In light of this approach, the Board concluded that excessive pricing of secondary products (*i.e.*, spare parts) would not be economically rational in cases where the primary market (*i.e.*, the combi boilers market) was a competitive market, given that consumers can easily switch to other combi boiler brands in case of an increase in the price of spare parts for combi boilers.

In light of the foregoing, the Board ultimately concluded that there was no legal grounds to initiate a full-fledged investigation with regard to the allegation that Viessmann Isı had abused its dominant position by way of excessive/exploitative pricing, since (i) consumers had plenty of alternatives to Viessmann in the combi boilers market, (ii) the combi boilers market was a competitive market, hence excessive pricing of combi boiler spare parts would not be profitable or sustainable in the medium or long term, (iii) the profitability ratio of Viessmann Isı did not indicate that it engaged in excessive pricing, and (iv) the prices of spare parts for Viessmann-branded combi boilers were lower than its competitors' prices in the same segment, and, for certain products, lower than its competitors' prices in the lower segment.

This decision can be viewed as a reaffirmation of the Board's well-established decisional practice on excessive pricing, given that the reasoning and the methodology that the Board used in reaching and constructing its decision were in line with the Board's decisions in previous cases.

Labor Law

A New Regulation Regarding Employees' Inventions Is Published

The Regulation on Employees' Inventions, Inventions Made at Higher Education Institutions and Projects with Public Support ("Regulation on Inventions") was published in the Official Gazette on September 29, 2017.

The Regulation on Inventions comprehensively regulates patent and utility model rights with respect to inventions made by employees, at higher education institutions, and in projects receiving public support.

The Regulation on Inventions declares that an invention created by an employee during his/her employment, (i) while fulfilling his/her duties for the employer (either a public or private enterprise), or (ii) based mainly on the experience and works of the public or private enterprise, is defined as a "*service invention*." All other inventions, which fall outside the scope of service inventions, are defined as "independent inventions." Service or independent inventions (which can be protected by either a patent model or a utility model) created by an employee are collectively defined as "employee inventions."

An employee is defined under Article 4(b) of the Regulation on Inventions (as well as the Law No. 6769 on Industrial Property), as a person who is in the service of another person, and who is obliged to perform his/her duties within the bounds of an employment relationship with respect to a particular work assigned by the employer, and with a personal dependence on the employer.

As per Article 5 of the Regulation on Inventions, an employee who makes a service invention is obliged to notify his/her employer of this invention, and to provide technical explanations regarding the invention. As per Article 6 of the Regulation on Inventions, employers are entitled to claim intellectual property rights on service inventions (partially or in full) within 4 months following the receipt of the notification to be made by the employee who made the service invention. Such claims shall be made in writing.

If the employer does not claim any rights regarding the service invention within this specified time period, the service invention then becomes (and is treated as) an independent invention. The employee may make use of such an independent invention without being subject to any further restrictions related to his/her employment. Moreover, if the employer claims rights on the service invention in full, then all rights relating to the invention pass to the employer as of the date of arrival of the written notification to the employee. On the other hand, if the employer only claims partial rights on the service invention, the invention is converted into (and treated as) an independent invention. However, the employer may use the invention based on its partial rights on the invention.

If an employee makes an independent invention while he/she is in an employment relationship with an employer, then the employee is obliged to notify the employer of such an invention. The employee must provide the employer with explanations in the notification that may enable the employer to determine whether the invention is indeed an independent invention. The employer may object to the categorization of the invention as an independent invention within 3 months of the notification.

If the invention falls within the scope of the enterprise's area of activity, or if the enterprise is involved in serious preparations to conduct business in that area of activity, the employee is obliged to make an offer to the employer to allow the employer to make use of his/her invention, without granting full rights to the employer on the invention. If the parties cannot come to an agreement on the conditions of such an arrangement, then the Court will determine the conditions of the arrangement upon the parties' submission of the dispute to the Court.

If it is clear that the independent invention should not be considered to fall within the scope of the employer's activities, then the employee is not subject to a notification obligation with respect to the employer.

An employer can also claim to be the holder of the rights of an invention if it was made by using the knowledge and tools available at the enterprise, if such knowledge and tools are related to the general sphere of activity of the enterprise. The ownership of rights with regard to inventions that are created within the scope of an agreement other than an employment agreement is determined by the particular provisions of that agreement.

Consequently, the Regulation on Inventions, along with the Law No. 6769 on Industrial Property, brings a breath of fresh air and much-needed clarity with respect to inventions created by employees, as this important subject has now been regulated in detail for the first time. Therefore, one may expect that these new and innovative regulations will be the most effective way to settle disputes arising between employers and employees in regard to workplace inventions.

The New Law on Labor Courts has Entered into Force with a Ground-Breaking Concept

The long-awaited Law on Labor Courts No. 7036 ("Law No. 7036") was published on October 25, 2017 by the Official Gazette, just after it was introduced to the parliament to be enacted. The Law No. 7036 contains quite a few amendments and brings substantial differences other than what the abrogated Law on Labor Courts No. 5521 ("LLC") stipulated. Mandatory mediation is inarguably one of the

attention-grabbing reforms, but is not the mere difference which brings substantial reforms to the employment law in Turkey.

The rationale behind the rising need of a new law is that, as the preamble of the Law No. 7036 suggests, the necessity to ease the workload of labor courts in Turkey is of paramount importance topic, 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 appealed lawsuits are pending before Court of Appeals as of 2015, which presumably has reached an even more alarming amount as of today.

Furthermore, the LLC has a history dating back to 1950s, bearing seven amendments but yet seems to be outdated. Some of the articles (*e.g.* Articles 9 and 10) were no longer applicable whereas some of the procedures it regulates were not compatible with the current Civil Procedure Law No. 6100 ("CPL"), regulating judicial process of labor law litigation.

Having said that, the principal amendment and the key change brought by the Law No. 7036 is the introduction of mandatory mediation. According to Article 3 of the Law No. 7036, in cases of compensation claims raised by employees or employers based on employment agreements or collective bargaining agreements and for re-employment lawsuits, it is mandatory for the parties to submit their case to a mediator before filing a lawsuit before the labor courts. However, it is important to note that, as per Article 3/3 of the Law No. 7036 mandatory mediation does not cover or apply to the pecuniary and non-pecuniary damages that may arise from occupational illnesses and work-related accidents.

