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Preface to the March 2019 Issue

The March 2019 Issue of Legal Insights Quarterly examines the noteworthy developments in thirteen different areas of law, with the aim of providing the reader with a framework of the most controversial, significant and current topics of the first quarter of 2019.

This issue sheds light on two new legal disciplines that invite debate and consideration from scholars: Advertisement Law and E-Money Law. The Advertisement Law section dissects the newly adopted regulation and addresses the issue of comparative advertisements.

The E-Money Law section examines the amendment to the e-money and payment services regulation and summarizes the developments and requirements of companies that conduct business activities using e-money should be aware of.

The Competition Law section discusses four significant decisions published by the Turkish Competition Board within the past three months, and provides in-depth examinations of highly significant contemporary topics, concerning Passolig (the football tribune subscription card system) and the packaged chips market.

The debate around the Amendment to the Regulation on the Processing and Privacy of Personal Health Data has been a heated one, and the Council of State decision on this matter is examined in the Personal Data Protection Law section.

The Corporate Law section focuses on and examines the specific ability of majority shareholders to remove minority shareholders of a group of companies from the joint-stock company.

The Banking and Finance Law section acquaints readers with the Regulation on the Restructuring of Debts Owed to the Financial Sector. This Regulation covers debts owed to banks, financial leasing companies, factoring companies and financing companies in Turkey, whilst leaving the door open for other creditors to participate in the financial restructuring of undertakings.

Finally, the White Collar Irregularities section summarizes the enforcement actions and highlights pertaining to the Foreign Corrupt Practices Act in 2018.

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.

March 2019

Corporate Law

Squeeze-Out Right in Group of Companies

I. Introduction

The Turkish Commercial Code No. 6102 ("**TCC**") introduced the concept of "squeeze-out right in group of companies" to the Turkish legal landscape. Article 208 of the TCC stipulates (and enables) the removal of the minority shareholders of a group of companies from the joint-stock company by the majority shareholders in certain circumstances.

There are three specific circumstances under the TCC that enable the "squeeze-out" of the minority shareholders: (i) in case of merger transactions (Article 141), or (ii) the right of shareholders to request dissolution of the company due to just cause (Article 531), or (iii) in group companies (Article 208). However, this Section will only analyse the squeeze-out right from the perspective of Article 208, which allows the parent company in a group company to eliminate the minority shareholders. This article aims to explain the legal concept of the squeeze-out right by analysing the mandatory conditions for eliminating the minority shareholders from the company.

II. Requirements for the Implementation of the Squeeze-Out Right

The first condition for the use of the squeeze-out right regulated under Article 208 of the TCC is the existence of a parent company (*i.e.*, majority shareholder) and an affiliate company (*i.e.*, minority shareholder). Moreover, the parent company must hold, directly or indirectly, at least 90% of both the shares and the voting rights of the affiliate company. In other words, it is not sufficient for the parent company to reach 90% only in shares or in voting rights. Furthermore, since the squeeze-out right can only be executed through a court order, the 90% threshold must be maintained at least until the date of the court decision.

The second condition stipulates that, if the minority shareholders (i) act recklessly, (ii) act in bad faith, (iii) act in a manner so as to obstruct the company's operations, or (iv) create a perceptible disruption in the company, then the shareholders holding (directly or indirectly) at least 90% of the share capital and voting rights of the company can squeeze out the minority shareholders. Accordingly, the minority shareholders whose actions are hindering the company's development or impeding its progress may be removed from the company in order to terminate their disruptive actions and secure a peaceful environment within the company.

Lastly, the third condition for the use of the squeeze-out right requires that the price of the minority shareholders' shares must be paid; in fact, the courts are authorized to determine the applicable share price. Within this scope, the parent company should pay at least the stock-exchange value of the minority shareholders' shares. If the stock-exchange value of the shares cannot be determined (*i.e.*, does not exist) or if such a value is deemed not to be equitable, then the actual value of the shares or a value determined by employing a generally accepted rule must be paid as compensation in order to eliminate the minority shareholders from the company. We conclude that the courts should determine the share prices by considering the value of the company on the date that is closest to the date of the court's judgement, for the purpose of protecting the interests of the minority shareholders.

III. Conclusion

In a group of companies, the squeeze-out right that allows the majority shareholders to remove the minority shareholders from the company is regulated under Article 208 of the TCC. Thus, the minority shareholders who are protected under several provisions of the law will not be allowed to impede the rights of the majority shareholders who possess at least 90% of the shares and voting rights through their malicious actions. In simple terms, the squeeze-out right balances the interests of both the minority shareholders and the majority shareholders.

Banking and Finance Law

A Second Chance: Financial Restructuring

I. General Overview and Scope of the Financial Restructuring Process

The Banking Regulatory and Supervisory Agency ("**BRSA**") published the Regulation on the Restructuring of Debts Owed to the Financial Sector ("**Regulation**") amid ongoing currency and inflation pressures. The Regulation was published in the Official Gazette No. 30510 on August 15, 2018, and entered into force on the same date. The Regulation primarily covers debts owed to banks, financial leasing companies, factoring companies and financing companies in Turkey ("**Creditors**"). However, the Regulation also leaves the door open for other creditors to participate in the financial restructuring process.

The primary purpose of the Regulation is to offer a chance to debtors to fulfil their repayment obligations. In order to achieve this goal, the Regulation provides a general overview of the contractual restructuring of financial debts.

The Regulation Amending the Regulation on the Restructuring of Debts Owed to the Financial Sector ("**Amending Regulation**") entered into force upon its publication in the Official Gazette No. 30602 on November 21, 2018. The Amending Regulation introduces certain changes to the Regulation, and clarifies some issues and answers certain questions as to the content and scope of the Regulation.

