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Preface to the June 2018 Issue

In this issue, the Corporate Law section discusses the recent developments regarding the Trade Registry Regulations, which include certain changes to the Turkish Commercial Code concerning signature declarations, opening commercial books and signing Articles of Association ("AoAs"). The amendments to the Incorporation Agreement Communiqué address issues relating to legalization abroad and the requirements for signature declarations.

The Competition Law section discusses, among other topics, the Board's decision regarding the changes made to the Guidelines on Vertical Agreements that address online sales and "most favored nation" ("MFN") clauses in order to align the secondary legislation in Turkey with European Union law and meet the needs and challenges posed by evolving market conditions in the modern economy. Further, this section also examines whether the Istanbul Metropolitan Municipality could constitute or be deemed as an "undertaking" under Turkish competition law doctrine.

The Data Protection Law section analyzes a recent decision of the Personal Data Protection Board, which outlines the necessary measures that data controllers are required to take concerning special categories of personal data, such as racial or ethnic origin, political opinions, philosophical beliefs, religion, sect or other beliefs, appearance and clothing, association, foundation or trade-union membership, health or sex life, and criminal conviction or security measures that a person is subject to, along with biometric and genetic information.

On the Internet Law front, this issue explores the amendments to the Radio and Television Legislation, which now includes certain provisions regarding internet broadcasting services.

Finally, on the White Collar Irregularities front, this issue sheds light on and reiterates the importance of corporate cooperation with the U.S. Department of Justice.

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

June 2018

Corporate Law

Recent Developments in Trade Registry Regulations

1. Introduction

Turkey has introduced several amendments to the Turkish Commercial Code No. 6102 ("***TCC***") in order to (i) regulate the signing procedure of corporate documents before trade registries, and (ii) determine the scope and limits of the authority of notary publics. These changes were introduced with the Law No. 7099 on the Amendment of Certain Laws in order to Enhance the Investment Environment, which was published in the Official Gazette on March 10, 2018.

Accordingly, the Ministry of Customs and Trade has published a number of Communiqués amending the Communiqué on the Signing of the Incorporation Agreement of the Company Before the Trade Registry ("***Incorporation Agreement Communiqué***"), which were published in the Official Gazette on March 13, 2018 and April 17, 2018, in order to change the signing process of corporate documents. Furthermore, the Communiqué Amending the Communiqué on the Commercial Books ("***Commercial Books Communiqué***") was published in the Official Gazette on March 22, 2018, in order to modify the opening procedure of commercial books.

This article summarizes some of these changes.

2. Amendments to the TCC

(i) **Signature Declarations:** Notary publics are no longer entitled to certify the signature declarations of merchants (whether real person merchants or representatives of legal entities). Instead, the merchants' signature declarations must be issued in person before authorized persons at the trade registries, as per the amended Article 40 of the TCC. This amendment only applies to signature declarations submitted prior to the incorporation of an enterprise and came into effect as of March 10, 2018. Articles of the Incorporation Agreement Communiqué have been amended accordingly.

(ii) **Opening of Commercial Books:** Trade registries are authorized to open the commercial books of joint-stock and limited liability companies during the incorporation process of such companies, as per the amended Article 64 of the TCC. Previously, notary publics were allowed to do so as well. This amendment came into effect as of March 10, 2018. Article 13 of the Commercial Books Communiqué has been amended accordingly.

(iii) **Signing of the Articles of Association ("AoA"):** The founder of a limited liability company must now sign the company's AoA before an authorized person at the trade registry, as per the amended Article 575 of the TCC. In other words, notary publics are no longer authorized to certify the articles of association of limited liability companies. This amendment came into effect as of March 15, 2018. However, contrary to this new rule, notary publics remain authorized to notarize and certify the signatures of the founders on the AoAs of joint-stock companies. In any case, it would be recommended to consult with the relevant trade registry as to its preferred practice and procedures, in order to prevent any refusal by the trade registry officials regarding the registration of the notarized articles of association of joint-stock companies during the incorporation process.

(iv) **Capital Contribution Payment:** The founders of limited liability companies are no longer required to make a capital contribution payment of at least a quarter of the share capital prior to the registration of the company. This obligation still remains in effect for the founders of joint-stock companies. This amendment came into effect as of March 15, 2018.

3. Amendments to the Incorporation Agreement Communiqué

(i) **Legalization abroad:** The signature declarations of signatories who reside abroad may be certified by Turkish consulates in the country where the signatory resides. This amendment came into effect as of April 17, 2018.

(ii) **Requirement for signature declaration:** As per amended Article 13/A of the Incorporation Agreement Communiqué, signature declarations are no longer required under some circumstances. According to this amendment, if the founder of a company is also authorized to represent the company and signs the incorporation agreement in person before the trade registry, his/her signature declaration is not required. Furthermore, in cases where the incorporation agreement is signed by proxy at the trade registry and the founder is also authorized to represent the company, his/her signature declaration is not required, subject to the condition that the original copy of the proxy bearing his/her signature is submitted to the trade registry. The proxy may be issued in Turkey or abroad. If issued abroad, it must be legalized and apostilled and then translated into Turkish and notarized in Turkey before submission to the trade registry. This amendment came into effect as of March 13, 2018.

As a result of the foregoing amendments, the notary publics' duty of approval (*i.e.*, the necessity of obtaining the authorization of a notary public during the incorporation process), which was widely acknowledged and observed prior to these changes, is neither essential nor required. Instead, authorized persons are entitled to administer the signing procedures of signature declarations and execute the incorporation process of companies. The proper implementation of these changes by trade registries and Turkish consulates abroad would lead to the improvement of the investment climate in Turkey, and thus facilitate and promote the creation of new investments and businesses in the country, which are the stated aims of the said amendments.

Banking and Finance Law

Authorized Institutions Under Turkish Law

1. Introduction

Turkey has adopted the Communiqué No. 2018-32/45[1] related to the Decree No. 32[2] (the ***"Communiqué"***) in order to determine the procedures and principles of the establishment, authorization, branch opening, liabilities and auditing of authorized institutions (namely exchange offices). The Communiqué entered into force on January 30, 2018. The Communiqué abolished the Communiqué No. 2006-32/32 related to the Decree No. 32.

As per Article 2 of the Decree No. 32, authorized institutions are defined as joint-stock companies that are permitted to carry out transactions regarding foreign currencies, as well as precious metals, stones and objects.

[1] The Communiqué No. 2018-32/45 published in the Official Gazette dated January 30, 2018 and numbered 30317.

[2] Decree No. 32 on the Protection of the Value of Turkish Currency published in the Official Gazette dated August 11, 1989 and numbered 20249.

This article addresses significant amendments and novelties introduced by the Communiqué.

2. Authorized Institution

(i) Area of Activity

The Communiqué sets forth two types of authorized institutions, namely Group A and Group B.

According to the Communiqué, Group B authorized institutions are defined as authorized institutions that may engage in the following activities:

- Buying and selling foreign currencies, except for bank money,
- Converting foreign currencies (except for bank money) into other foreign currencies using smaller or larger denominations, excluding different types of bank money,
- Buying cheques in foreign currencies pursuant to the procedures and principles determined by the Turkish Central Bank,
- Buying and selling gold pressed coins issued by the Turkish State Mint (such as Meskuk [standard] and Ziynet [decorative], etc.), as well as standard, unprocessed gold bars and ingots weighing less than 1 kg.,
- Buying and selling foreign currencies and exchanging different types of foreign currencies through bank transfers, authorized institutions and customer transactions using banking systems, provided that the transfer order is given or the physical delivery subject to the transaction is completed within the same business day.

Group A authorized institutions are allowed to engage in all the activities that are permissible for Group B authorized institutions, as well as the following activities:

- Importing and exporting precious stones, and standard and non-standard unprocessed precious metals and conducting transactions related to precious metals and stones on the stock exchange in accordance with the applicable laws, rules and regulations, provided that the authorized institution is a registered member of the stock exchange,
- Purchase and sales of foreign currencies and exchanging different types of foreign currencies through banks, authorized institutions and other institutions that can carry out transfers with their customers, provided that a transfer order is given or the physical delivery subject to the transaction is completed within the same business day,
- Acting as a representative for electronic money companies and electronic payment institutions,
- Buying and selling foreign currencies and engaging in related transactions through cash machines (*i.e.*, ATMs) at the head offices and/or branches and other suitable locations, subject to the permission of the Undersecretariat of Treasury,
- Buying and selling foreign currencies up to USD 10,000 through pre-paid cards and in unlimited amounts through bank/debit cards,
- Delivering foreign coins or Turkish Lira banknotes overseas, subject to the prior permission of the Undersecretariat of Treasury, and according to the procedures and principles that shall be determined by the Undersecretariat of Treasury,
- Performing other activities deemed to be suitable and appropriate by the Undersecretariat of Treasury, which shall be announced on the website of the Undersecretariat.

Authorized institutions are not allowed to engage in any activities other than the ones enumerated above.

(ii) Authorization and Establishment

The permission of the Undersecretariat of

Treasury is required for the establishment of an authorized institution. In order to establish an authorized institution, a joint-stock company with paid-in capital of at least TRY 5,000,000 for Group A authorized institutions and TRY 1,000,000 for Group B authorized institutions should be established. Other requirements for founding partners, general managers, members of the board of directors, authorized signatories and internal control officers for Group A authorized institutions, rules for trade names and share certificates, as well as the conditions of establishment of authorized institutions are specified in detail in the Communiqué.