The mediator will be appointed either by the office from the list, by the commissions to be formed, or by the parties. The essential duties of the mediator are, informing the parties about meetings and showing the best efforts possible to communicate with parties in order to make them invited, informing the mediation office as soon as the meeting is over, taking meeting minutes at the end of each negotiation session and sending those to the mediation office.

The mediator shall conclude the negotiations within three weeks' period and this duration may extend for one week by the mediator in particular cases.

As per Article 3/12 of the Law No. 7036, if one of the parties does not attend the first meeting of the mediation with presenting no valid excuse, the unattended party will bear the litigation expenses regardless of the lawsuit (if any) is for or against.

If the parties file a lawsuit against each other without applying a mediation procedure beforehand, the court will dismiss the case on the basis of lack of cause of action. Therefore, for instance, if an employee thinks her/his dismissal is unlawful, s/he shall apply the mediator within one month as of the notification date of the termination notice, as per Article 11 of the Law No. 7036, which amends Article 20 of the Labor Law No. 4857. If the parties cannot reach a consensus before the mediator, the employee shall initiate a lawsuit within two weeks as of the last minutes issued by the mediator as per the same article. The parties are entitled to bring local courts' decision under Regional Court of Justice's appellate review, where Regional Court of Justice's decision thereof is final.

Last not but least, the articles covering the mandatory mediation *i.e.* Article 3, 11 and 12 of the Law No. 7036 will come into force as of January 1, 2018 whereas all other articles of Law No. 7036 have already came into force on October 25, 2017.

Another significant change which came along with the Law No. 7036 is that, as per Additional Article 3, a new article is added to Labor Law No. 4857. By way of this, period

of limitation for claims on severance payment, notice payment, bad-faith compensation and compensation for unequal treatment is now 5 years instead of 10 years.

All in all, whilst the fundamental development the Law No. 7036 brings is on the issue of mandatory mediation, many other amendments are implemented, aiming to lessen the workload of the judiciary and clarify their work range.

Litigation

The Court of Appeals Clarifies the Validity of Standardized Terms in Agreements between Merchants

The Turkish Code of Obligations No. 6098 ("TCO") entered into force on July 1, 2012. One of the novelties introduced by the TCO involved provisions regarding standardized terms in agreements. Despite the fact that the "freedom of contract" is a touchstone principle of the TCO, in some cases, the validity of certain provisions in an agreement may be challenged based on Articles 20-25 of the TCO, which regulate standardized terms in agreements.

According to the text of the TCO and scholarly analysis, standardized terms are defined as stipulations that are: (i) drafted in advance by one party unilaterally, (ii) offered to the counterparty without providing an opportunity to negotiate, (iii) with the aim of using such terms in similar agreements in the future. Under the TCO, such standardized terms are subject to a control mechanism in terms of their validity, as explained below.

As per Article 21 of the TCO, if a standardized term is contrary to the interests of the counterparty, such a term may be deemed valid only if the party drafting the term provides the other party with the opportunity to become aware of and comprehend the contents of the term by explicitly pointing out and calling attention to its existence, and only if the other party then explicitly accepts the term. Otherwise, such standardized terms are deemed null and void, and the agreement is treated as if such terms do not exist in the agreement. In the same vein, if a standardized term is contrary to the character of the agreement and the nature of the business, such a term will also be deemed null and void.

The TCO provides a control mechanism with regard to the interpretation of standardized terms. Pursuant to Article 23 of the TCO, if a standardized provision is not explicit and comprehensible, or if it is open to multiple interpretations, such a term will be interpreted against the interest of the party drafting the term and will be interpreted in favor of the opposite party.

If a standardized term confers on the drafting party the authority to unilaterally amend the agreement or to add new provisions to the agreement to the detriment of the counterparty, such a standardized term will be deemed null and void as well.

The final control mechanism that the TCO provides is known as "content control," which entails that standardized terms cannot work against the interests of the counterparty or aggravate/change the circumstances and responsibilities of the counterparty in a way that is contrary to the principles of honesty and fair dealing.

Therefore, the TCO provides a highly detailed and theoretically effective control mechanism for standardized terms. But, in practice, parties undersigning agreements that contain standardized terms to their detriment, which are usually the parties that are in a weaker position economically, claim that they are often forced or left with no option but to sign these agreements, and thereby are compelled to seek judicial relief and request that such terms be deemed invalid. There are various decisions rendered by different local courts, which accept such claims without properly examining the validity of standardized terms in light of the abovementioned control mechanism provided by the TCO. This could be interpreted as a prejudicial approach and dismissive of the principle of the freedom of contract, especially for merchants who are supposed to be prudent and savvy enough to walk away from agreements that they perceive to be highly detrimental and contrary to their interests.

The 19th Civil Chamber of the High Court of Appeals recognized this prejudicial and dismissive approach, and clarified its stance with respect to the validity of standardized terms in agreements between merchants in its Decision No. 2016/9737 E., 2017/5110 K., dated June 19, 2017. In its decision, the High Court of Appeals stated that, when there is an agreement signed between two merchants, the mere fact that one of the parties is economically weaker than the other is not sufficient by itself to deem a standardized term null and void.

Thus, the High Court of Appeals established that invalidity claims regarding standardized terms should not be granted merely because such terms may be to the detriment of (or disadvantageous for) the party that is weaker economically. In light of this decision, it has been established that a proper examination pursuant to the control mechanisms put forth in the TCO must be carried out before deeming such terms null and void.

In conclusion, the mere fact that a standardized term is detrimental to the economically weaker party cannot be the determinative factor that leads to the invalidation of such standardized terms in an agreement on its own, and the mentioned precedent of High Court of Appeals show that courts must thoroughly and carefully investigate the specific facts surrounding each agreement on a case-by-case basis. This is a significant step forward in the judicial approach to standardized terms, which would make it easier for the economically stronger party to an agreement to legally execute and enforce the standardized terms of such agreements, subject to the terms surviving the scrutiny of the control mechanism prescribed by the TCO.