Firstly, the Amending Regulation introduces a new term for eligible debtors ("**Debtors**"). Accordingly, the following entities are not authorized or permitted to apply for financial restructuring under the Regulation:

- Entities subject to the Banking Law No. 5411 (*i.e.*, (i) deposit banks, participation banks, development and investment banks established in Turkey, (ii) Turkish branches of such institutions established abroad, and (iii) financial holding companies);
- Capital markets institutions listed in Article 35 of the Capital Markets Law No. 6362 which are: (i) investment institutions, (ii) collective investment institutions, (iii) independent audit firms, valuation firms and rating firms that carry out activities in capital markets, (iv) portfolio management companies, (v) mortgage finance institutions, (vi) housing finance and asset finance funds, (vii) asset leasing companies, (viii) central settlement institutions, (ix) central depository institutions, (x) data storage institutions, (xi) other capital markets institutions whose establishment and activities are to be determined and regulated by the Capital Markets Board;
- Entities subject to the Insurance Law No. 5684 (*i.e.*, insurance companies and reinsurance companies which carry out their business activities in Turkey, intermediaries, actuaries and insurance experts);
- Entities subject to the Law No. 6361 on Financial Leasing, Factoring and Finance Companies which are (i) financial leasing, factoring and financing companies established in Turkey, (ii) banks, with regard to their factoring transactions, participation banks and investment banks, with regard to their financial leasing transactions, (iii) companies, institutions and financial leasing companies that are authorized to lease air transportation vehicles, their engines and accessories and parts to airlines in accordance with their own legislation, with a financial leasing agreement for a minimum of two years, and
- Entities subject to the Law No. 6493 on Payment and Securities Settlement Systems, Payment Services and Electronic

Fund Institutions (*i.e*., payment institutions and electronic payment institutions).

Secondly, the Regulation requires Creditors to assess the financial status and condition of the Debtors. Accordingly, the Amending Regulation clarifies that, in order for the Debtors to benefit from financial restructuring, they are required to repay their debts within a reasonable period of time. Furthermore, it is stipulated that framework agreements will determine and designate the institutions that will assess the financial status and condition of the Debtors, as discussed below.

II. Framework Agreements

The debts may be restructured within the scope of the framework agreements drafted by the Banks Association of Turkey and approved by the BRSA ("**Framework Agreements**"). Accordingly, the template of the framework agreement prepared by the Banks Association of Turkey and signed by the Creditors was entered into force with the BRSA's approval on September 19, 2018. It is important to note that there are no restrictions on the number of Framework Agreements that a Debtor may enter into, and there may be multiple Framework Agreements in addition to the one that was approved by the BRSA on September 19, 2018.

The Regulation stipulates the content of the Framework Agreements. Accordingly, the following matters must be included and addressed in the Framework Agreements:

- fundamental terms and conditions as to the financial restructuring;
- minimum qualifications of the Debtors;
- main obligations of the parties to the framework agreement;
- events of default under the framework agreement; and
- fundamental elements to be included in, and parties' obligations to be governed by, the restructuring agreement to be executed between the Creditors and the Debtors.

The Regulation further specifies that the Framework Agreements determine the scope of the receivables to be restructured, establish the Debtors' qualifications, and regulate the minimum content of the restructuring agreements to be executed between the Debtors and the Creditors.

As stated above, the Regulation primarily regulates the restructuring of the debts to the Creditors. However, the Regulation also leaves room for the possibility of other creditors to participate in the financial restructuring process. In this regard, foreign credit institutions and international organizations may also participate in financial restructuring without requiring the Creditors' consent. The Framework Agreements, on the other hand, set out the procedures and principles relating to the participation of foreign credit institutions and international organizations in the financial restructuring process.

Any disputes arising from the Framework Agreements will be resolved by arbitration committees, which will be composed of three members appointed by the Banks Association of Turkey. Arbitrators must be objective and they must possess the necessary knowledge and experience required for their duties. The working principles of the arbitration committees and the consequences of their decisions are determined by the Framework Agreements.

The Regulation further stipulates that the following restructuring schemes may be implemented under the Framework Agreements:

- extending the relevant loan's maturity;
- renewing the' Debtors' loans;
- providing additional loans to the Debtors;
- agreeing to a reduction of or waiving receivables relating to principal, interest, default interest, dividend payments or any other receivables arising from the loans;

- converting loan receivables (*i.e.*, receivables relating to principal, interest or dividends) into equity, assigning or transferring loan receivables in exchange for payment in cash, in kind or consideration depending on collection, liquidating, selling, or writing off loan receivables in exchange for the assets of the Debtors and third parties;
- executing protocols with other banks and with the Creditors.

III. Restructuring Agreements

Framework Agreements will be implemented through the restructuring agreements to be executed by and between each Debtor and the Creditor(s). The Regulation sets out that the restructuring agreements must be executed within two (2) years as of the approval date of the relevant framework agreement by the BRSA.

One of the controversial provisions of the Regulation obliges the Creditors which are parties to a framework agreement to restructure the corresponding debts of the Debtor, if a restructuring agreement is signed by the Creditors comprising two-thirds of the outstanding debts of the Debtor. Although the Amending Regulation clarifies that this obligation is not applicable to a Creditor who is not a party to the relevant framework agreement, this provision is still open to criticism.

IV. Conclusion

Considering the recent economic developments in Turkey, the Regulation is a positive step toward facilitating/easing debts owed to the financial sector. The contractual restructuring of debts offered by the Regulation allows the Debtors to benefit from the aid in order to fulfil their repayment obligations, while also helping financial institutions to carry out successful restructurings.

Capital Markets Law

Significant Changes During the Second Half of 2018

Considering certain gaps in the market, and in light of the ongoing economic imbalances, the Turkish Capital Markets Board ("**CMB**") continues to update capital markets legislation day by day. This article will focus on some of the significant changes that have been introduced to Turkish capital markets legislation during the second half of 2018, which are as follows:

Regulation on the Activity, Working and Auditing Principles of the Data Storage Institution

According to Article 87 of the Capital Markets Law, the CMB may require capital market transactions to be notified to a duly authorized data storage institution for the surveillance of systemic risks and for ensuring financial stability. In this respect, on September 19, 2018, the CMB introduced the Regulation on the Activity, Working and Auditing Principles of the Data Storage Institution as a secondary legislation.

The regulation mainly focuses on the following: (i) requirements to be fulfilled in order to act as a data storage institution, (ii) duties and obligations thereof, (iii) membership principles of the data storage institution, (iv) data sharing rules, (v) access to the information kept by the data storage institution, and (vi) auditing process of the data storage institution.