Once permission for the establishment of an authorized institution is obtained, authorized institutions are required to obtain an "activity authorization" from the Undersecretariat of Treasury in order to perform the activities enumerated in section (i) above.

(iii) Other Matters

In order to open new branches, Group A authorized institutions are required to obtain permission from the Undersecretariat of Treasury. Group B authorized institutions are not allowed to open new branches or to apply to the Undersecretariat of Treasury for permission to open new branches.

Authorized institutions are obliged to inform the Undersecretariat of Treasury of a change of address (within 30 days) and they are also required to notify the Undersecretariat of Treasury of trade name changes and share transfers, both of which are subject to permission from the Undersecretariat of Treasury. Additionally, the required internal control and corporate management systems, as well as the auditing procedures and applicable sanctions that may be imposed on authorized institutions are described in detail in the Communiqué.

Applications for the establishment of Group A authorized institutions may be made as of March 1, 2018, and for Group B authorized institutions as of January 1, 2019. Authorized institutions that have already obtained an activity authorization before the Communiqué's entry into force are required to apply to the Undersecretariat of Treasury until January 1, 2019, to continue to perform their activities as Group A and Group B authorized institutions. Such authorized institutions are required to comply with the establishment and activity requirements set forth in the Communiqué by July 1, 2019.

3. Conclusion

The Communiqué sets forth two types of authorized institutions, as outlined above, which are categorized as Group A and Group B authorized institutions. In order to establish an authorized institution, it is necessary to establish a joint-stock company whose paid-in capital cannot be less than the amounts stated both for Group A and Group B authorized institutions (TRY 5,000,000 and TRY 1,000,000, respectively). Moreover, authorized institutions are required to obtain permission from the Undersecretariat of Treasury in order to start engaging in the permitted activities, which are explicitly set forth in the Communiqué.

Capital Markets Law

Turkish REITs: Key Points to Consider Before an Initial Public Offering

This article aims to provide insight into various key points to consider before launching an initial public offering ("***IPO***") for real estate investment trusts ("***REIT***") in Turkey.

1. Procurement of Necessary Business Premises, Equipment and Employees

A REIT must conduct its activities in suitable business premises with the necessary equipment. However, the Communiqué on Real Estate Investment Trusts (Communiqué No. III-48.1, dated May 28, 2013) does not provide in detail requirements as to the features of such "suitable business premises" and the content of the "necessary equipment" requirement. A REIT should also employ qualified employees who are suitable for its activities together with "specialized employees" (*ihtisas personeli*) who should be qualified to carry out the duties specified in the applicable capital markets legislation and should possess certain licenses in the capital markets field.

It should be noted that if a REIT is a tenant on its business premises, the lease agreement of the premises should be duly annotated and affixed to the title deed, as per Article 26 of the Communiqué on Real Estate Investment Trusts.

2. Establishment of an Appropriate Organization

A REIT should duly establish an appropriate and suitable internal organization to conduct its activities in an effective manner. According to Article 4(5) of the Corporate Governance Communiqué (Communiqué No. II-17.1, dated January 3, 2014), a REIT should also form an audit committee, an early detection of risk committee, a corporate governance committee, a nomination committee and a compensation committee, as may be necessary, and appoint skilled and capable members to those committees.

On the other hand, Article 23 of the Communiqué on Real Estate Investment Trusts sets forth the activities that a REIT is not allowed to engage in, which include real estate construction work, operating hotels, hospitals, shopping malls, supermarkets, commercial warehouses, etc., for commercial purposes, and providing project development services to third parties, among others. Therefore, a REIT must conduct its activities in accordance with these restrictions and limitations, and cease prohibited activities immediately, if any.

3. Appointment of a General Manager

As per Article 18 of the Communiqué on Real Estate Investment Trusts, the general manager employed by a REIT must possess a bachelor's degree from a four-year institution of higher education and at least 5 years of work experience in the fields of infrastructure, law, construction, banking, real estate or financing. Furthermore, in accordance with Article 7 of the Communiqué on Real Estate Investment Trusts, the general manager (i) should be honest and reputable, (ii) should not have any outstanding tax debts, (iii) should not have been convicted of certain crimes, (iv) should not have been banned from capital markets activities, and (v) should not be involved in bankruptcy or liquidation proceedings in an individual capacity or as a shareholder of any company.

4. Fulfillment of Certain Requirements Regarding the Assets in the REIT Portfolio

The Communiqué on Real Estate Investment Trusts stipulates certain requirements and limitations as to the types and features of assets that can be included in a REIT's portfolio. In this respect, REITs should always take into account and comply with such requirements and limitations when they are making investment decisions or disposing of assets in their portfolios. During the public offering process, details of the portfolio are determined through real estate value assessment reports for the Capital Market Board's ("***CMB***") review.

5. Application to the CMB and Borsa Istanbul

A REIT should apply to the CMB within three (3) months as of the date of its incorporation or conversion to a REIT from a joint-stock company. This application must be made by using the standard application form of the CMB and by providing all other required documentation and supporting documents (*e.g.*, offering circular, real estate value assessment reports, trade registry gazettes, board of directors' resolutions and declarations/undertakings, etc.) for a public offering of at least 25% of its issued share capital. If a REIT fails to apply to the CMB within the prescribed time period, its application will be denied by the CMB and the "real estate investment trust" status of the entity and its related legal rights (*i.e.*, tax exemptions, etc.) stemming from this status will be terminated. Furthermore, a REIT should also apply to the Borsa Istanbul simultaneously with its CMB application, and an independent lawyer's report and other required documents should be duly prepared for the listing of its shares by Borsa Istanbul.

Finally, a thorough and detailed legal due diligence of the REIT should be conducted for the preparation of the independent lawyer's report.

All information contained in the foregoing documents should be complete, true and accurate, and reflect the current status of the REIT to ensure the successful completion of the IPO.

Competition Law / Antitrust Law

The Board Denies INTES Individual Exemption for Price Variation Survey: Walking the Fine Line in Exchanging Price Information

The Turkish Competition Board ("***Board***") published its reasoned decision regarding the request by the Turkish Employers Association of Construction Industry ("***INTES***") for an individual exemption for a survey ("***Survey***"), which would be carried out by an independent firm to track variations in the prices of raw materials affecting the costs in the construction sector. The case handlers' report indicated that as long as (i) the results of the Survey would be made public 6 months after the data collection, (ii) the results would also be shared with the Board, and (iii) the company carrying out the Survey and INTES would enter into a non-disclosure agreement, the proposed Survey would be a suitable candidate for an individual exemption. Despite the affirmative opinion of the case handlers, the Board refused to grant an individual exemption to the Survey, as it concluded that the information exchange for the purposes of the Survey failed to satisfy the cumulative conditions for an individual exemption under Article 5 of the Law No. 4054 on the Protection of Competition (***"Law No. 4054"***).[3]

INTES, a trade association in the construction sector, comprises over 100 members who undertake large-scale projects in Turkey and abroad. INTES applied to the Board for an individual exemption to be granted to the Survey, which would be carried out by a third-party independent survey company, in order to determine price variations in the raw materials (such as iron, cement, ready-mixed concrete, asphalt material and lumber) that

[3] The Board's decision numbered 18-03/31-18 and dated January 18, 2018.

affect the costs of its members' projects. The participation of INTES members in the Survey would be voluntary, and non-member undertakings could also take part in the Survey upon request. According to the information provided by INTES, the Survey would have been a novel development for the construction sector, since it would include inquiries regarding the raw material costs and total unit costs. INTES confirmed that individual data provided by the participants would be collected each month by the independent survey company and would not be shared with any of the parties involved in the Survey. Moreover, only the aggregated results would be shared with the INTES board. The data collected by the independent survey company would then be used to calculate an index, known as the "construction costs index" which would be used to examine whether a trend of increasing costs could be discerned for each material. INTES asserted that the index, which would be made public, would not be segmented or divided on the basis of geographic regions, and if the index identified any trends regarding increasing costs for a particular geographic market, INTES would notify the Turkish Competition Authority (***"Authority"***) and other relevant institutions of any such findings.

In its assessment, the Board defined the relevant product market as "*construction services*" by taking note of the fact that all the members of INTES were active in the construction industry and that the construction materials and the raw materials used in construction (regardless of whether a particular project concerns the construction of houses or other structures) are generally very similar. The Board defined the relevant geographic market as *"Turkey"* in light of the fact that all the players in the Turkish construction market would have benefitted from the information exchange in the course of the Survey contemplated by INTES.

In order to determine whether the Survey would hinder competition in the relevant market, the Board examined the characteristics of the relevant product market and assessed the scope of the proposed Survey. Accordingly, the Board evaluated whether the members of INTES constituted a separate product market and, if so, whether there were any barriers to entry to that market. The Board also assessed whether the information that would be collected by the survey company would be strategic, private or public, current or historic, and whether the information would be exchanged frequently.

The Board found that the proposed Survey seemed to give the impression that it would not lead to any competitive concerns, since (i) the relevant product market was competitive, (ii) the data collected would be aggregated, and (iii) the outcome of the Survey would be announced publicly. However, the Board nevertheless concluded that the Survey could hinder competition within the meaning of Article 4 of the Law No. 4054, given that the information exchange that would ensue as a result of the Survey (i) would include strategic and current information that is not publicly accessible, and (ii) would occur frequently.