Pharmaceutical Law

New Legislations on Pricing and Manufacturing Plants of Human Medicinal Products

The Ministry of Health had two major items on its legislative agenda during the last quarter of 2017, which may impact the manufacturers and importers of human medicinal products, as these items pertain to the manufacturing as well as the pricing of medicines.

On September 29, 2017, the Ministry of Health ("Ministry") published the new Communiqué on the Pricing of Human Medicinal Products ("Pricing Communiqué") in the Official Gazette. Upon the publication of the Pricing Communiqué, the predecessor Communiqué on the Pricing of Human Medicinal Products ("Abolished Communiqué") has been abrogated.

After the new Pricing Communiqué went into effect, the Ministry set its sights on manufacturing plants of human medicinal products and rolled up its sleeves to introduce a new regulation regarding such plants, known as the Regulation on Manufacturing Plants of Human Medicinal Products ("Manufacturing Regulation"). Aiming to regulate the manufacturing and importing of human medicinal products and to bring them in line with internationally acknowledged /implemented standards, the Ministry published the Manufacturing Regulation in the Official Gazette of October 21, 2017. Upon the publication of the Manufacturing Regulation, the predecessor Regulation on Human Medicinal Products Manufactories has been abrogated.

- First Look at the Pricing Communiqué

The Pricing Communiqué adopts a simpler and more user-friendly language regarding the technicalities of drug pricing principles, which are aimed at regulating the Turkish drug pricing system as well as the encouragement of domestic drug manufacturing. The most striking amendment introduced with the Pricing Communiqué is that prices in this market will be amended once a year, rather than the "twice a year" arrangement that was in force under the Abolished Communiqué.

Pricing principles are regulated under Article

7 of the Pricing Communiqué. In this sense, compared to the Abolished Communiqué, it is clearly seen that the Ministry has developed and set forth more detailed pricing principles:

- Transition Period for New Pricing Principles

The Ministry has announced its transition schedule under Provisional Article 1 of the Pricing Communiqué. In this respect, the sales prices to the wholesalers for the products falling within the scope of the following provision, which was abolished by the Decision, will be updated during the real source price amendment period of 2017, in line with their source prices: "The changes in the selling price to the wholesalers approved in Turkey due to the change in reference price or reference country shall not be reflected in the price, unless it exceeds 3%. Only reference and reference country information shall be updated."

Changes that lead to an increase in price will be made upon the request of the license-holders, while changes which lead to a decrease in price will be made by the Institution ex officio. These updated prices will be effective as of the effective date of the final interim list, which will be issued at the end of the actual source price amendment period.

Finally, amendments introduced with the Pricing Communiqué regarding the real source price amendment period will not be applied to the real source price amendment period of 2017, except for Paragraphs 1, 4, 5 and 7 of Article 10. Provisions under the Abolished Communiqué will be taken into account and applied for the real source price amendment period of 2017.

- Manufacturing Plants of Human Medicinal Products in a Nutshell

With the Manufacturing Regulation, the Ministry has broadened the responsibilities of license/permit holders. In this respect, the Ministry has added certain provisions to the responsibility list, which seem to impose a strict monitoring liability to license holders.

For instance, license holders will be responsible for assigning a manager within 30 days after the resignation of the previous manager and notifying the Ministry accordingly. Furthermore, license holders will have to possess and retain the documentation proving that the manufacturers, importers or distributors of active agents with whom they work are duly registered with the relevant authorities in their countries. License holders, in this respect, will have to verify and confirm the safety and quality of the active agents and the inactive ingredients that they use, and ensure that they maintain necessary and adequate control over human medicinal products as well as active agents during all stages of manufacturing.

Article 10 of the Manufacturing Regulation lays out detailed arrangements and instructions with respect to the auditing of human medicinal product manufacturing sites.

Article 13 of the Manufacturing Regulation sets forth important principles regarding the importation of human medicinal products and imposes certain responsibilities on importers and license holders.

The Principles regarding active agents and inactive ingredients are regulated under Article 14 of the Manufacturing Regulation. According to Article 14(2), permit/license holders must confirm that the manufacturers and distributors of their active agents are in compliance with the principles of Good Manufacturing Practices and Good Delivery Practices, by way of auditing the manufacturing and distribution sites of such manufacturers and distributors.

On a side note, as per Article 32 of the Manufacturing Regulation, Article 14(2) will come into effect one year after the date of publication of the Regulation (*i.e.*, on October 21, 2018).

Article 27 of the Manufacturing Regulation provides a more detailed and comprehensive regulation regarding sanctions to be imposed on license/permit holders as well as managers. While the Ministry retains its suspension and withdrawal authority, certain changes made in the Article shed light on the process in the aftermath of a suspension/withdrawal.

Importers who wish to conduct only batch-release operations are obliged to apply to the Ministry and obtain a permit within one year as of the publication date of the Manufacturing Regulation.

Data Protection Law

Draft Regulation on Processing and Protection of Personal Data in the Electronic Communications Sector

The Information and Communication Technologies Authority ("ICTA") published the Draft Regulation on Processing and Protection of the Privacy of Personal Data in the Electronic Communications Sector ("Draft Regulation") for public notice and comment on their website on August 17, 2017. However, the current Regulation on Processing and Protection of Personal Data in the Electronic Communications Sector ("Effective Regulation") is still in force.

The Draft Regulation is based on Articles 4, 6, 12 and 51 of the Law No. 5809 on Electronic Communications ("Law No. 5809"), just like the Effective Regulation. Article 51 of the Law No. 5809 is the main provision concerning the processing and protection of the privacy of personal data in the electronic communications sector. Article 51 was previously annulled by the Turkish Constitutional Court's decision of April 9, 2014 with case number 2013/122 E and 2014/74 K. Subsequently, a new provision replacing the annulled provision was introduced and entered into legal force as of January 26, 2015.

Meanwhile, Turkey enacted a comprehensive law on the protection of personal data (Law No. 6698 on the Protection of Personal Data, or "Law No. 6698") on April 7, 2016.