In accordance with Article 6 of the regulation, the core duties of the data storage institution can be listed as follows:

- Registering and maintaining the duly reported capital market transactions within the boundaries of Turkey and in the electronic environment,
- Checking inconsistencies with respect to the reporting conveyed by the members

(*e.g.*, legal entities that are parties to the transactions, intermediary investment institutions etc.) and taking all necessary actions before the members and the CMB in case of discrepancies,
- Keeping the records confidential,
- Disclosing certain data to the public,
- Sharing the relevant information with approved third parties (*e.g.*, the Central Bank of Turkey, the Banking Regulation and Supervisory Agency, etc.),
- Other relevant duties and operations, as determined and instructed by the CMB.

It is also worth mentioning that the CMB has already chosen the Central Registry Agency ("Merkezi Kayıt Kuruluşu" or "**MKK**") as the designated data storage institution.

Communiqué on the Principles of Reporting to the Data Storage Institution (IV-87.1)
Further to the Regulation on the Activity, Working and Auditing Principles of the Data Storage Institution, the CMB has also introduced the Communiqué on the Principles of Reporting to the Data Storage Institution (IV-87.1) ("**Communiqué No. IV-87.1**") on October 27, 2018.

The purpose of this Communiqué is to set out the procedures and principles of reporting to the data storage institution. The Communiqué also explicitly stipulates liable parties, transfers of liability, and sets forth the details and content of other reporting-related matters.

It should be noted that the details of derivative agreements that are executed on stock exchanges, other organized marketplaces and over-the-counter markets must be reported to the data storage institution in accordance with Article 5 of the Communiqué. The underlying rationale of the foregoing rule is to bring transparency to the derivatives market. Nevertheless, it should be mentioned that the CMB is entitled to exclude certain derivatives from the reporting liability at its sole discretion.

Changes to the Istanbul Settlement and Custody Bank Central Counterparty Regulation and the Istanbul Settlement and Custody Bank Central Clearing and Settlement Regulation
Article 19 of the Istanbul Settlement and Custody Bank Central Counterparty Regulation lists the collateral types of counterparties that can be submitted to the Istanbul Settlement and Custody Bank during central counterparty transactions.

Pursuant to paragraph (ğ), which has been newly added to Article 19, the scope of the type of acceptable collaterals has been expanded. In this context, mortgage-backed securities, mortgage-covered securities, asset-backed securities and asset-covered securities are also newly designated as allowed collateral types.

Article 38 of the Istanbul Settlement and Custody Bank Central Clearing and Settlement Regulation is related to permissible collateral types for settlement transactions. In simple terms, Article 38 of the Istanbul Settlement and Custody Bank Central Clearing and Settlement Regulation has been amended in parallel with Article 19 of the Istanbul Settlement and Custody Bank Central Counterparty Regulation.

Within this scope, paragraph (1) has been added to Article 38, and accordingly, the scope of the permitted collaterals has been expanded by way of including mortgage-backed securities, mortgage-covered securities, asset-backed securities and asset-covered securities among the types of acceptable collaterals.

Communiqué on Joint-Stock Companies Whose Majority Shares Are Held by Cooperatives and Cooperative Associations (II-16.2)
Another novelty introduced by the CMB on September 19, 2018, is the Communiqué on Joint-Stock Companies Whose Majority Shares Are Held by Cooperatives and

Cooperative Associations (II-16.2) ("**Communiqué No. II-16.2**"). The main subject matter of the Communiqué No. II-16.2 concerns the liabilities of joint-stock companies whose majority shares are held by cooperatives and cooperative associations and the applicable exceptions thereof.

In general, the scope of the Communiqué can be summarized as follows: (i) if a cooperative has at least five hundred (500) shareholders, or (ii) if one or more members of a cooperative association has at least five hundred (500) shareholders, and (iii) if the cooperative or cooperative association holds the majority of the shares of a joint-stock company, then the foregoing cooperative, cooperative association and joint-stock company shall be subject to the Communiqué.

Communiqué on Material Events Disclosure (III-15.1)

On November 17, 2018, the CMB amended Articles 12/4 and 23/7 of the Communiqué on Material Events Disclosure ("**Communiqué No. III-15.1**").

Article 12/4 of the Communiqué No. III-15.1 concerns the public disclosures that are required in the event of changes to the share-capital structure and management control of a company. In this regard, if the shareholding ratio of a real person or legal entity in a publicly held company reaches 5%, 10%, 15%, 20%, 25%, 33%, 50%, 67%, 95%, or falls below these ratios, the relevant public disclosure of these events shall be made available to the general public by the Central Registry Agency. However, in accordance with the amendment, if the relevant real persons and legal entities reach or fall below the foregoing shareholding ratios indirectly, by being subject to voting rights or with the relevant persons acting in concert, such real persons/legal entities or the persons acting in concert shall themselves be liable for making the public disclosure.

The amended version of Article 23/7 now stipulates that developments and changes regarding the content of former public disclosures shall be updated and disclosed to the public. In this respect, the public disclosure liabilities of the relevant parties, which obliged them to make public disclosures at certain intervals (*i.e.*, every 60 days), even if there were no new developments and/or changes with regard to the former public disclosures, have now been eliminated.

Competition Law / Antitrust Law

Frito Lay Receives an All-Clear for Allegations Concerning Exclusivity, RPM Practices and Rebate Systems: The Board Decides Not to Initiate a Full-Fledged Investigation

The Turkish Competition Board's ("**Board**") reasoned decision[1] on the preliminary investigation launched against Frito Lay Gıda San. Tic. A.Ş. ("**Frito Lay**") is "hot off the presses." The Authority investigated a complaint received from a former sales chief of Frito Lay, alleging that the company had violated the Law No. 4054 on the Protection of Competition ("**Law No. 4054**") by excluding its competitors and by engaging in exclusivity practices.

Frito Lay is a Turkish subsidiary of PepsiCo, Inc. ("**PepsiCo**"). It is active in the "*packaged chips*" market through its Lay's, Ruffles, Doritos, Cheetos, A la Turca, and Çerezza brands, and in the "*sugary products*" market through its Rocco brand.