As the Board determined that the Survey could restrict competition within the meaning of Article 4 of the Law No. 4054, the Board proceeded to apply the individual exemption test based on the following cumulative conditions: (a) the Survey must contribute to the improvement of the production or distribution of goods or the promotion of technical or economic progress, (b) the Survey must provide consumers a fair share of the resulting benefits, (c) the Survey should not lead to the elimination of competition with respect to a substantial part of the products in question, and (d) the Survey should not impose restrictions on the undertakings in question that are not indispensable to the achievement of the objectives specified under (a) and (b).

With regard to the first condition, INTES pointed out that, despite the obvious need, there had been no previous study that allowed construction firms to track price trends with regard to the raw materials affecting construction costs. INTES further argued that, through the Survey, construction firms would increase their efficiency by comparing their own performance to those of their competitors in the relevant market. In addition, INTES noted that, if a trend of increasing input costs was identified as a result of the Survey, then it would inform the Board and other relevant institutions of such a trend.

In response, the Board stated that it did not see the connection between informing the Board of such a trend (*i.e.*, of increasing costs) on the one hand and achieving the proposed cost savings on the other. The Board decided that potential cost savings were more likely to result from the Board's examination and finding of a competition law infringement, if any, rather than the Survey itself, and declared that it was unclear how the monitoring of competitors would affect the costs of construction firms. The Board therefore concluded that the proposed Survey did not satisfy the first condition of an individual exemption.

For the second condition regarding consumer benefits, the Board determined that the Survey did not fulfill the requirement of providing consumers a fair share of the resulting benefits, since it would not create any efficiency gains.

In terms of the third condition, the Board decided that the Survey fell short of satisfying the requirement, since the information exchange in the course of the Survey could lead to coordination among undertakings active in the input markets. The Board also noted that information exchange among firms with regards to the raw material prices of the preceding month might create coordination effects, especially in certain sectors (such as cement and ready-mixed concrete) where seasonality and regionality are important factors in the market. For instance, the Board determined that, if the survey company collected information in the same geographic markets as the markets defined in the Board's decisions, then the risk of coordination among producers in those regions would increase, since those producers would be informed of the cost trends in their regions.

As for the fourth condition of an individual exemption, the Board concluded that the Survey would restrict competition beyond what is necessary to attain the objectives stated, even if it had the goal or effect of informing the Authority of a potential increase in input costs. The Board indicated that the Authority already carries out investigations (in the construction sector in general and in the cement and ready-mixed concrete sectors in particular) *ex officio* and/or upon complaints. Therefore, the Survey was deemed likely to hinder competition beyond what is necessary to achieve its stated objectives.

As a result, the Board decided that the Survey did not meet any of the conditions of an individual exemption under Article 5 of the Law No. 4054 and chose not to grant an individual exemption to it.

The Board Closes the Door on Antitrust Allegations against Yataş for its "Best Price Guarantee" Campaign – A Blessing for Best Price Practices

The Board published its reasoned decision[4] on the preliminary investigation launched against Yataş Yorgan ve Yatak San. ve Tic.

[4] The Board's decision numbered 17-30/487-211 and dated September 27, 2017.

A.Ş. (*"Yataş"*), a company active in the furnishings and home textile sectors, in order to determine whether Yataş had violated the Law No. 4054 either by acting in cooperation with its independent retailers or by imposing certain pricing policies on them through its "best price guarantee" campaign.

The Board evaluated Yataş's conduct in light of its recent decisions on most favored customer/most favored nation (*"MFN"*) clauses. The Board found that MFN clauses can restrict competition by facilitating coordination (in particular, through cartels), creating entry barriers and excluding competitors. MFN clauses can also have pro-competitive effects, such as creating efficiencies, eliminating the free-rider problem, protecting trademarks, and reducing costs. In this respect, the Board noted that the conditions of Yataş's "best price guarantee" aim to ensure that its distributors will offer the lowest prices available in a specific time period. To that end, the Board held that the conduct of Yataş should be evaluated as an instance of resale price maintenance (*"RPM"*), rather than an MFN practice.

The Board also noted that RPM could arise when the supplier directly or indirectly obligates the reseller to a fixed, minimum or maximum price. Although RPM is considered to be a hard-core restriction within the scope of Article 4(a) of the Block Exemption Communiqué on Vertical Agreements (*"Communiqué No. 2002/2"*), the Board held, in line with its recent precedents, that an effects-based approach could be adopted in this case, provided that objective justifications existed for the practice in question. The Board determined that Yataş competed with a great number of small-scale and large-scale suppliers, and that its market share in the relevant markets did not exceed 40%. Therefore, the Board concluded that the agreements between Yataş and its distributors could benefit from a block exemption under the Communiqué No. 2002/2, if the relevant conditions were met.

In this respect, although the Board did not find any evidence that the best price guarantee campaign prevented resellers from offering lower prices, it decided to analyze whether (i) the campaign could still constitute an RPM-related violation in light of the market structure, and (ii) Yataş's campaign could prevent the resellers from selling the relevant products for a price below the guaranteed price after the campaign period ended.

Based on the information and documents gathered during the preliminary investigation and the interviews conducted with the resellers, the Board ultimately concluded that (i) there was no indication that Yataş had pressured resellers regarding the resale prices through its best price guarantee campaign, (ii) resellers were able to sell the products with prices and discounts that differed from the recommended prices even during the campaign period, and (iii) inter-brand competition was considerably high, and there was a large number of undertakings who were active in the relevant markets—with none of them possessing a significant amount of market power. As a result, it was determined that the best price guarantee campaign was unlikely to result in an RPM violation.

Furthermore, the Board took into account that Yataş's best price guarantee campaign had two separate justifications, namely (i) to generate campaigns in order to ameliorate the "expensive product" perception of its products in its concept stores, and (ii) to prevent and counteract the negative effects arising from the expectation of lower prices (particularly in the periods following the peak wedding season), which resulted in reduced or postponed customer demand and caused fluctuations in the demand structure for its products. Consequently, the Board concluded that, even though these two justifications did not constitute an "*objective justification*" that could remove any infringements in terms of RPM, due to the specific market structure and the lack of evidence regarding RPM in this case, these justifications could be deemed sufficient to reveal Yataş's intentions.

Therefore, the Board decided not to initiate a full-fledged investigation against Yataş.

This is a significant and noteworthy decision by the Board, which sheds considerable light on its current approach to RPM allegations.

The Board's Reasoned Decision on the Istanbul Metropolitan Municipality: "Is the Municipality an Undertaking within the Meaning of Competition Law?"

The Board's reasoned decision[5] regarding the allegations that the Istanbul Metropolitan Municipality (*İstanbul Büyükşehir Belediyesi Başkanlığı*) ("***Municipality***") had violated the Law No. 4054 through certain activities regarding the right of way, was published on the Authority's official website. In its reasoned decision, the Board primarily assessed whether the Municipality could be deemed and treated as an "undertaking" within the meaning of the Law No. 4054.

In its complaint to the Authority, the Turkish Competitive Telco Operators Association[6] (*Serbest Telekomünikasyon İşletmecileri Derneği*) ("***TELKODER***") stated that, in accordance with the Law No. 5809 on Electronic Communications ("***ECL***"), a number of its members conduct their businesses by obtaining authorization for infrastructural operations. It was also asserted that such authorizations can only be fully and efficiently utilized when the related "right of way" is also granted. TELKODER claimed that (i) the Municipality denied the operators an excavation permit between the years 2012 and 2014, (ii) the main contracts relating to the right of way on metro routes and funicular railway routes were terminated in 2016 without any legal basis, (iii) the Municipality denied applications for excavation permits and directed the operators to İstanbul Elektronik Haberleşme ve Altyapı Hizmetleri San. ve Tic. A.Ş. (a company incorporated by the Municipality) ("***ISTTELKOM***")[7], (iv) the Municipality forced other undertakings to enter into an agreement with ISTTELKOM for facility sharing, (v) the provision within the tariff of the Municipality regarding the right of way, which indicates that subsidiaries of the Municipality could use the right of way without paying a fee, is discriminatory, and (vi) the Municipality is an "undertaking" which acts as a provider of the right of way, and its subsidiary ISTTELKOM functions as an infrastructure operator.

In this respect, TELKODER alleged that the Municipality and ISTTELKOM, which constitute a single economic unity, had violated Article 4 of the Law No. 4054 by foreclosing the market through a vertical agreement.

The Board held that, in the absence of any explicit definition for public undertakings under the Law No. 4054, and pursuant to the Board's settled case law, public undertakings could either have an independent legal identity or they could be established within central,

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[5] The Board's decision numbered 17-30/489-222 and dated September 27, 2017.

[6] This is the official English name that the association uses on its website. However, a better translation would be "Turkish Association of Independent Telecommunications Operators."

[7] ISTTELKOM was founded by the Municipality in 2012 in order to address the needs in the areas of information technologies and electronic communications, and to make contributions to solutions for infrastructure problems in the telecommunication industry.

regional or local administrative bodies. Additionally, the Board stated that, in light of its settled case law on this topic, if public authorities conduct economic activities (even without a separate legal identity), they should be deemed as "undertakings" within the meaning of the Law No. 4054, except for acts that are carried out with the authority and power granted to them based on their public duties.