The Draft Regulation, which was drafted after the enactment of the Law No. 6698, sets out the principles and procedures regarding the processing and protection of the privacy of personal data in the electronic communications sector, and incorporates the provisions of the Law No. 6698 that were not included in the Effective Regulation.

The Draft Regulation does not bring fundamental changes to the Effective Regulation, and mainly updates it in accordance with the new provisions introduced in the Law No. 6698.

The major changes proposed by the Draft Regulation are as follows:

(i) The storage of personal data relating to the content of communications was not included in Article 1(2) of the Effective Regulation. The Draft Regulation adds in and includes the storage of personal data in the relevant article. Therefore, the storage of personal data relating to the content of communications will also be subject to the Draft Regulation.

(ii) Article 2 of the Effective Regulation is revised by the Draft Regulations so that it incorporates the Law No. 6698 as one of the legal grounds of the Draft Regulation.

(iii) The definitions provided under Article 3 of the Current Regulation are expanded and the definitions relating to certain terms such as the "processing of personal data" and "explicit consent," which are also referred to by the Law No. 6698, are included in the Draft Regulation. The general principles relating to the processing of personal data under Article 4 of the Effective Regulation are modified and brought in line with the provisions of the Law No. 6698.

(iv) The Draft Regulation also expands the scope of the Effective Regulation through the inclusion and incorporation of the rights of

those parties (*i.e.*, subscribers) whose personal data are being processed (Article 18). This provision is consistent with the Law No. 6698.

(v) The Draft Regulation also expands Article 5 of the Effective Regulation (entitled "Security") by including a provision that requires the operators to publish a privacy policy on their websites. It also incorporates the obligation to inform the data subjects of the processing of their personal data. According to this new paragraph, the operators must make the necessary notifications to the data subjects regarding the type of personal data being processed and the methods and means used for processing such personal data in line with the principles of transparency and accountability.

(vi) A provision relating to the transfer of personal data abroad (Article 10) is also set out in the Draft Regulation. According to this new provision, the traffic and location information attached to such personal data cannot be transferred abroad without first obtaining the explicit consent of the data subjects. Such personal data can only be transferred abroad after notifying the data subjects about the scope of the personal data being transferred, the purpose and the period of the transfer abroad, and only after this transfer is examined and approved by the ICTA in terms of maintaining national security and public order.

The Draft Regulation was available for public consultation and comment for 30 days, until September 15, 2017, and may enter into legal force after the ICTA reviews and evaluates the public comments, and incorporates them into the Current Regulation, if and where it deems necessary.

Regulation on the Erasure, Destruction or Anonymization of Personal Data

The Regulation on the Erasure, Destruction or Anonymization of Personal Data ("Regulation") was published in the Official Gazette No. 30224 of October 28, 2017. The Regulation was published five months after the publication of the Draft Regulation on the Erasure, Destruction or Anonymization of Personal Data ("Draft Regulation"), on the website of the Personal Data Protection Authority ("Authority") in May. The Draft Regulation remained available for public consultation and comment until mid-June. The final Regulation contains alterations and departures from the Draft Regulation, which appear to have been incorporated into the Draft Regulation during the legislative process, per the public opinions and comments submitted to the Authority.

The Regulation applies to data controllers and sets out the principles and procedures pertaining to the erasure, destruction and anonymization of personal data. Under the Law No. 6698 on the Protection of Personal Data ("DP Law"), a "data controller" is defined as the real person or legal entity that sets the objectives and means of processing personal data and that is in charge of the establishment and management of the data filing system. For the purposes of the Regulation, the erasure of personal data refers to the operation of rendering the personal data in question inaccessible to the relevant users and non-reusable in any way. Destruction is defined as rendering the relevant personal data inaccessible to everyone and non-reusable in any way. Finally, anonymization is defined as rendering personal data anonymous in such a manner that it cannot in any way be linked or connected to an identified or identifiable real person even through methods involving matching said personal data with other data. The Regulation also includes the term "demolition," which encompasses the erasure, destruction and anonymization of personal data altogether.

The Regulation requires data controllers, who are also under the obligation to register with the Data Controllers Registry, to prepare a data retention and destruction policy. According to the Regulation, this policy should comprise, at a minimum, the following: (i) information regarding the purpose of the preparation of the policy, (ii) filing medium

regulated under the policy, (iii) definitions of the legal and technical terms included in the policy, (iv) explanations regarding the legal, technical or other reasons necessitating personal data storage and demolition, (v) technical and administrative measures taken in order to store personal data safely, and to prevent personal data from being illegally processed and accessed, (vi) technical and administrative measures taken in order to demolish personal data in compliance with the law, titles, departments and responsibilities of those taking part in the personal data storage and demolition processes, (vii) periods and frequency of periodic demolition, (viii) changes to the current policy, if any, (ix) along with a table displaying the personal data storage and demolition periods.

The Regulation also includes a section outlining the principles that should guide data controllers in the personal data demolition processes. Accordingly, data controllers are obliged to register and maintain records of all transactions relating to the erasure, destruction and anonymization of personal data, and keep these records for at least three years. Moreover, data controllers are required to disclose the methods and processes they use in relation to the erasure, destruction and anonymization of personal data.

The prescribed time periods for personal data demolition processes are also stipulated under the Regulation. Accordingly, data controllers who have prepared personal data storage and demolition policies must erase, destroy or anonymize personal data during the first periodic demolition operation following the date on which the obligation begins or comes into effect. The time frames for periodic demolition operations are to be determined by the data controller, but they may not exceed six months. Data controllers who are not subject to the obligation to prepare personal data storage and demolition policies must demolish personal data within three months following the date on which they become obliged to do so.

If the data subject (*i.e.*, the real person whose data is being processed), applies to the data controller and asks for the erasure or destruction of the personal data belonging to him/her, and the conditions for the processing of personal data are no longer in effect, then the data controller may erase, destroy or anonymize the personal data that is subject to the request. In such cases, the data controller must carry out and conclude the data subject's request within thirty days at the latest, and inform the data subject accordingly. If all of the conditions for personal data processing have not been eliminated or obviated, the data controller may reject the data subject's request by explaining its reasons for the rejection. In that case, the data subject must be notified of the rejection within thirty days at the latest, in writing or through electronic communications. Additionally, in case such personal data is transferred to third parties, the Regulation obliges data controllers to inform third parties of the data subject's requests and ensure the compliance of the relevant third parties receiving the data with the data subject's request.