In line with its previous decisions concerning the same sector, the Board defined the relevant product market in this case as the "packaged chips" market. The Board then outlined the general characteristics of the packaged chips market and described it as a "*tight oligopoly*" market, in which the sales are mostly made by Frito Lay (through its Lay's, Ruffles,

[1] The Board's decision dated June 12, 2018, and numbered 18-19/329-163.

Doritos, Cheetos, A la Turca and Çerezza brands) and Doğuş Yiyecek ve İçecek Üretim Sanayi Ticaret A.Ş. (through its Patos, Cipso, Chips Master and Çerezos brands).

The Board's Substantial Assessment

The main allegation in this case concerned *de facto* exclusivity practices on the part of Frito Lay through its provision of certain discounts and incentives.

Having examined the available evidence, the Board ultimately determined that the complainant had failed to provide sufficient evidence in support of the allegations. The documents collected during the on-site inspections at Frito Lay's premises were also found to fall short of supporting or substantiating the exclusivity allegations. However, the Board decided that it would be useful to further analyse the various incentive schemes that Frito Lay had implemented for its sales points and distributors (including discounts) in order to determine whether these *practices had led* to *de facto* exclusivity.

Furthermore, the Board declared that, since one of the documents collected during the on-site inspection implied that Frito Lay had intervened in its distributors' resale prices, and given that the Board had previously examined resale price maintenance ("**RPM**") allegations against Frito Lay in 2007, a separate examination should be conducted as to whether Frito Lay had engaged in anticompetitive RPM practices. Accordingly, the Board conducted its ensuing assessment under two separate categories, namely: (i) abuse of dominance through *de facto* exclusivity behavior and rebate systems, and (ii) RPM practices through handheld terminals. As for the evaluation of dominant position, the Board did not provide a precise assessment as to whether Frito Lay enjoyed a dominant position in the relevant market, and opted to proceed directly with the examination of the practices mentioned above.

Assessment on *de facto* exclusivity and rebate systems

On the complainant's allegations that Frito Lay had implemented exclusive arrangements with its distributors, the Board found that the agreements concluded between Frito Lay and its distributors did not contain any exclusivity clauses. The Board also noted that the documents collected during the on-site inspections of Frito Lay's facilities did not imply or suggest that Frito Lay had engaged in exclusivity or exclusionary practices in the relevant product market.

That being said, the Board found that Frito Lay had established certain sales objectives for its sales points and had granted various incentives (such as discounts, free products, display prices and stands) to its sales points in order to incentivize them to reach and attain these sales objectives. In this regard, the Board decided that it was necessary to carry out a more detailed analysis as to whether Frito Lay's strategy had had an effect of *de facto* exclusivity and market foreclosure in the relevant market.

In its detailed analysis, the Board first mentioned that Frito Lay's strategy had enabled the salespersons of Frito Lay's distributors to receive higher premiums if they reached the relevant sales objectives, and thus, noted that the system increased the employees' motivation to increase their sales and achieve the sales objectives. In this regard, the Board first compared Frito Lay's growth objectives to the general growth level in the relevant market, in order to assess whether Frito Lay's investigated practices had an effect in the market. Accordingly, the Board concluded that Frito Lay's growth objectives were not significantly different from the general growth level in the market. Furthermore, the Board also conducted a separate analysis regarding the İzmir market (Turkey's third largest city), where Frito Lay had established higher growth targets compared to other regions. According to this analysis, the Board determined that:

(i) Frito Lay's growth objectives had only been applied for the relatively short period of 5 months, (ii) Frito Lay had not implemented such an elevated growth objective prior to 2018, and (iii) there had been successful new entries into the market. Based on all of these considerations, the Board ultimately concluded that there were no grounds or factors that would lead the Board to initiate a full-fledged investigation against Frito Lay in connection with its rebate systems.

Assessment on RPM practices

As for the allegations that Frito Lay had engaged in RPM practices through handheld terminals, the Board stated that one of the documents collected during the on-site inspection indicated that the distributors' resale prices had been set by Frito Lay's headquarters, and that the distributors were not in a position to change or adjust the prices that were defined in (*i.e.*, pre-loaded onto) the handheld terminals.

In this regard, the Board first referred to its previous Frito Lay decision,[2] where it had examined the RPM allegations against Frito Lay and decided to send an opinion letter to Frito Lay requiring it abstain from the investigated practices (on the basis of Article 9 of the Law No. 4054), rather than initiating a full-fledged investigation against the company. That decision had been based on the limited use of handheld terminals and the distributors' tendency to set different prices, even though the Board had concluded that the handheld terminal system used by Frito Lay had the potential to prevent distributors from setting their own resale prices. The Board also referred to another of its decisions,[3] in which it had once again evaluated Frito Lay's handheld terminal system and concluded that there were no grounds to initiate a full-fledged investigation against the undertaking, since the system under scrutiny gave distributors the ability to change the prices that had been defined (*i.e.*, pre-loaded) in the handheld terminal system.

Pursuant to its assessment of Frito Lay's distributorship agreements in light of the legislative framework applying to such agreements, the Board determined that Frito Lay's agreements were in compliance with the Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("**Communiqué No. 2002/2**"). The Board also conducted a separate analysis as to whether Frito Lay had intervened in its distributors' resale prices in practice through the meetings that it had held with the distributors. As a result of its examination, the Board concluded that there were no documents or information supporting the allegation that Frito Lay had determined the resale prices of its distributors, and thus decided not to initiate a full-fledged investigation against the company regarding the RPM allegations concerning handheld terminals.

In light of the foregoing considerations, the Board ultimately decided not to initiate a full-fledged investigation against Frito Lay, pursuant to Article 41 of the Law No. 4054.

Competition Law Assessment of Football Tribune Card System, Passolig: The Board Granted Yet Another Individual Exemption to the Long-Term Exclusive Agreements for the Passolig System and Decided Not to Initiate a Full-Fledged Investigation Against Aktifbank

The Board published its reasoned decision[4] on the individual exemption application

[2] The Board's decision dated January 11, 2007, and numbered 07-01/12-7.

[3] The Board's decision dated July 18, 2013, and numbered 13-46/588-258.