The Board found that establishing and operating the infrastructure that is necessary in order to provide a public service is an integral part of such public service itself. In this respect, the Board determined that actions taken by the Municipality with respect to its decisions on whether to grant an excavation permit regarding the use of the right of way, based on its public power as a provider of the right of way under the ECL and the Regulation on the Transition of All Types Of Cables and Similar Equipment Used in the Fixed and Mobile Communications Infrastructure or Networks (***"Regulation on the Right of Way"***) are a part of its public service duties. Therefore, the Board ruled that the Municipality cannot be deemed as an undertaking under Article 3 of the Law No. 4054 with regard to such activities. To that end, the Board concluded that the decision of the Municipality not to grant an excavation permit could not be deemed as an abuse of dominant position under Article 6 of the Law No. 4054, and thus, the Board declined to initiate an investigation against the Municipality on this front.

However, the Board decided to investigate the competition law concerns that could potentially arise from the Municipality directing applicants to ISTTELKOM by way of declining to grant them excavation permits. In this respect, the Board ultimately decided to send an opinion letter to the Municipality, in line with its duty to foster and promote competition.

It follows from the reasoned decision of the Board that the right of way is essential for the sustainability of electronic communication services. Moreover, it is undoubtedly true that public authorities are obligated to address the "right of way" requirements in compliance with the applicable legislation. That being said, sector representatives claimed (before the Ministry of Transport, Maritime Affairs and Communications) that, after the adoption of the regulation regarding the right of way, municipalities had started to use the excavation licensing process as an illegitimate source of revenue.

As set forth in detail within the Board's reasoned decision, under the Regulation on the Right of Way, any request for a right of way must be granted if certain conditions are satisfied, so long as it is not exempted under that regulation. The Board's decision also emphasized that, according to the same regulation, public authorities and institutions have certain additional obligations, which can be listed as follows: (i) they should primarily evaluate applications without any delay, (ii) they should conclude evaluations within sixty (60) days, (iii) they should not discriminate against operators, and (iv) the evaluation process should be transparent. The Board also mentioned that the principle of aiming to secure an effective and sustainable competitive environment is emphasized in the Regulation on the Right of Way. However, it should be noted that the regulation does not introduce any sanctions against those parties that fail to fulfill these obligations or that infringe on these principles.

As a result of its preliminary investigation, the Board dismissed the allegations that the Municipality had denied excavation permits to the operators. Moreover, the Board stated that there was no written evidence indicating that the Municipality had directed operators to ISTTELKOM. That being said, the Board explicitly stated that, since ISTTELKOM had attained a significant amount of business with respect to providing the right of way (except from the "Protocol for Facility Sharing" and the Municipality's "Public Bid for Infrastructure Enlargement for 2017," which ISTTELKOM had won in its second year), serious suspicions had arisen that the Municipality had been directing the operators to ISTTELKOM. Nevertheless, the Board reiterated that this behavior could not be examined under the Law No. 4054, since the Municipality did not qualify as an "undertaking" within the meaning of competition law rules. The Board also indicated that the termination of the main contracts for the right of way on metro routes and funicular railway routes were acts of a purely administrative nature, and thus the Municipality could not be deemed as an "undertaking" for these acts either.

With respect to the allegations that the Municipality and ISTTELKKOM had violated Article 4 of the Law No. 4054 by using a vertical agreement to prevent the use of the right of way by other operators and thereby foreclosing the market, the Board reiterated that the Municipality did not qualify as an "undertaking" under Article 3 of the Law No. 4054, and thus, it could not violate Article 4 of the Law No. 4054.

After addressing the allegations contained within the case file, the Board decided to provide certain explanations on whether entities comprising a single economic unit could violate Article 4 of the Law No. 4054 through vertical agreements. In this respect, the Board first declared that separate entities within the same economic unit constitute a single undertaking for competition law purposes. Accordingly, the Board asserted that even a "cartel agreement" between companies within the same economic unit could not be assessed as an anti-competitive agreement. The Board also stated that, even if the Municipality were considered to be an undertaking for the purposes of the case file, an anti-competitive vertical agreement between the Municipality and ISTTELKOM could not be evaluated under Article 4 of the Law No. 4054, since these two entities are part of the same economic unit.

In conclusion, the Board decided that there were no legal grounds to initiate a full-fledged investigation against the Municipality pursuant to Article 41 of the Law No. 4054. However, in light of its duty to foster and promote competition, the Board decided to send an opinion letter to the Municipality regarding certain competition law concerns that might arise if the Municipality handled the requests for right of way in a discriminatory manner.

Amendments to the Guidelines on Vertical Agreements

The Authority published revised Guidelines on Vertical Agreements (***"Guidelines"***) on March 30, 2018.

The Guidelines include newly introduced provisions and amendments with regard to online sales and MFN clauses. These changes are aimed at aligning the secondary legislation in Turkey with current European Union laws in order to meet the needs and challenges posed by evolving market conditions in a modern economy.

In relation to online sales, the Authority's main objective in revising its Guidelines was to take into consideration the necessity of providing specific provisions under the Turkish competition law regime and to harmonize the current legislative framework with the approach adopted by the European Commission's Guidelines on Vertical Restraints. In its announcement, the Authority stated that the emergence of the internet platform as a new distribution channel provides consumers with the opportunity to

(i) easily access large amounts of information, (ii) compare prices, and (iii) reach more products and more sellers without difficulty. It also enables suppliers to market and promote their products to wider geographical markets at lower costs. For these reasons, and due to the rapid growth of online sales in Turkey, it is apparent that a regulation regarding internet sales has become necessary.

The Authority further added that these amendments seek to maintain a balance between (i) re-evaluating competition law rules with respect to online sales and thereby ensuring the preservation of the internet's contributions and benefits to consumers and resellers, and (ii) the protection of the commercial interests of suppliers.

In view of these objectives, a couple of new paragraphs have been added to the Guidelines, and the regulatory changes entailed by these new paragraphs can be categorized as follows: (i) description of certain restrictions with regard to online sales which would exclude the relevant agreement from the benefit of the block exemption (*i.e.*, hard-core restrictions for online sales), (ii) conditions that suppliers may impose on internet distribution channels—which must be objective, fair and acceptable ("principle of equivalence"), and (iii) provisions regarding online sales in selective distribution systems.

These amendments include expanded descriptions and specific examples of the types of online sales that would be categorized as active or passive sales or that would be considered to fall within or outside of the protective cloak of the block exemption. For instance, examples of hard-core restrictions include (i) restrictions on sales requested through the distributor's website from a particular region or customer group in exclusive distribution systems, (ii) rules about terminating an exclusive distributor's transaction after realizing that the customer is not located in its exclusive region, (iii) restrictions regarding the share of online sales in the total amount of sales, and (iv) restrictions about a supplier's application of different prices to its distributors for online sales.

The Guidelines also state that the prohibition of active sales of exclusive distributors may benefit from the protective cloak of the block exemption. As for selective distribution systems, it is asserted that if a distributor launches a website for reselling through the internet, this will not be deemed as a new physical sales point.

In terms of MFN clauses, the Guidelines introduce new provisions that assess MFN clauses under the "*rule of reason*" approach. The amended Guidelines deviate from the draft version that was submitted to public comment. The draft version of the amended Guidelines merely stated that MFN clauses may lead to resale price maintenance; in contrast, the updated version now provides that an MFN clause on its own may not result in determining the resale price, although it still recognizes that there may be a risk of resale price maintenance.

The Guidelines indicate that MFN clauses should be evaluated on a case-by-case basis, and that this analysis should be based on a number of factors, such as (i) the position of the parties and their competitors within the relevant market, (ii) the purpose of the MFN clause, and (iii) the specific characteristics of the relevant market and the MFN clause in question. An MFN clause may benefit from the block exemption, provided that the market share of the beneficiary of the relevant MFN clause does not exceed 40%, together with other conditions as set forth under Communiqué No. 2002/2. If the market share threshold is exceeded, an individual exemption assessment should be conducted by taking into consideration the pro-competitive and anti-competitive effects of the relevant MFN clause. For instance, if the parties to an MFN clause possess market power, the risk of market foreclosure or the exclusion of competitors that are not party to the MFN clause cannot be eliminated or overlooked. Moreover, if MFN clauses are applied in concentrated markets and in a cumulative manner, certain anti-competitive effects may arise, such as the difficulty for other market players to find alternative suppliers or the cumulative restrictive effects in the relevant market.

When small-scale buyers use MFN clauses in their agreements, this would generate positive effects for the competitive environment in the market instead of raising any competition law concerns, given that the relevant buyers could benefit from favorable prices and advantageous conditions in the market. When the concentration level of the upstream market is low (*i.e.*, when the upstream market is highly competitive), competition may not be harmed, given that competitors can choose alternative suppliers in the market in such a situation. If the relevant market is not transparent, the negative effects of MFN clauses would be expected to be relatively low since, in such situations, it is unlikely for the parties imposing MFN clauses to effectively monitor the implementation of these clauses in the market.