The consequences of failing to comply with the requirements of the Regulation are not explicitly stated in the Regulation itself. However, the DP Law has introduced a criminal sanction of imprisonment up to two years and/or an administrative fine up to TL 1,000,000 for those who do not comply with the obligations set out thereunder or in related secondary legislation. Therefore, failing to comply with the obligations imposed by the Regulation would trigger the foregoing penalties set out under the DP Law.

The Regulation, which was one of the most highly anticipated regulations following the enactment of the DP Law, will enter into force as of January 1, 2018. This grace period might allow and enable data controllers to adjust their practices according to the Regulation and to comply with their obligations set forth thereunder.

Internet Law

A Recent Decision of the European Court of Human Rights: Balancing Privacy Rights Against the Freedom of Expression

On October 19, 2017, the European Court of Human Rights ("ECHR") announced its decision in a significant case, regarding a piece of content published on a website.

In the case of Fuchsmann v. Germany, the applicant was an internationally active entrepreneur in the media sector and the chief executive officer of a media company. In his application to the ECHR, he claimed that the domestic courts had failed to protect his privacy rights by refusing to prevent the circulation of an article in an online newspaper, which was allegedly damaging to his reputation.

According to the decision of the ECHR, on June 12, 2001, the New York Times (a daily newspaper in the United States) published an article about a corruption investigation being conducted against a company regarding allegations that the company had paid at least USD 1,000,000 in order to bribe Ukrainian officials in exchange for a valuable television license, and a slightly altered version of the article was also published on the newspaper's website. The version of the article published on the website included allegations regarding the applicant as well.

On July 31, 2002, the applicant sought injunctions against certain parts of the printed and online versions of the article. However, the Düsseldorf Regional Court dismissed the lawsuit and the Düsseldorf Court of Appeals confirmed the lower court's dismissal decision. The Federal Court of Justice in Germany also rejected the complaint lodged by the applicant, and the Federal Constitutional Court subsequently declined to consider a constitutional complaint lodged by the applicant, without providing a reasoned decision.

The ECHR, by considering and examining the relevant provisions of the basic law, found the application to be admissible. The Court further stated that it had considered whether a fair balance had been struck between the applicant's right to the protection of his private life under Article 8 of the European Convention on Human Rights ("Convention") and the newspaper's right to exercise its freedom of expression, as guaranteed by Article 10 of the Convention. The ECHR further declared that the following criteria had been taken into account while balancing these competing interests:

(i) the contribution to a debate of public interest;
(ii) the degree to which the person affected is well-known;
(iii) the subject of the news report;
(iv) the prior conduct of the person concerned;
(v) the method of obtaining the information and confirming its veracity; and
(vi) the content, form and consequences of the publication.

Since the applicant in this case was an internationally active entrepreneur in the media sector, the ECHR emphasized that, while an unknown private individual may claim that his/her private life warrants strong legal protection, this principle does not hold true for public figures to the same degree. The ECHR found that the first-degree courts had also taken into account and applied the foregoing criteria in balancing the applicant's right to respect for his private life with the newspaper's right to exercise its freedom of expression, and, therefore, concluded that there had been no violation of Article 8 of the Convention in this case.

The Turkish Supreme Court has stated in numerous previous decisions that public figures may be criticized more harshly than private citizens in the media, and that they need to be more broadminded and tolerant regarding the criticisms directed at them, due to their positions in the public eye. Therefore, the Fuchsmann v. Germany case may be

viewed as one of the most recent ECHR decisions confirming the Turkish Supreme Court's position on this matter, with respect to balancing the competing interests (*i.e.*, privacy vs. freedom of expression) of the parties.

Telecommunications Law

District Court Decision: "Warning" as a Prerequisite of Issuing an Administrative Fine in the Telecommunications Sector

On June 14, 2017, the Ankara Regional Administrative Court's 7th Administrative Chamber ("Regional Court") rendered a decision stating that telecommunications operators must be warned regarding an infringement before an administrative fine is imposed on them. This is a landmark decision for the electronic communications sector, as the underlying legislation does not set forth a warning procedure as a prerequisite for an administrative fine, but rather provides it as an optional measure (*i.e.*, an additional tool) for the Information and Communication Technologies Authority ("ICTA").

The case before the Regional Court was related to an administrative fine of TL 35,406.09 issued by the ICTA to a certain telecommunications operator, due to the operator's violation of Article 29 of the Regulation on Network and Information Security in the Electronic Communications Sector ("Regulation"), which was published in the Official Gazette of July 13, 2014, and became effective on the same day. The plaintiff filed a lawsuit for the annulment of the ICTA's decision and the repeal of the administrative fine. However, the Ankara 15th Administrative Court rejected the lawsuit on February 17, 2017, with its Decision No. 2016/2979 E., 2017/557 K. The plaintiff subsequently filed an appeal against Ankara 15th Administrative Court's decision and requested the cancellation of the administrative act in question and the reversal of the decision, by asserting that the decision was unlawful.

As per Article 19 of the Regulation on Information and Communication Technologies Authority Administrative Sanctions ("Administrative Sanctions Regulation"), in case an operator fails to abide by legislation regarding electronic communication safety—including network safety—an administrative fine of up to 1% of net sales in the previous calendar year may be imposed. However, Article 46 of the Administrative Sanctions Regulation (entitled "Warning") provides that the sanction criteria shall be taken into account with respect to infringements that have occurred within the scope of the Administrative Sanctions Regulation. Furthermore, the same Article declares that the ICTA may warn the operator before imposing an administrative fine. ICTA will consider the repetition period while giving the warning. ICTA may warn the operator once again, if the period taken into account for evaluation of the repetition expires.

In its decision (No. 2015/213 E., 2017/187 K.), the Regional Court considered that the plaintiff had been subject to an investigation with respect to whether it had fulfilled its obligations set forth and regulated under the relevant legislation regarding network and information security. As a result of the investigation, it had been concluded that the plaintiff had not fulfilled its obligation to keep logs and records in accordance with the relevant legislation, and an administrative fine corresponding to 0.025% of the company's net sales in 2014 was imposed on the company. The plaintiff had appealed this decision to the Regional Court.