[4] The Board's decision dated September 12, 2018, and numbered 18-31/532-262.

regarding (i) the Financial Establishment Agreement ("**FEA**") concluded between the Turkish Football Federation ("**TFF**") and Aktif Yatırım Bankası A.Ş. ("**Aktifbank**"), (ii) the System Integrator Agreement ("**SIA**") executed between TFF and E-Kent Teknoloji ve Ödeme Sistemleri San. ve Tic. A.Ş/Netaş Telekomünikasyon A.Ş. Consortium ("**E-Kent/Netaş**"), and (iii) the Intermediary Services for Ticket Sales Agreement ("**ISTSA**") executed between Aktifbank and the football clubs (together with the FEA and the SIA, referred to hereinafter as the "**Agreements**").

For the purposes of its analysis, the Board defined the relevant market as "*the market for electronic cards used for the ticket sales of football games,*" "*the market of intermediary services for the ticket sales of football games,*" and "*the banking services market,*" which are in line with the Board's previous Passolig decision of 2014,[5] where the Board had granted an individual exemption to the relevant agreements executed between TFF, Aktifbank and E-Kent/Netaş, and the ISTSA executed between Aktifbank and the football clubs, until the end of the 2016-2017 football season. Although TFF and Aktifbank raised an objection against the Board's definition of the relevant market as "*the market of intermediary services for the ticket sales of football games*" and argued for a broader definition encompassing "*the provision of intermediary services for the electronic sales of event tickets through a platform*" in parallel with the Board's Biletix decision of 2013,[6] the Board ultimately rejected this argument on the grounds that the supply and demand substitution of intermediary services for football games distinguishes and separates such football-specific services from other events, due to the existence of specific legislative regulations.

[5] The Board's decision dated November 26, 2014, and numbered 14-46/834-375.

[6] The Board's decision dated November 5, 2013, and numbered 13-61/851-539.

In the end, the Board unanimously decided that:

- The FEA and the ISTSA fell under the scope of Article 4 of the Law No. 4054, and that they could not benefit from a negative clearance decision.
- The FEA and the ISTSA did benefit from an individual exemption, since they satisfied all the conditions stipulated under Article 5 of the Law No. 4054.
- A negative clearance decision could be granted to the SIA.

In addition, the Board also examined the alleged tying practices of Aktifbank, and decided that Aktifbank was in a dominant position in the market for "*electronic cards used for the ticket sales of football games*" and for "*intermediary services for the ticket sales of football games.*" However, the Board determined that, although Aktifbank tied its credit cards with its electronic cards, both products were also separately available to consumers, and therefore, this practice did not result in the foreclosure of the market for banking services. Furthermore, in terms of football clubs, the Board concluded that it was unlikely that receiving intermediary services from a single undertaking would lead to any competitive concerns. The Board therefore decided not to initiate a full-fledged investigation against Aktifbank.

In its individual exemption analysis, the Board referred to the assessments in its Passolig decision of 2014,[7] which can be summarized as follows: (i) services could be supplied more securely by (a) using the e-card system and electronic ticketing, and (b) implementing security measures in stadiums and creating relevant software databases, (ii) these systems would also lead to more security for football clubs in terms of protection from potential damages that might arise from violent

[7] The Board's decision dated November 26, 2014, and numbered 14-46/834-375.

incidents during football matches, (iii) the procurement of such services exclusively from a single supplier would create cost advantages for the football clubs, (iv) utilizing a single integrated system would provide enhanced safety and security in terms of data collection, and enable the monitoring of cardholders for security reasons, (v) multiple system integrators would generate additional costs and hinder the operability and functioning of such a system. To that end, the Board concluded that there were no new developments or changes that would require the Board to alter its previous analysis regarding the Passolig System and stated that the Agreements fulfilled the conditions listed under Article 5/1(a) of the Law No 4054.

Regarding the "consumer benefit" condition of the individual exemption rules, the Board referred to its previous assessments in its Passolig decision of 2014,[8] and concluded that a single integrated system would result in (i) a more secure system, and (ii) cost advantages that would prevent virtual price increases on the tickets stemming from the establishment of multiple systems. All in all, the Board deemed (i) the ability of consumers to procure products at the value/price determined by the football clubs, and (ii) the creation of certain cost advantages, to constitute consumer benefits generated through the investigated practice.

The Board also assessed complaints that the Passolig system (i) had decreased attendance (*i.e.*, spectator numbers) at stadiums, (ii) had not prevented violent incidents, and (iii) had not personalized penalties. The Board concluded that there was no direct causal link between the complaints and the operation of the Passolig system by a single undertaking. The Board stressed that determining whether the prevention of violence in sports had reached its targeted levels or whether penalties were sufficiently personalized were not questions that were in its jurisdiction. Furthermore, the Board decided there were no new developments that would require it to modify its previous analysis on that front. The Board therefore concluded that the Agreements fulfilled the conditions listed within Article 5/1(b) of the Law No. 4054.

As for the Board's analysis on whether the Agreements eliminated competition within a considerable portion of the relevant market, the Board stated, first of all, that for the system to function in the most effective manner (both financially and technically speaking) under the Law No. 6222 on the Prevention of Violence and Disorder in Sports, the clubs and the federations must work in practice with a single provider. The Board proceeded to say that it is therefore important to ensure that there is competition within the market during the process of determining that provider. In this context, the Board noted that the tenders are publicly held and that competition within the market is secured through this tender process. The Board also stated that the revenues from the Passolig system are not expected to counterbalance or offset the investments for the remaining term of the Agreements, due to the high investment costs of the system, and therefore, exclusivity in the FEA is required to be implemented for the next six (6) football seasons by the date of this decision. The Board further found that, considering the specific requirements of the system, the "*market for electronic cards used for the ticket sales of football games*" and the "*market of intermediary services for the ticket sales of football games*" should be considered and examined as a whole. On that note, the Board also took into account that football clubs generally prefer to conclude agreements related to intermediary services for ticket sales with the same undertaking, as Aktifbank is authorized to operate the e-card system exclusively.

[8] *Ibid*.