The revised Guidelines provide valuable guidance on the assessment of two important commercial practices, namely internet sales and MFN clauses, under the Turkish competition law regime. The new text added to the Guidelines brings more legal certainty and clarity to the Turkish legal system, as it incorporates the principles already set forth by the Board's decisional practice and promises further compliance and increased harmony with European Union law.

Labor Law

A Labor Court of First Instance Amends the Type of Termination Ex Officio

As soon as a dismissed employee filed a re-employment lawsuit filed by a dismissed employee against his employer before the Gebze 6th Labor Court of First Instance ("*Court*") with file number 2017/324 E., the Court rendered an unexpected and highly significant decision by amending the type of termination subject to the dispute at its own discretion, and thereby potentially positioned this case at the very center of a hotly debated topic, *i.e., ex officio* conversion of *termination for cause* to *valid termination*.

As for the background of the case at hand, it was alleged that the employee had displayed a disrespectful and aggressive attitude at work (*e.g.*, kept chewing gum) and had exhibited severe disobedience by acting in a hostile manner against the employer, despite several warnings. Accordingly, the employer immediately terminated the employment agreement of the employee, without first obtaining a written defense letter or issuing a warning letter, as per Article 25/II/b of the Labor Law No. 4857 (***"Law No. 4857"***), and thereby engaged in what is known as "*for cause termination*." The employee then applied to the Court and requested his re-employment to his position at work, on the grounds that the employer had unlawfully invoked Article 25/II/b of the Law No. 4857 in his case. The Court partially accepted the lawsuit on the merit that the employee's alleged actions had only breached the employment contract to the extent that the termination would constitute *valid termination* under Article 18 of the Law No. 4857, rather than *for cause termination*. Nevertheless, in deciding that this had been a valid termination, the Court did not require the employer to have carried out the strict termination procedures that are normally necessary for a valid termination.

In light of the foregoing, one may inquire as to whether the Court should have also sought the fulfillment of the termination procedures that must ordinarily be completed by the employer in order for a termination to be deemed a "*valid termination*." This question is highly significant, given the fact that almost all re-employment lawsuits that are initiated under Turkish labor legislation following a termination that is based on valid reasons result in favor of the employee, because it is often not possible for employers to comply with the strict procedural requirements or meet the stringent criteria set forth by the Labor Law and by the precedents of the Court of Appeals. Therefore, one can reasonably ask, when there is such an amendment by the courts regarding the type of termination, whether the court should also examine, for instance, if the employer obtained a written defense or provided guidance to the employee in order to eliminate the bad behavior, or followed the *ultima ratio* ("last resort") principle for termination, all of which are only applicable and required for valid dismissals. Or, alternatively, one may argue that the court should simply change the type of termination on its own (*ex officio*) without expecting the employer to follow the strict procedural rules for *valid* termination, since the employer initially intended to terminate the employee *for cause*, which does not obligate an employer to follow the above-mentioned procedures for valid termination.

There are two main perspectives on this highly controversial topic, which can be pitted against each another. On the one hand, one may argue that the employer should not be penalized for miscalculating the gravity of the offense and choosing the wrong type of termination (*i.e.*, picking *for cause termination* rather than *valid termination*), and should be allowed to decide not to continue the employment relationship when there are sufficient reasons for valid termination. On the other hand, it could also be argued that this would enable employers to circumvent the law, so that an employer could always opt for termination for cause instead of valid termination, in order to avoid the strict procedural rules to be followed for valid termination, and just request from the court, if need be, an *ex officio* amendment to the termination type, and thereby judicially validate its dismissal without complying with the required termination procedures.

In this case, the Court picked the first approach, which was entirely in favor of the employer, thus reaching an unusual conclusion. This decision was particularly atypical in light of the fact that, for most controversial labor law disputes, it is often more expedient and widely adopted by the Court of Appeals as a well-established principle to make an interpretation in favor of the employee while deciding on the merits of the case.

Consequently, the Court's decision in this case might set a precedent that, when a court changes the type of termination in a labor dispute between an employer and an employee, it should not seek to determine whether or not the procedural requirements for termination have been met, but simply rule for valid termination. However, a reasonable claim can also be made for the alternative, as this approach may pose the risk of allowing employers to circumvent the labor laws and evade their obligations under the law. Considering the differing approaches and perspectives on this matter, the optimal solution may be to evaluate this matter on a case-by-case basis.

Litigation

Scope of Notification via Electronic Means Has Been Recently Expanded

Notifications served via electronic means (***"electronic notification"***) have been part of Turkish law since the introduction of Article 7/A of the Notification Law No. 7201 (***"Notification Law"***) in 2011. Pursuant to this provision, electronic notification was made mandatory with regards to joint-stock companies (*anonim şirket*), limited liability companies (*limited şirket*), and limited partnerships divided into shares (*sermayesi paylara bölünmüş komandit şirket*). In addition to these companies, any other legal or real person is allowed to request to use electronic notification by providing a suitable electronic address. On March 15, 2018, the Law No. 7101 Amending the Bankruptcy and Enforcement Law and Certain Laws (***"Law"***) was published in the Official Gazette, and this legislation introduced several amendments regarding the Notification Law, which have significantly expanded the scope of electronic notification.

Amendments Introduced by the Law: Article 48 of the Law amends Article 7/A of the Notification Law by requiring notifications to be made to certain natural and legal persons through electronic means. Natural and legal persons specified under Article 7/A are defined as follows:

(i) Certain public administrations and their affiliated institutions,
(ii) Certain local authorities,
(iii) Funds and bail funds established by law, and other public institutions and organizations established under special laws,
(iv) State-owned enterprises and their subsidiaries, institutions and enterprises,
(v) Other partnerships with more than fifty percent of the capital belonging to the state,
(vi) Professional and superior bodies with the status of public institutions,
(vii) All private legal entities including those that are established by laws,
(viii) Notary publics,
(ix) Bar-registered attorneys at law,
(x) Registered mediators and experts,
(xi) Entities and units with which the following are affiliated: those persons who are authorized, as a proxy, to represent administrative authorities, public economic undertakings or other partnerships where more than fifty percent of the capital is publicly owned, before civil and administrative judicial authorities, execution offices, or arbitrators.

As outlined above, all commercial companies are included within the scope of the foregoing provision, since they are categorized as private legal entities. In addition to commercial companies, other private legal entities (such as cooperatives, associations, and foundations) are also obliged to use electronic notification methods. Consequently, the Law has significantly expanded the scope of electronic notification, not only for private legal entities but also for other actors.

If the notification cannot be made due to *force majeure*, then it must be completed according to the procedures set forth under the Notification Law, *i.e.*, the regular notification procedures that had been in effect until now.

Electronic notification will be deemed to have been made at the end of the fifth day following the date on which it arrives at the electronic address of the recipient.

National Electronic Notification System: The Law introduced a system called *"National Electronic Notification System"*, in which the electronic notification operations implemented pursuant to the Notification Law will be established and operated by the Postal and Telegraph Corporation (***"PTT"***). Moreover, it is stated that the principles and procedures related to the application of the foregoing provision will be defined and delineated with a secondary legislation, *i.e.*, a regulation. Therefore, it is expected that a regulation stipulating the principles and procedures regarding the National Electronic Notification System will be published in the near future.

Establishment of the Electronic Notification Address: As per Article 49 of the Law, an electronic notification address will be created by the PTT, based on the "system number" that will be assigned to legal entities and registered to the system. The electronic notification addresses that are created will be sent to the relevant authority, institution or association to be delivered to the address owners. Following the delivery of the electronic notification addresses to the address owners, they will be put into the service of the relevant authorities that are empowered to issue notifications, such as courts, execution offices, notaries, etc.

Furthermore, the PTT will request the necessary information and documents from the relevant authorities, institutions or associations in order to implement and carry out the National Electronic Notification System. The relevant authorities, institutions or associations are obliged to provide the requested information and documents to the PTT.

Issuance of the Electronic Notification Addresses: Pursuant to Article 50 of the Law, which introduces a provisional article to the Notification Law, the PTT will request all the necessary information and documents from the Ministry of Customs and Trade with respect to companies in order to create the electronic notification addresses. This request must be made by the PTT within one (1) month of the enforcement date of the said article (March 15, 2018). Similar information and document requests will be made to different public and private authorities (including the Ministry of the Interior, the Turkish Bar Association, the Turkish Association of Notary Publics, etc.) for information and documents relating to other types of legal entities. The relevant authorities, institutions and associations are obliged to provide the requested information to the PTT within one (1) month. Based on the foregoing information, the PTT will then create the electronic notification addresses within three (3) months. Following the creation of the electronic notification addresses, the PTT will send them to the relevant authority, institution or association to be delivered to the address owners. Finally, subsequent to the delivery of the electronic notification addresses, the PTT will put the addresses into the service of the relevant authorities that are permitted and empowered to issue notifications.

Enforcement Date of the Amendments: Article 50 of the Law, regulating how the electronic notification addresses will be issued, entered into force on March 15, 2018. However, according to Article 66 of the Law, Articles 48 and 49 of the Law, comprising the amendments introduced to the Notification Law (which have been explained above in detail), will enter into force on January 1, 2019. Therefore, the obligation to use electronic notification methods will become fully operative on January 1, 2019.