The Regional Court initially determined that the Administrative Sanctions Regulation was in force on the date of the dispute, and that it provided a warning procedure before the imposition of an administrative fine on the operators. The Regional Court further stated that the Administrative Sanctions Regulation implemented a new system that prohibited the imposition of an administrative fine before the operator had been given a warning regarding the infringement, and only allowed

the imposition of an administrative fine if the operator failed to remedy the infringement after being warned about it.

The Regional Court also indicated that, when the amount of the potential administrative fine is taken into account, the "warning mechanism" would lead operators to work more carefully and more meticulously to avoid such fines. Therefore, the Regional Court decided that the warning mechanism would be considered as a procedural requirement that would need to be exhausted prior to the imposition of administrative fines. In order to protect the interests of individuals/customers with respect to the operators that provide the services, the operators are saddled with certain obligations, while the enforcement authority or administration (*i.e.*, the defendant in this case) must also undertake certain supervision and enforcement obligations.

Accordingly, the Regional Court concluded that, even though it is part of the defendant administration's supervision and enforcement obligation to penalize and prevent the failures and infringements of the operators, as well as to prevent consumers from getting harmed in the course of business, when the weight of the sanctions/fines and the provisions of the Administrative Sanctions Regulation are considered, it is clear that the main purpose of the law is to provide a fair balance by warning the operators about the relevant infringement, before they are hit with an administrative fine for the said infringement.

In light of the foregoing, the Regional Court rendered its decision that it was not lawful and fair to impose an administrative fine on the plaintiff without first warning the company about the relevant infringement, and decided to reverse the Ankara 15th Administrative Court's decision and cancel the ICTA's administrative fine of TL 35,406.09.

Real Estate Law

Controversy Continues: The New Zoning Regulation for Planned Areas Has Been Amended

The new Zoning Regulation for Planned Areas ("Regulation") was published in the Official Gazette of July 3, 2017, and it abolished the Type Zoning Regulation for Planned Areas ("Abolished Regulation"), which had been in force for over thirty years. The enforcement date of the Regulation was established (and announced) as October 1, 2017. However, not long after the Regulation's publication, the Ministry of Environment and Urbanization published the Regulation Amending the Regulation ("Amendment Regulation") on September 30, 2017.

The Amendment Regulation has amended a total of 14 articles in the Regulation right before its enforcement date. Below is the outline of the remarkable last-minute changes made to the Regulation:

(i) Definition of "atrium" under Article 4 has been changed. The distance between the edges of an atrium has been decreased to 3 meters (from 5 meters).

(ii) Under Article 5 of the Regulation, the areas that will be excluded from the calculation of the floor-area ratio ("*emsal*" in Turkish) have been amended. For instance, 100 square meters of common-area playgrounds for children and child-care units with non-commercial purposes will not be included in the calculation of the floor area.

(iii) Under Article 20 of the Regulation, the areas that will be excluded from the calculation of the footprint ratio ("*taban alanı*" in Turkish) have been amended. Water cisterns, gray water collection pools, parking lots, bunker and installation areas, and fuel and water reservoirs that are completely under the soil have been removed from the exclusion list.

(iv) Under Article 22 of the Regulation, the list of areas that will be excluded from the

calculation of the flat-area ratio ("*kat alani*" in Turkish) has been amended. For non-residential uses, a total area of 200 square meters consisting of prayer rooms and outbuildings considered as common areas, have been removed from the exclusion list.

(v) Article 54(10) of the Regulation has been removed from the scope of the Article. The removed section read as follows: "The construction of buildings that are under construction in line with their construction permits shall be ceased if the plan is not complied with. The construction of buildings that can be preserved in their current or modified states as per the new zoning plan (to be prepared provided that the cancellation grounds included in the court decision are taken into account) will be allowed. As to buildings that cannot be protected, their licenses shall be annulled and the parts constructed in accordance with the licenses and annex projects prior to the stoppage of the construction shall be considered under the scope of the acquired rights."

(vi) Provisional Article 3 has also been amended. As per the amendment, the licensing process of non-licensed buildings that are subject to a risk assessment or are classified as being in a risk area and whose construction agreements are signed before a Notary Public by at least two-thirds of the owners before enforcement of the Regulation, will be finalized according to the Abolished Regulation, if requested. Furthermore, pursuant to the amendment made to Provisional Article 3, construction license applications for buildings that are under construction and that were licensed before the enforcement of the Regulation, will be processed and finalized according to the Abolished Regulation, if requested.

As per Article 15 of the Amendment Regulation, the foregoing changes made in Provisional Article 3 will be deemed effective as of July 3, 2017, whereas all other amendments will be deemed effective as of October 1, 2017.

Anti-Dumping Law

Dumping and Safeguard Measures Evaluation Survey from the Ministry of Economy

Recently, the Ministry of Economy has launched a survey page on its website,[7] inviting relevant parties to provide their comments and convey their remarks on current anti-dumping/anti-subsidy and safeguard measures.[8]

The Ministry explains on its website that: "This survey aims to evaluate the effects of currently applicable "Anti-dumping/Anti-subsidy measures" and "Safeguard measures"—to which you became a party as an applicant, a supporting company or an association, in relation to products you manufacture—on your company/industry and to determine whether these measures are useful or necessary for your company/industry. In order for us to properly evaluate our practices and regulations with respect to imports, it is vital that you complete each section of the survey by providing accurate and detailed information."

In light of the foregoing, parties that are affected by currently applicable trade protection measures (*i.e.*, anti-dumping, anti-subsidy and safeguard measures) are allowed to participate in the survey by completing and submitting the survey document published on the website.

For parties that are subject to more than one applicable protective measure, the survey will have to be filled in Excel format and completed separately for each product that is subject to the protective measure.

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[7] The survey page can be reached at https://www.ekonomi.gov.tr/portal/faces/home/ithalat/ticaretPolitikasiSav/ticaretPolitikasiSav-DampingveKorunmaAnket?