Finally, the Board assessed whether the Agreements' exclusivity clauses restricted competition more than necessary for achieving the goals set out in paragraphs (a) and (b) of Article 5 of the Law No. 4054, and determined that these clauses were necessary for the targeted benefits. To that end, the Board unanimously decided to grant an individual exemption to the Agreements.

Green-Light to the "Green Car Project": The Board Granted Negative Clearance to a Joint Venture between Turkcell, Anadolu Group, Zorlu, Kök Ulaşım, BMC and TOBB

The Board published its reasoned decision[9] on the formation of a joint-stock company ("**JV**") by (i) Turkcell İletişim Hizmetleri A.Ş. ("**Turkcell**"), (ii) Turkcell Gayrimenkul Hizmetleri A.Ş. ("**Turkcell Gayrimenkul**"), (iii) AG Anadolu Grubu Holding A.Ş. ("**Anadolu Group**"), (iv) Zorlu Holding A.Ş. ("**Zorlu**"), (v) Vestel Elektronik Sanayi ve Ticaret A.Ş. ("**Vestel**"), (vi) Kök Ulaşım Taşımacılık A.Ş. ("**Kök Ulaşım**"), (vii) BMC Otomotiv Sanayi ve Ticaret A.Ş. ("**BMC**"), and (viii) the Union of Chambers and Commodity Exchanges of Turkey ("**TOBB**") (together with Turkcell, Turkcell Gayrimenkul, Anadolu Group, Zorlu, Vestel, Kök Ulaşım and BMC, the ("**Parties**") for the purpose of designing, developing, producing, and marketing electrically powered and new generation cars, along with the production of their spare parts, and the provision of maintenance and repair services within the scope of "Turkey's Automobile" project ("**Transaction**").

In its review of the Transaction, the Board first conducted an examination as to whether the Transaction could be considered as an "acquisition" within the meaning of Article 7 of the Law No. 4054 and the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("**Communiqué No. 2010/4**").

To that end, the Board first reiterated that the formation of a greenfield joint venture is deemed as an "acquisition" under Article 5(3) of the Communiqué No. 2010/4, provided that the joint venture is (i) jointly controlled by the parent companies, and (ii) an independent economic entity (*i.e.*, full function JV) that is established on a lasting basis. In this regard, the Board examined the joint control criterion in light of the contemplated shareholding structure of the JV (*i.e.*, 19% of shares held by Anadolu Group, 19% by BMC, 19% by Kök Ulaşım, 19% by Turkcell Gayrimenkul, 19% by Vestel, and 5% by TOBB) and the relevant provisions of the Share Purchase Agreement ("**SPA**") regarding the meeting and voting quorum requirements of the JV's general shareholders meetings and its board of directors.

According to the SPA, with regard to the general shareholders meetings, the quorum (i) for significant resolutions was 75% of the share capital of the JV, and (ii) for the remaining matters, it was the majority provided under the Turkish Commercial Code No. 6102. In this regard, the Board found that both significant resolutions and the remaining matters would require a majority constituted by different combinations of the JV's shareholders, and thus determined that no single party would enjoy veto rights over these matters.

In terms of the resolutions of the board of directors, according to the SPA, the Parties would be able to nominate members of the board of directors in accordance with their shareholding percentages. In other words, Turkcell, Anadolu Group, Zorlu, Kök Ulaşım and BMC would be entitled to appoint a certain number of board members, which would be different than the number of board

[9] The Board's decision dated September 26, 2018, and numbered 18-34/566-279.

members appointed by TOBB (the details of this arrangement were redacted in the Board's reasoned decision for confidentiality purposes). In this regard, the Board held that the meeting and voting quorum rules provided under the SPA enabled different combinations of board members to cast the decisive vote on significant resolutions and on non-significant (*i.e.*, remaining) matters.

In view of the fact that the meeting and decision quorums for the JV's general assembly meetings and its board of directors could be achieved through various alliances and different combinations of shareholders (*i.e.*, these quorums were subject to shifting alliances), the Board concluded that there would be no stable majority in the decision-making process of the JV. As a result, the Board determined that the JV would not be jointly controlled by the Parties, and hence, the Transaction was not an "acquisition" within the meaning of Article 7 of the Law No. 4054 and the Communiqué No. 2010/4.

The Board then evaluated the Transaction within the scope of Article 4 of the Law No. 4054, which applies to agreements between undertakings, and conducted an assessment as to whether the SPA and the Articles of Association (together referred to as "**Transaction Agreements**") could benefit from the block exemption regime under the Block Exemption Communiqué No. 2013/3 on Specialization Agreements ("**Communiqué No. 2013/3**"). In this regard, the Board first characterized the SPA as "*a joint production agreement whereby two or more parties that are active in the same product market or aiming to enter a new market through specialization, undertake to jointly produce specific products*," which is listed among the agreements that may benefit from the protective cloak of the block exemption regime provided under Article 5(c) of the Communiqué No. 2013/3.

To that end, the Board first looked into whether the Transaction had the object of restricting competition. Referring to the Guidelines on Horizontal Cooperation Agreements, the Board noted that, in cases where the parties agree on matters directly concerning production agreements (such as the capacity and production volumes of a joint venture or the amount of products that would be outsourced to third parties, etc.), the agreement does not amount to a restriction of competition by object, provided that the agreement in question does not restrict or eliminate other parameters of competition. In light of this principle, the Board decided that the Transaction did not have the object of restricting competition, despite the fact that the JV would be active not only in the production of electrically powered cars, but would also enable the Parties to determine (i) the number of cars produced and sold by the JV, (ii) sales territories, and (iii) prices.

The Board also examined the relevant market dynamics by taking into consideration the specific features of the market involved herein, namely the market for "electrically powered vehicles."[10] Accordingly, the Board observed that this is a rapidly evolving and highly dynamic market, which requires high levels of investment, sophisticated distribution networks, and technical expertise. Taking these facts into consideration, the Board concluded that the Parties would be unable to carry out production by their own means, and therefore, the SPA was unlikely to create any anticompetitive effects.

[10] Taking into account the current market positions of the Parties in the automobile sector, and considering that none of the Parties had produced electrically powered cars prior to the Transaction, the Board did not find it necessary to provide a precise relevant product market definition in this case, and hence, left the relevant product market definition open.