Practical Impact of the Amendments: The goal of promoting the use of electronic notification can be summarized as follows: (i) ensuring the security of the documents to be served, and (ii) reducing the costs and time burden associated with the service of documents by physical means. Considering the fact that there are 40 million notifications sent annually in Turkey and in light of the estimate that almost 30 million of them will be sent by electronic notification methods as a result of the recent amendments, it can be concluded that the Law will significantly cut the costs and time burden associated with serving documents in Turkey.

Data Protection Law

Personal Data Protection Board's Decision on Adequate Measures to Be Taken by Data Controllers Regarding Special Categories of Personal Data

The Law No. 6698 on the Protection of Personal Data ("***DP Law***") requires data controllers to take adequate measures, as determined by the Personal Data Protection Board ("***Board***"), for processing special categories of personal data. These are defined by legislation as data concerning racial or ethnic origin, political opinions, philosophical beliefs, religion, sect or other beliefs, appearance and clothing, association, foundation or trade-union membership, health or sex life, and criminal conviction and security measures that a person may be subject to, along with their biometric and genetic information. Even though the DP Law was enacted on April 7, 2016, these "adequate measures" that data controllers are required to implement were not determined or specified by the Board for the past two years.

On March 7, 2018, the Board's decision (No. 2018/10) on these adequate measures was finally published in the Official Gazette. The Board indicated in its decision that data controllers should determine a separate, systematic, and manageable procedure with definite rules for the protection of special categories of personal data.

The decision also requires data controllers (i) to take certain measures regarding its personnel who deal with special categories of personal data, such as providing them with periodic trainings on the legislation, requiring them to sign non-disclosure agreements and determining the scope and limits of their authorizations, checking their authorizations periodically, ensuring the return of inventory that was furnished to authorized personnel after a change of their position/duty or at the end of their employment, and (ii) to adopt certain security measures for safeguarding such data in physical and electronic environments. The decision also provides specific procedures that must be followed by data controllers for the transfer of special categories of personal data.

As for the security measures to be implemented by data controllers, the decision states that if the special categories of personal data are kept, processed and/or accessed in an electronic medium, then the data should be secured by using cryptographic methods and cryptographic keys, and should kept safely and in different mediums. The decision also specifies that all transaction records regarding such data must be logged in a secure environment. Thus, the security updates of the data medium should be continuously monitored, the necessary security tests should be regularly undertaken, and the results of these tests should be recorded as well. Moreover, if such data is accessed through software, users of such software should receive prior authorization and, once again, the necessary security tests should be performed regularly and the results of these tests should be recorded. If remote access is required for this type of data, a two-step verification system should be provided (at a minimum).

According to the Board's decision, if the special categories of personal data are kept, processed and/or accessed in a physical medium, then the data controller must ensure that the necessary security measures are taken in the event of electrical leakage, fire, flood or theft, and in order to prevent unauthorized entry and exit, the physical safety and security of these environments must also be ensured.

If the special categories of personal data will be transferred, the following requirements should be satisfied:
(i) If transferred via e-mail, such data should be transferred by using the corporate e-mail account or a registered electronic mail address

(*Kayıtlı Elektronik Posta* or "KEP" in Turkish),
(ii) If transferred via a memory stick, CD or DVD, it should be coded by using cryptographic methods and the cryptographic keys should be kept securely and in separate environments,
(iii) If transferred between servers in separate physical locations, the data should be transferred by installing a virtual private network ("VPN") between servers or by using the secure file transfer protocol ("sFTP") method.
(iv) If the special categories of personal data will be transferred on paper, necessary and appropriate measures should be taken in order to prevent the risks of theft, loss or observation by unauthorized persons, and the paper should be sent in the "classified document" format.

Lastly, the Board's decision states that, in addition to the obligations above, the technical and administrative measures that are published on the Board's website and recommended by the Personal Data Security Guidelines should also be taken into account whilst taking the foregoing adequate measures.

The adequate measures that need to be implemented by data controllers in order to process special categories of personal data are now clearly listed by the Board in this decision. Data controllers should abide by these requirements and take all the necessary measures and precautions set forth by the Board to ensure compliance with the DP Law when processing and transferring special categories of personal data.

Internet Law

A New Era for Internet Broadcasting Services: An Amendment to the Radio and Television Legislation Which Regulates Internet Broadcasts

The expected amendment to the Law No. 6112 on the Establishment and Broadcasting Services of Radio and Television Enterprises (***"RT Law"***), which aims to regulate radio, television and on-demand broadcasts provided through the internet, has entered into force as of March 28, 2018. Providers of radio, television and on-demand broadcasting services through the internet and platform operators transmitting these broadcasts will be required to obtain a license from the Radio and Television Supreme Council ("***RTUK***") as of this date.

The amendment was introduced within the Law No. 7103 on Amending the Tax Law, Certain Laws and Certain Decrees and it introduced a new article (Article 29/A) to the RT Law, titled "Broadcasting services through the internet." Prior to Article 29/A, the RT Law was not applicable to and the RTUK did not have supervisory authority over broadcasts through the internet. Prior to the amendment, the scope of the RT Law only covered services that were provided by conventional broadcasting entities directly to customers, such as radio or television channels operating under a license obtained from the RTUK.

Per the newly added Article 29/A of the RT Law, radio, television and on-demand broadcast services provided through the internet and the providers of these services (*i.e.*, media service providers and platform operators) will be subject to the supervision and authority of the RTUK.

The RT Law defines "media service providers" as legal entities that have the editorial responsibility to choose content for radio, television and on-demand broadcast services and who determine the means and methods of regulating and providing these services. Media service providers are obliged to obtain broadcasting licenses from the RTUK in order to broadcast by means of terrestrial, satellite and cable transmissions. RT Law also defines "platform operators" as enterprises that transform multiple media services or multiple signals into a single service or signal, and enable their transmission through satellite, cable and similar networks, either in an encoded and/or decoded form that is directly accessible by consumers. Since both definitions omit any references to internet broadcasts and only refer to means of terrestrial, satellite or cable transmissions, the RTUK did not have any authority over broadcasts through the internet under the previous legislation.

According to the first paragraph of Article 29/A of the RT Law, even if the broadcast services are only provided through the internet, media service providers who are willing to offer their radio, television and on-demand broadcast services through the internet are obliged to obtain broadcasting licenses from the RTUK. Similarly, platform operators who wish to transmit these broadcasts are obliged to obtain broadcast transmission authorizations from the RTUK as well. Article 29/A also states that media service providers that hold a temporary broadcast permit and/or license from the RTUK (*i.e.*, radio and television channels operating under a license and/or permit issued by the RTUK) may broadcast through the internet, as long as their broadcasts are in accordance with the RT Law and also in compliance with the Law No. 5651 on the Regulation of Broadcasts via the Internet and the Prevention of Crimes Committed through Such Broadcasts ("***Law No. 5651***"). In other words, the RTUK is now authorized to monitor such broadcasts and their content, and empowered to decide on measures and take various disciplinary actions, such as banning broadcasts or imposing monetary fines that are determined within the scope of RT Law.

The second paragraph of Article 29/A regulates that, if the RTUK determines that the broadcasting services of real persons or legal entities who do not hold a temporary broadcast permit and/or license or whose broadcasting license has been cancelled, are being transmitted through the internet, criminal judgeships of peace may order the removal and/or access ban of the relevant content upon the RTUK's request. While an earlier proposed version of the second paragraph stated that the decisions of the criminal judgeships of peace would be sent to the Access Providers Union for execution, the final and published version of Article 29/A refers to the Information and Communication Technologies Authority ("***ICTA***") as the executing authority instead of the Access Providers Union with respect to the implementation of such judicial decisions. Furthermore, criminal judgeships of peace are required to render their decisions within twenty-four hours at the latest, without holding a hearing. However, it should be noted that such decisions can still be appealed under the rules of the Turkish Code of Criminal Procedure. Finally, the article also refers to the third and fifth paragraphs of Article 8/A of the Law No. 5651, which requires access ban decisions to be applicable to specific URL addresses or limited to the part of a publication/broadcast that is in violation of the RT law (unless the access ban cannot be limited to the violating content for technical reasons or if banning the specific URL/publication/broadcast does not eliminate the violation, in which case the entire website may be access banned), and sets forth monetary fines for those who fail to comply with access ban and content removal decisions, respectively.

Another significant change that Article 29/A introduces is that the provision in question does not only target local broadcasters in Turkey, but also covers foreign media service providers and platform operators who target Turkish audiences, regardless of whether they provide their services and broadcasts in Turkish. The third paragraph of Article 29/A states that, even if the content or service provider is located in a foreign country, the foregoing principles and restrictions will be applicable. In other words, these rules and restrictions will be applicable to the transmission of broadcasting services by platform operators or by media service providers that are under the jurisdiction of a foreign country, if the RTUK determines that these broadcasts are in violation of the RT Law, of international treaties to which Turkey is a signatory, and of the assigned functions and responsibilities of the RTUK. Furthermore, they are also applicable to broadcasting institutions that (i) broadcast in Turkish through the internet in order to target a Turkish audience or (ii) whose broadcasts are in another language but aimed at Turkey and include commercial broadcasts. The new provision explicitly dictates that such entities are obliged to acquire a broadcasting license if they fall under the definition of media service operators, or a transmission authorization certificate if they fall under the definition of platform operators.