[8] *Contact information for the survey:*
T.C. Ekonomi Bakanlığı İthalat Genel Müdürlüğü Söğütözü Mah. 2176. Sokak No:63 06530 Çankaya/Ankara
Telefon: 0312 204 92 95 - 99 37
Faks: 0312 204 86 33
E-posta: damping@ekonomi.gov.tr
Elektronik Ağ: www.ekonomi.gov.tr-www.tpsa.gov.tr

As per the Ministry's website, the survey document should have been sent in Excel format, by 5:00 pm on Wednesday, September 6, 2017, to the e-mail address provided by the Ministry, damping@ekonomi.gov.tr . With that said, we would expect that the Ministry would continue to accept feedback from the relevant parties past this deadline.

As the survey document indicates, answers to whether companies' businesses have been benefiting from current anti-dumping, anti-subsidy or safeguard measures remains a key focus of the survey. For this purpose, the participants are expected to answer questions such as, "Did you experience capacity increases or new investments following the enforcement of the measure?", "Please provide the number of new investors in your industry", and "Do you believe the current measure is beneficial for your company and for you industry?" The survey is aimed at evaluating changes in these sectors between the year prior to the enforcement of the first protective measure and the year after the enforcement of the last protective measure.

White Collar Irregularities

2017 FCPA Enforcement Actions and Highlights

Overall, this was a less active year in terms of Foreign Corrupt Practices Act ("FCPA") enforcement actions, at least when compared to 2016. In 2017, the Department of Justice ("DOJ") took a total of 9 enforcement actions and the Securities and Exchange Commission ("SEC") took a total of 7 enforcement actions. Therefore, we observe that the DOJ has been more active than the SEC in terms of the number of enforcement actions this year. So far in 2017, we have witnessed only 2 declinations within the scope of the Pilot Program,[9] as opposed to 5 declination decisions in 2016.

[9] The pilot program provides companies with the opportunity to receive declination decisions, in case these companies meet the conditions put forth in "The Fraud Section's Foreign Corrupt Practices Act Enforcement Plan and Guidance."

Of the 9 enforcement actions taken by the DOJ, 5 of them were related to real persons. 2 individuals were charged with offenses within the scope of the 7 SEC enforcement actions.

2017 marks another year in which enforcement actions against individuals were lower in number than the enforcement actions taken against corporations. The Yates Memo, which was published on 2015, underlined the significance of individual accountability for deterring corporate wrongdoing, and provided guidelines as to how to enforce and ensure such accountability. Nevertheless, the total number of FCPA enforcement actions taken against individuals so far is 7, as opposed to 12 enforcement actions brought against corporations.

DOJ Declination Decisions

In June 2017, the DOJ closed its investigation with regard to Linde North America, Inc., and Linde Gas North America, LLC (collectively known as "Linde"). According to the DOJ, Spectra Gases, Inc. ("Spectra"), a company that Linde acquired in 2006, bribed foreign public officials in the Republic of Georgia between 2006 and 2009, in relation to Spectra's transactions with the National High Technology Center ("NHTC"), a state-owned and state-controlled entity in Georgia. The DOJ records indicate that three high-level executives of Spectra entered into an arrangement with NHTC officials and a third-party intermediary, whereby the parties would share the profits of income-producing products sold by NHTC to Spectra. Throughout the course of this scheme, Spectra entered into an agreement with a company established by NHTC officials, which allegedly provided consultancy services to Spectra, and, in return, received a certain amount of profit from the transaction in question. After Linde learned of the corrupt arrangement, it withheld the $10 million payment due to Spectra executives, and refused to make any further payments that were due to the companies controlled by NHTC officials. The DOJ's

declination decision was based on this withholding of payments (which was viewed and categorized as a remediation step), Linde's timely and voluntary disclosure, full cooperation, its termination of the employees and business partners who had taken part in the corrupt arrangement, and the fact that it had agreed to disgorge any profits it had received due to the corrupt arrangement, among others.

In June 2017, the DOJ closed its investigation with regard to CDM Smith, Inc. ("CDM"), a Boston-based engineering and construction firm. According to the DOJ, CDM and its subsidiary in India had paid approximately $1.18 million in bribes to Indian government officials through various employees and agents, in order to secure construction contracts. The bribes, which were funneled through subcontractors, were generally in the range of 2-4% of the contract price. The subcontractors provided no actual services and they were aware that the payments were being made for the benefit of public officials. All members of the senior management of CDM India had taken part in this scheme. Among others, the DOJ's declination decision was based on CDM's timely and voluntary self-disclosure, its full cooperation, its comprehensive investigation of the matter, and the fact that it had agreed to disgorge profits resulting from the scheme.

DOJ Enforcement Actions

In January and October 2017, three individuals (Juan Jose Hernandez Comerma, Charles Quintard Beech III, and Fernando Ardila Rueada), who were all owners or partial owners of energy companies, pleaded guilty to a bribery scheme related to Venezuela's state-owned and state-controlled energy company, Petroleos de Venezuela S.A. ("PDVSA"). According to their statements and admissions, all three had paid bribes so that their company could enter into contracts with PDVSA. Public officials had been entertained based on the contracts that had been awarded thanks to the actions and decisions of the relevant officials. Beech also admitted that he had conspired to hide the nature of the corrupt payments through various financial schemes and transactions. In January 2017, Zimmer Biomet Holdings, Inc. ("Biomet"), a medical device manufacturing company, agreed to pay a $17.4 million penalty to the DOJ, and more than $13 million to the SEC, for having violated the deferred prosecution agreement ("DPA") that it had entered into in 2012. According to the SEC and the DOJ, Biomet continued to do business with a prohibited distributor in Brazil, which was notorious for its corruption and bribed a Mexican customs official via a customs broker. Biomet was deemed not to have established adequate internal control systems, as red flags suggesting bribery were continuously ignored.