Furthermore, bearing in mind that production agreements are unlikely to pose a constraint on competition when the parties involved in the agreement do not enjoy high market powers, the Board analysed the market shares attributed to the Parties' overlapping activities in order to assess the effects of the Transaction on competition. In this regard, the Board found that Anadolu Group and Kök Ulaşım (through its affiliated company, Karsan) were active in the market for passenger cars and light commercial vehicles, while BMC was active in the market for heavy commercial vehicles. In light of the fact that these two markets are related to one another, the Board reviewed the market shares of Anadolu Group, Karsan and BMC in the markets for both (i) passenger cars and light commercial vehicles, and (ii) heavy commercial vehicles, and concluded that they did not reveal or indicate any elevated market power that would raise any competition law concerns. The Board reached a similar conclusion with regard to the markets for electricity generation (in which Zorlu is active through a subsidiary) and electricity distribution (where Turkcell is a retailer of electricity services). With respect to the battery manufacturing market, in which the affiliates of TOBB and Zorlu are active, the Board deemedthat the market shares of these undertakings were unlikely to result in constraints on competition, as TOBB's activities concerning batteries focused on the defense industry, while Zorlu's activities primarily concerned electric vehicles.

Finally, the Board determined that, since the JV would essentially produce electrically powered vehicles (and would not manufacture products that would be used as inputs for the Parties' businesses), the Transaction would not lead to "commonality of costs". Moreover, the Board found that the SPA did not include any provisions that would give rise to a collusive outcome or bring about an information exchange leading to market foreclosure.

As a result, the Board ultimately concluded that the SPA and the JV did not have the object or effect of restricting competition. Therefore, the Board granted negative clearance to the Transaction Agreements, pursuant to Article 8 of the Law No. 4054.

The Mastervolt Decision: The Board's Attempt at Deviating from the European Competition Law Rules Is Rejected by the Court of First Instance

The Ankara 7th Administrative Court (**"Court"**) annulled the Board's decision[11] in the investigation initiated against Mastervolt International Holding BV (**"Mastervolt"**) and Artı Marin Elektrik Dış Ticaret Ltd. Şti. (**"Artı Marin"**), on the grounds that these undertakings had violated Article 4 of the Law No. 4054 through their agreements and conduct (**"Judgement"**).[12] The Judgement is highly noteworthy in the context of Turkish competition law, as the Court blocked the Board's attempt at conducting an effects-based analysis with respect to a prohibition of parallel trade that would have been in conflict with the relevant EU precedents.

The Board's investigation against Mastervolt and Artı Marin was aimed at determining whether these companies had violated Article 4 of the Law No. 4054 by restricting Eltesan Mobil Teknoloji Sistemleri San. ve Tic. A.Ş.'s (**"Eltesan"**) sales of Mastervolt products in Turkey through parallel trade activities. The Board's investigation was initiated upon Eltesan's complaint.

Mastervolt is a Netherlands-based company, which manufactures energy solutions that are utilized in marine vehicles and platforms, solar energy fields and land vehicles. Artı

[11] The Board's decision dated May 11, 2016 and numbered 16-16/278-122.
[12] The Ankara 7th Administrative Court's judgement dated November 28, 2018, with file number 2017/251 E., 2018/2104 K.

Marin is the exclusive distributor of Mastervolt products in Turkey, and Eltesan is the exclusive distributor of Waeco products in Turkey.

In its investigation, the Board had chosen to leave the relevant product market definition open, since it determined that the relevant product market definition would not have any effect upon the Board's evaluation of the case, pursuant to Paragraph 20 of the Guidelines on the Definition of the Relevant Market.

In its substantive assessment of the case, the Board found that Artı Marin was the exclusive authorized distributor of Mastervolt and Eltesan was the authorized distributor of Waeco (which is a competitor of Mastervolt) in the market for mobile power equipment, such as energy invertors, convertors, and batteries. Moreover, the Board determined that, from the beginning of 2009, Eltesan had sold Mastervolt products in Turkey by engaging in parallel trade activities, in which Mastervolt products had been supplied to Eltesan by Mastervolt's authorized reseller in Austria (thus enabling Eltesan to challenge Artı Marin's exclusivity in Turkey by offering Mastervolt products at lower prices than Artı Marin). In this regard, the documents submitted by Eltesan revealed that Mastervolt products had been sold in Turkey since 2009, whereas the restrictive actions of the investigated parties (both jointly and separately) had occurred from 2010 to 2015.

In its decision, the Board cited the *Consten and Grundig*[13] ruling of the European Court of Justice ("**ECJ**"), and held that the EU practice classifies the agreements restricting parallel trade as anticompetitive without further conducting any effects-based analysis, and that EU practice considers any behavior of this type to constitute a violation of the competition law rules.

Consequently, even though the Board clearly stated in its decision that, according to the EU precedents, the agreement between Mastervolt and Artı Marin on the restriction of parallel trade (which was concluded through e-mail messages) might be sufficient to find that the relevant parties' actions had breached competition law rules, the Board went on to say that, due to the structural differences between the EU and Turkey (such as the fact that the EU common market consists of different national markets, whereas the Turkish market is a single national market), the restriction of parallel trade in Turkey might lead to different outcomes than in the EU. Therefore, the Board emphasized that these structural differences might require case-specific assessments and might necessitate an effects-based analysis to determine whether there had been an actual competition law violation in Turkey in this case.

As a result of its assessment, the Board found that there was an agreement between Mastervolt and Artı Marin to restrict the sales of Mastervolt products in Turkey through other dealers (namely, Eltesan) by engaging in attempts to (i) discredit Eltesan's presence in the Turkish market, and (ii) prevent Mastervolt's non-Turkish distributors from supplying Eltesan with Mastervolt products. However, the Board held that Eltesan's sales of Mastervolt products had not decreased significantly throughout the period subject to investigation, and also found that Eltesan's turnover generated from the sales of the relevant products was not substantial. Therefore, the Board concluded in its assessment that the efforts of the investigated parties had not been clearly systematic and successful.

13 Joined Cases 56 and 58-64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission of the European Economic Community*, ECR 1966/299 [1966].