The fourth paragraph of Article 29/A clarifies certain concerns with respect to the scope of this regulation, and states that, notwithstanding the duties, powers and authorizations of the ICTA, (i) individual communications cannot be considered to fall within the scope of Article 29/A, (ii) platforms that are not dedicated to transmitting radio, television and on-demand broadcast services through the internet and real persons and legal entities who only provide hosting services to radio, television and on-demand broadcast services will not be considered as "platform operators" within the scope of this article.

The fifth and final paragraph of Article 29/A provides that the RTUK and the ICTA will jointly issue a regulation which will determine and specify the procedures and principles applicable to (i) the presentation of radio, television and on-demand broadcasting services through the internet, (ii) the transmission of such services, (iii) the broadcasting licenses for media service providers through the internet, (iv) the broadcasting transmission authorizations for platform operators, (v) the monitoring of broadcasts, and (vi) the implementation of Article 29/A.

In light of foregoing provisions of Article 29/A, it appears that the RTUK will now be entitled to intervene in certain online broadcasts. For the moment, the details of the practical implementation and interpretation of this new article is unknown, and the RTUK's further regulations and/or decisions on this matter in the forthcoming period might provide some clarity regarding the proper scope and reach of this provision. Nevertheless, entities that provide radio, television and on-demand broadcasting services through the internet will need to assess whether their services fall under this new provision and whether they will need to obtain a license from the RTUK to maintain their services targeting a Turkish audience, and they will have to adjust their broadcasts accordingly to avoid potential restrictions or penalties.

Telecommunications Law

Draft Regulation Amending the Regulation on Network and Information Security in the Electronic Communications Sector

The Information and Communication Technologies Authority (***"ICTA"***) has published the Draft Regulation Amending the Regulation on Network and Information Security in the Electronic Communications Sector (***"Draft Regulation"***), which regulates and sets forth the procedures and principles that operators must comply with.

The major changes proposed by the Draft Regulation are listed below:

(i) The Draft Regulation states that the name of the Regulation on Network and Information Security in the Electronic Communications

Sector (***"Current Regulation"***) will be changed to the "Network and Information Security Regulation." Hence, the ICTA's supervisory authority will not be limited to authorized operators and it will now have the right to audit other real and legal persons as well, regardless of whether or not such real and legal persons are classified as operators.

(ii) The Draft Regulation also expands the purpose of the Current Regulation by adding the following sentence to Article 1:

"The purpose of the regulation is to also regulate the protection of legal persons against cyberattacks and the elements providing deterrence against these attacks."

(iii) The Draft Regulation also expands the legal basis of the Current Regulation by adding Article 10 of the Law No. 5651 on the Regulation of Broadcasts via the Internet and the Prevention of Crimes Committed through Such Broadcasts (***"Law No. 5651"***) as one of the regulations that the Current Regulation is based on. By doing so, the ICTA aims to bring all real and legal persons within the scope of the Current Regulation.

(iv) The Draft Regulation also amends Article 35(3) of the Current Regulation, which requires operators to take all the necessary and appropriate measures under the coordination of the Computer Emergency Response Team (***"TRCERT"***) against DOS/DDos attacks and other types of cyberattacks. According to the Draft Regulation, operators are also required to establish the substructures requested by the ICTA in relation to the analysis, identification and prevention of cyber threats. However, the foregoing amendment has been criticized by some operators due to its lack of clarity, because it does not specify how such a substructure will be established and what it will include and which qualities it will encompass.

(v) The Draft Regulation adds a new provision to the Current Regulation, which is titled "Internet Traffic Management." According to this new provision, operators are not allowed to take internet traffic abroad.

(vi) Another provision introduced by the Draft Regulation concerns information and document requests. According to this provision, the ICTA might obtain all information, documents, data and records from the relevant sources that relate to its duties on network, information and cyber security. This provision has also been criticized by some operators who have argued that a similar provision under the Law No. 5651 was voided by the Constitutional Court due to its vagueness with regard to the scope of the information that can be requested.

(vii) The Draft Regulation includes another new provision that requires corporate Computer Emergency Response Teams (***"CERTs"***) to conduct security tests on the companies' IT systems annually and to keep the relevant information and documents for two years. That being said, it should be noted that this provision has also been criticized by commentators who assert that this test requirement lacks a valid legal basis.

(viii) According to another provision introduced by the Draft Regulation, the ICTA can audit operators or other real and legal persons to determine whether they are in compliance with respect to their obligations arising from the Regulation. The same provision also allows the ICTA to have third-party contractors carry out such audits.

This provision has been met with criticism regarding the practice of using third-party contractors to conduct such audits, as this may lead to security risks and flaws, according to critics.

The Draft Regulation was open for public comment until January 10, 2018, and may enter into force after the ICTA reviews the public opinions it received and incorporates them into the Current Regulation, where it deems necessary.

E-Commerce Law

Recent Developments Regarding the Practice of E-commerce in Turkey

The Communiqué on the Electronic Commerce Information System and Notification Requirement was published in the Official Gazette dated August 11, 2017, and the Communiqué on Trust Seals in Electronic Commerce was published in the Official Gazette dated June 6, 2017, and both regulations came into effect as of their publication dates. These Communiqués bring several innovations to the e-commerce field in Turkey.

Mandatory Registration to the Electronic Commerce Information System ("ETBİS") and Notification Requirements

The Ministry of Customs and Trade has stated that, through the Communiqué on the Electronic Commerce Information System and Notification Requirement, certain issues and problems arising from e-commerce will be resolved, the Communiqué on the Electronic Commerce Information System and Notification Requirement will lead to the fostering and growth of e-commerce in Turkey, and it will make a positive contribution to the Turkish economy. Within this framework, pursuant to the Communiqué on the Electronic Commerce Information System and Notification Requirement, the following service providers are obliged to register with ETBİS before starting their activities:

(i) Service providers who conduct business on their own e-commerce platforms,
(ii) Intermediary service providers, and
(iii) Domestic service providers who do not carry out e-commerce activities in Turkey but enter into agreements or receive orders through an intermediary service provider located abroad.

In order to register with ETBİS, the following information must be provided: (i) central registration system number (MERSİS No.) for real and legal persons engaging in e-commerce (or, alternatively, Turkish I.D. number for artisans, tradesmen, and craftsmen), (ii) tax identification number, and (iii) mobile application and domain name information for the platform on which e-commerce activities are carried out.

Service providers and intermediary service providers that are registered with ETBİS are obliged to report the following information:

- Registered mail address suitable for notification (KEP),
- Type and nature of e-commerce activities,
- Other types of commercial activities carried out apart from e-commerce activities, if any,
- Types of goods and services offered on the e-commerce platform,
- Payment methods provided on the e-commerce platform,
- Whether there are any second-hand goods offered for sale, and their types, if any,
- Information regarding the services received from payment or e-money institutions, as well as shipping and logistics operators,
- Information regarding e-commerce infrastructure service providers,
- Information regarding the countries where the databases are located for the storage of personal data and customer information,

- In case of cross-border e-commerce activities, information relating to the annual volume of such cross-border trade, reported on the basis of each country and payment method, and
- Any other information that may be deemed necessary and requested by the Ministry of Customs and Trade.

In addition to the above-mentioned information, service providers who conduct business on their own e-commerce platforms must report the place of manufacture, warehouse addresses and the domain names of the intermediary service providers with whom they carry out e-commerce activities.

Service providers and intermediary service providers who engage in cross-border e-commerce activities on e-commerce platforms are required to report the annual volume of such trade on a country-by-country basis and according to each payment method every year by the last day of March. Other notification-related obligations must be fulfilled within thirty (30) days of registering with ETBİS. Pursuant to the provisional Article 1 of the Communiqué on the Electronic Commerce Information System and Notification Requirement, service providers and intermediary service providers that were carrying out their activities as of December 1, 2017, were obliged to fulfill the registration and notification requirements within thirty (30) days as of December 1, 2017. Finally, any changes related to matters that carry registration and notification obligations must be reported within thirty (30) days of the change date.

These notifications must be made to ETBİS through the e-government (*e-devlet*) platform by the authorized representatives of the legal entity.

In case of non-fulfillment of these obligations, pursuant to Article 12 of the Law on E-Commerce, an administrative fine in the amount of TRY 5.000 to 20.000 will be imposed on the legal and real persons responsible for the failure.

"Trust Seal": A New Standard for the Security and Service Quality of E-Commerce Service Providers and Intermediary Service Providers

The Communiqué on Trust Seal in Electronic Commerce concerns intermediary service providers and service providers who carry out certain activities on their own e-commerce platforms that fall within the scope of the Regulation on Service Providers and Intermediary Service Providers in Electronic Commerce and who wish to receive the trust seal. The Communiqué regulates the procedures and principles related to the security and service quality standards of such service providers, the activities and obligations of the trust seal providers, and the issuance, suspension and annulment of the trust seal.