In January 2017, a Chilean-based chemical and mining company called Sociedad Quimica y Minera de Chile S.A. ("SQM") agreed to pay a $15 million penalty to settle the SEC's charges and a $15.5 million penalty as part of a deferred prosecution agreement with the DOJ. According to the company's admissions, SQM had made donations to numerous foundations affiliated with Chilean politicians. For example, SQM paid around $630,000 to a foundation controlled by a Chilean official who had influence over a key part of SQM's business in Chile. Furthermore, SQM hid these payments under the guise of payments for consulting and professional services, which it never received.

In January 2017, Las Vegas Sands Corp. ("Sands"), a Nevada-based gaming and resort company, entered into a non-prosecution agreement ("NPA") with the DOJ, and agreed to pay a fine of nearly $7 million for its FCPA violations. According to the company's admissions, Sands knowingly and willfully failed to implement an internal controls system in order to ensure that the company books and records were complete and accurate. Sands paid approximately $5.8 million to a business consultant without any apparent legitimate business purpose. In fact, the consultant was a former official of People's Republic of

China ("PRC") and had offered its assistance to Sands based primarily on the qualification that it had political connections with PRC officials. Sands did not carry out any enhanced due diligence regarding the consultant or its dubious business practices, despite the numerous red flags. An employee of the finance department, along with an outside auditor, had warned the company that some of the payments made to the consultant could not be accounted for. Sands terminated the finance-department employee who had raised this issue. In 2016, Sands had paid $9 million to the SEC in a parallel investigation.

In July 2017, Amadeus Richers, the former general manager of an American telecommunications company, pleaded guilty to the charge of conspiring to violate the FCPA. According to his admission, Richers (along with his co-conspirators) had paid about $3 million to Haitian government officials in order to obtain business in relation to Telecommunications D'Haiti, the state-owned and state-controlled telecommunications company in Haiti. Some of the bribes had been paid through third-party intermediaries, and others had been paid directly to officials or to the relatives of those officials. Richers, a German citizen living in Brazil, was sentenced to time served, 3 years of supervisory release, and also ordered to pay a criminal monetary penalty of $100.

In September 2017, a Swedish telecommunications company, Telia Company AB ("Telia"), entered into a global settlement with the SEC, the DOJ and the Dutch and Swedish law enforcement agencies. Telia and its Uzbek subsidiary, Coscom LLC ("Coscom"), agreed to pay a total penalty of more than $965 million to resolve charges with regard to a bribery scheme in Uzbekistan. According to the records of the SEC and the DOJ, Telia and Coscom had bribed an Uzbek government official in the amount of at least $331 million. According to the SEC, Telia paid the bribes to a shell company, which was controlled by a family member of the Uzbek president, in the guise of payments for lobbying and consulting services, which were never obtained. The penalty payment of $965 million may be offset by the fines paid to Swedish and Dutch authorities.

In October 2017, Joseph Baptiste, a retired U.S. Army Colonel, was charged in an indictment for allegedly taking part in a foreign bribery and money laundering scheme with regard to an $84 million port-development project in Haiti. Mr. Baptiste allegedly solicited bribes from undercover FBI agents, who were acting as potential investors. Mr. Baptiste allegedly told the agents that the payment would be made to Haiti officials through a non-profit that he controlled. Mr. Baptiste allegedly took approximately $50,000 from the agents for the bribes, and used the money for his personal dealings, but he allegedly also intended to receive more money for the bribes.

SEC Enforcement Actions

In January 2017, Mondelez International, Inc., a US-based food beverage and snack manufacturer, along with its subsidiary, Cadbury Limited ("Cadbury"), agreed to pay a $13 million civil penalty to settle SEC charges with regard to the violation of the internal controls and books-and-records provisions of the FCPA. According to the SEC, Mondelez acquired Cadbury and its subsidiaries, including Cadbury India Limited ("Cadbury India"), in February 2010. Subsequently, Cadbury India hired an agent in order to obtain licenses and approvals for a factory in India. However, it did not conduct appropriate due diligence or sufficiently monitor the agent. After receiving payments from Cadbury India Limited, the agent withdrew most of the money (a total of $90,666) from the account in cash. According to the SEC, Cadbury India failed to keep accurate books and records with regards to the agent's purported services, and Cadbury failed to implement adequate controls regarding its subsidiary, Cadbury India.

In January 2017, Orthofix International ("Orthofix"), a Texas-based medical device company, agreed to admit wrongdoing and pay a fine of more than $14 million to the SEC. The settlement relates to two offenses: The SEC found that Orthofix had booked certain revenues improperly and had made payments to doctors who worked in a state-controlled hospital in Brazil in order to boost its sales. In addition, four former executives also agreed to pay penalties in cases that were related to the accounting violation. According to the SEC, Orthofix used high discounts, third parties and fake invoices in order to lure the doctors into using the company's products.

In January 2017, Michael L. Cohen, the former head of Och-Ziff Capital Management Group's ("Och-Ziff") European office, and Vanja Baros, a former executive of Och-Ziff who worked on deals related to Africa, were charged with violating the FCPA and the Securities Exchange Act, and with aiding and abetting Och-Ziff's violations. According to the SEC, the former executives allegedly orchestrated a bribery scheme worth millions of dollars involving high-level government officials in Africa, which resulted in an investment by the Libyan Investment Authority (Libya's sovereign wealth fund) in funds that were managed by Och-Ziff. They also allegedly attempted to pay bribes to government officials in Chad, Niger, Guinea, and the Democratic Republic of the Congo, in order to secure mining deals. Och-Ziff and two other executives had already settled the charges brought against them in 2016.

In July 2017, Halliburton, an American oil field services company, agreed to pay the SEC more than $29.2 million in order to settle the charges brought by the SEC with regard to the selection and payment processes of a local company with close ties to Angolan public officials, with the goal of winning oil field services contracts from the government. According to the SEC, the company outsourced its business to a local company whose owner was a former Halliburton employee and who also happened to be the friend and neighbor of the Sonangol official who would award the contracts. According to the SEC, the company entered into a relationship with this company not because of the work that the local company would carry out on its behalf, but solely in order to meet the local content regulations. The company's former vice president Jeannot Lorenz, also agreed to pay a $75,000 penalty to the SEC in relation to the same investigation.[10]

[10] Information regarding the cases mentioned in this section has been obtained from the official SEC (https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml) and DOJ (https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2017) websites.

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