A trust seal is a discretionary option for such service providers rather than a legal obligation. In this context, a service provider that intends to receive such a trust seal is required to meet the technical, legal and organizational standards discussed below, which are set forth under Article 5 of the Communiqué:

- Ensure that each transaction containing personal data and payment information is carried out with extended validation secure socket layer (***"EV SSL"***) on mobile websites and with secure socket layer (***"SSL"***) on mobile applications,
- Procure the services of penetration test firms that are approved by the Turkish Standards Institute (***"TSE"***) at least once in a calendar year and three (3) months before applying to receive the trust seal and take the necessary safety and security measures pursuant to their tests,

- Design processes that are in compliance with the applicable regulations and their secondary legislation and arrangements and with administrative decisions related to products that are banned or conditionally available on e-commerce platforms,
- Take appropriate measures in order to protect children on e-commerce platforms,
- Provide or enable the necessary information related to the status of an order that is subject to e-commerce,
- Provide or enable the information about the identity of the person who will provide the service subject to e-commerce, its scope and its time period,
- Provide a communication channel between customer service representatives and customers and ensure that the requests and complaints received from customers are processed and resolved effectively.

Trust seal applications should be made to the Trust Seal Providers (*"TSP"*), which are authorized by the Ministry of Customs and Trade. If a service provider or intermediary service provider has more than one e-commerce platform, it should apply separately to receive the trust seal for each e-commerce platform.

Applicants should submit the relevant documents set forth under Article 5 of the Communiqué, provide a written statement attesting that the application complies with the requirements listed above and furnish a receipt showing payment of the application fee to the TSP. The TSP will prepare a report within thirty (30) days from the application date if the applicant meets the conditions set forth under Article 5 of the Communiqué. If the applicant satisfies the conditions according to the TSP's evaluation, the trust seal will be issued to the applicant. If the applicant does not fulfill the conditions, the TSP will grant the applicant an additional thirty (30) days to meet the necessary requirements. This period may be extended once for a period of fifteen (15) days. If the applicant satisfies the necessary conditions by the end of the extension period, the trust seal will be issued. Otherwise, the application will be rejected.

Following the granting of the trust seal, it will be placed on the homepage of the e-commerce platform of the service provider or intermediary service provider. However, if requested, it can be placed on other pages of the e-commerce platform as well.

As per Article 13 of the Communiqué, the Ministry of Customs and Trade is authorized to request any information or documents in order to ensure the security and stability of e-commerce activities, to conduct audits, to take administrative measures, to accept objections related to the trust seal services provided by the TPS, to cancel the authorization of a TPS that fails to fulfill its obligations, to determine a cap on the maximum amount that can be paid as compensation for trust seal services, and to establish the form, standards and criteria of the trust seal.

Anti-Dumping Law

Concerns Raised Against Turkey's Measures During the Latest Meeting of the WTO's Committee on Anti-Dumping Practices and Their Outcomes

The World Trade Organization's (*"WTO"*) Committee on Anti-Dumping Practices (*"Committee"*) consists of representatives of each WTO Member State and meets twice a year, as per Article 16 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (*"AD Agreement"* or *"Anti-dumping Agreement"*). The purpose of these meetings is to provide an opportunity for the members to consult with each other regarding various matters pertaining to the operation of the AD Agreement. Accordingly, the latest meeting of the Committee took place on October 25, 2017, and WTO Members shared their views and concerns related to the members' anti-dumping activities. In this context, two main topics of the committee meeting were related to (i) the members' concerns about the draft amendments to the Basic Anti-Dumping Regulation in the EU, which has since entered into force, and (ii) other specific anti-dumping actions taken by certain WTO members.

During the meeting, members expressed their concerns, exchanged views and answered other members' questions on issues regarding specific anti-dumping actions included in the semi-annual notifications they had submitted containing information on all preliminary and final actions, in accordance with Article 16.4 of the AD Agreement.

Turkey was among the members who came under scrutiny during the Committee meeting after Brazil and Ukraine raised concerns about measures that had been imposed by Turkey. In this regard, it should be noted the Committee's Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations indicates that the period of data collection for injury investigations should normally be at least three (3) years, unless a party whose data is being gathered has existed for a shorter period of time, and should cover the entirety of the period of data collection for the dumping investigation. On the basis that the recommended period for data collection had not been met, Brazil argued that the investigation should be terminated without the imposition of any measures. Turkey responded that the investigation had been launched in line with WTO rules, but also indicated that it would nevertheless take Brazil's concerns into account in the course of the investigation. Turkey has since finalized the investigation and imposed an anti-dumping duty on Brazil's imports, along with imports from Finland, Russia and Poland on April 19, 2018. However, in line with Brazil's comments, the relevant Turkish authority also reviewed the entire 3-year period between 2014 and 2016 to analyze the injury threat in order to fulfill the requirements pertaining to objective examination under Article 3.1 of the AD Agreement. The Turkish authority carried out this review even though the scope of the review for the determination of an injury threat was initially set forth as the first six months of the years between 2014 and 2016, as the investigation period was established as the first six (6) months of 2016. Accordingly, the authority analyzed both 6-month data and 12-month data between 2014 and 2016 and determined that there had been distortions in economic indicators of local production, especially in the 12-month periods of the relevant three years compared to the 6-month periods.

Another concern was raised by Ukraine, who argued that Turkey had unfairly maintained anti-dumping duties on copper wire rod imports from Ukraine for more than ten (10) years, as the situation in Ukraine's domestic industry had changed drastically in the past ten (10) years and Turkish producers no longer faced any injury threat. Therefore, Ukraine argued that the measure previously applied to Ukrainian wire rod imports should be terminated. The measure in question was first imposed on the imports of copper wire rods from Russia in November 2005 and on the imports of copper wire rods from Ukraine in June 2006. In 2011, Turkey decided to maintain the measures on both Russian and Ukrainian imports pursuant to the results of a "sunset review" of the imports of the relevant product. In July 2016, another sunset review was initiated upon which Ukraine raised its above-mentioned concerns. During the Committee meeting, Turkey responded to Ukraine that the ongoing review period had been extended for six (6) months (meaning that the investigation could be completed in one year and six months) but would still be completed in line with the deadline prescribed in the AD Agreement (*i.e.*, the 18-month period as per Article 5.10). Turkey completed the sunset review on December 29, 2017, and the measure has since been terminated on the grounds that the injury to local production caused by dumping was not likely to continue or to resume.

White Collar Irregularities

Measures on Corporate Cooperation

With regards to the corporate enforcement policy under the Foreign Corrupt Practices Act (***"FCPA"***), the United States Department of Justice (***"DOJ"***) is responsible for conducting criminal enforcement actions, while the U.S. Securities and Exchange Commission (***"SEC"***) handles the civil enforcement side of the Act. Both governmental bodies have separate manuals and procedures that provide principles of guidance for managing and resolving corporate misconduct cases.

When determining whether or not to indict a corporation in a particular case, the DOJ takes into consideration the Principles of Federal Prosecution of Business Organizations (***"Principles"***) regulated under Chapter 9-28.000 of the U.S. Attorney's Manual. The Principles set forth the alternative resolution methods to indictment, such as entering into non-prosecution or deferred prosecution agreements with corporations. The DOJ evaluates the cooperation of the corporation under scrutiny in each case, provided that the requirements stipulated under the Principles are met. These evaluations are based on a number of factors that influence the DOJ's decision on charging the corporation or agreeing to a reduction in fine, or even deciding on a declination of the case.

These factors include, according to Chapter 9-28.720 of the U.S. Attorney's Manual, but are not limited to, the corporation's (i) timely and voluntary disclosure of the wrongdoing and all relevant facts and specific sources obtained by the corporation's independent investigation, (ii) proactive cooperation where the corporation identifies the evidence and provides the DOJ with such evidence, (iii) timely preservation and disclosure of all relevant documents and all information regarding such documents, and (iv) making available for interviews all current and former officers and employees who possess relevant information even if they are located overseas. Needless to say, the corporation's assistance to the DOJ on the interpretation of its documents and business records also contributes to the DOJ's determination with respect to the corporation's cooperation.

As for the SEC, the guiding principles on whether to open or close an investigation or to charge the corporation are regulated under the SEC's Enforcement Manual. The 2001 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions (***"Seaboard Report"***), sets out four broad measures for the evaluation of a corporation's cooperation in order to decide whether to grant it leniency.

These measures, which are not exclusive and which are considered for each case, are as enumerated as follows: "(i) self-policing prior to the discovery of the misconduct, including establishing effective compliance procedures and an appropriate tone at the top, (ii) self-reporting of misconduct when it is discovered, including conducting a thorough review of the nature, extent, origins, and consequences of the misconduct, and promptly, completely, and effectively disclosing the misconduct to the public, to regulatory agencies, and to self-regulatory organizations, (iii) remediation, including dismissing or appropriately disciplining wrongdoers, modifying and improving internal controls and procedures to prevent recurrence of the misconduct, and appropriately compensating those adversely affected, and (iv) cooperation with law enforcement authorities, including providing SEC staff with all information relevant to the underlying violations and the company's remedial efforts".

With respect to the Turkish anti-corruption enforcement system, a corporation's anti-corruption liability will be solely administrative, as the Turkish Criminal Code recognizes the "principle of personality" and therefore, existing leniency procedures are only applicable and available for natural persons. Additionally, the Turkish legislative system does not recognize civil procedures for crimes regulated under the Turkish Criminal Code.

Taking into account all of the foregoing, while mitigating factors are not available or applicable in the Turkish anti-corruption enforcement system, both the DOJ's and the SEC's measures indicate that the contributing factors to leniency are a corporation's awareness and willingness to demonstrate its cooperative intentions with regard to both preventing and handling the wrongdoings in an expedient and responsible manner during investigations.

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