In light of the above, the Board decided that the information at hand was not sufficient to indicate the existence of a restrictive agreement between the investigated parties.

Eltesan subsequently filed an annulment lawsuit before the Court with respect to the Board's decision, on the grounds that the Board's assessment of the evidence in the case file had been flawed, and that the evidence was actually sufficient to prove a competition law violation.

In its assessment of the case, the Court first recalled the main principles and prerequisites for demonstrating the existence of a restriction of competition through agreements and concerted practices within the meaning of Article 4 of the Law No. 4054. The Court also underlined that the mere existence of a restrictive agreement or concerted practice between undertakings within the meaning of Article 4 of the Law No. 4054 would suffice for determining a competition law violation, and that there was no need to demonstrate that the restrictive practices in question had had 'successful' effects in the market in order to establish such a violation within the scope of Article 4. The Court held that, in the case at hand, even though it could be ascertained from the documents submitted by the defendant that the plaintiff's sales had not declined between 2011 and 2015, thus indicating that there had been no systematic and successful restriction of competition, the evaluation of the documents obtained during the investigation and those submitted by the plaintiff clearly revealed that the defendants had intended to restrict competition in the market. Therefore, the Court concluded that the evidence in this case demonstrated the existence of a violation within the meaning of Article 4 of the Law No. 4054.

Based on the foregoing considerations, the Court ruled that the Board's contested decision did not comply with the relevant laws and decided on its annulment.

Employment Law

The High Court of Appeals Concludes that the Employees of a Foreign Company Must Be Considered in Terms of the Number of Employees of its Turkish Affiliate Regarding the Applicability of Job Security Provisions

Article 18 of the Turkish Labor Law No. 4857 (**"Labor Law"**) provides that an employer who terminates the employment agreement of an employee who (i) is engaged for an indefinite term, (ii) is employed in a workplace with thirty (30) or more employees, and (iii) meets a minimum seniority requirement of six (6) months, must rely on a valid reason (*i.e.*, provide "*just cause*") for such termination. A valid reason for termination can be based on the underperformance or inappropriate conduct of the employee in question, or it may relate to the operational requirements of the workplace or the work itself. This provision offers a certain amount of job security to designated employees by requiring a valid reason for the termination of an employment agreement, as long as the other conditions specified by the relevant provision are satisfied.

One of the conditions enumerated under Article 18 of the Labor Law is that there must be at least thirty (30) employees in the workplace for the job security provision to be applicable to a particular company. Moreover, employees working in the same field of activity who are employed at other workplaces belonging to the same employer are also taken into account in terms of the number of employees of the relevant company within the scope of Article 18 of the Labor Law. In this context, the determination of whether the threshold of thirty (30) employees is exceeded may not be straightforward if the relevant employer is an affiliate company with few employees in Turkey whose main/parent company is established abroad and comprises more employees.

A strict interpretation of Article 18 of the Labor Law requires that only the employees who are working at the relevant workplace must be taken into consideration in terms of the applicability of the job security provisions. In this case, adopting a strict interpretation of Article 18, only the employees of the affiliate company established in Turkey would have to be counted to determine whether the thirty (30) employee threshold has been met. That being said, the High Court of Appeals has concluded that, in this scenario, the employees of the foreign main company must also be included in terms of the number of employees of the affiliate company established in Turkey, with respect to the application of the job security provisions.

In the dispute subject to the decision of the 9th Civil Chamber of the High Court of Appeals (dated March 14, 2018, and numbered 2018/1959 E., 2018/5292 K.), the employee claimed that the employees of the main company established in Germany should have been taken into account for the calculation of the number of employees of the employer, regarding the applicability of the job security provisions with respect to the Turkish affiliate company. The local court had denied the employee's claims, as there were fewer than thirty (30) employees working at the affiliate employer company at the time of the employee's termination. The local court had justified its dismissal of the plaintiff's claim that the employees of the main company (established in Germany) must also be taken into account by stating that the employer (*i.e.*, affiliate) company was an independent company established in Turkey, and that it was separate from the main company established abroad. In this regard, it is evident that the reasoning of the local court was based on the legal principle of "corporate separateness".

However, the 9th Civil Chamber of the High Court of Appeals quashed the local court's decision, by declaring that the "*organic link*" between the main company and its affiliate company necessitated the consideration of the employees of the main company in terms of calculating the number of employees of the affiliate company for the application of the job security provisions. Having said that, the Court did not elaborate or provide any further explanations as to what exactly constitutes an "*organic link*" between the affiliate company and the main company.

The decision of the 9th Civil Chamber of the High Court of Appeals can be said to represent a departure from the "*corporate separateness*" principle, as the Court concluded that the employees of the foreign (main) company must also be counted in terms of the application of the job security provisions to the affiliate company, despite the fact that the main and affiliate companies had independent and separate corporate identities. This result cannot be considered as a surprise; however, as the High Court of Appeals had already adopted a similar approach with respect to company groups (holdings) in its previous decisions. Indeed, the 9th Civil Chamber of the High Court of Appeals had concluded (in its decision dated January 23, 2007, and numbered 2007/29128 E., 2007/441 K.) that, even though only the employees of an employer company are taken into account for the application of the job security provisions (despite the fact that the employer company belongs to a company group), as all companies are independent and separate from each other in terms of their corporate identity, if there is co-employment, (*i.e.*, if the employee performs work for more than one company belonging to the same company group), all employees of the relevant companies in the company group/holding must be taken into account in terms of the application of the job security provisions. Therefore, it can be observed that the High Court of Appeals has now adopted a similar approach with respect to the Turkish affiliate companies of foreign main companies.

Nevertheless, the decision of the 9th Civil Chamber of the High Court of Appeals can be criticized for failing to provide any detailed explanation or guidance in terms of what constitutes an "*organic link*" between main companies and their affiliates. The Court's decision indicates that, in this particular case, the trade registry records were taken into consideration when assessing whether there was an organic link between the main company established in Germany and the affiliate company in Turkey. This implies that the High Court of Appeals has taken the partnership status of a company into account while assessing the "*organic link*" between the two companies. Therefore, it could be concluded that, if a sole shareholder of an affiliate company is a main company established abroad, or if all the shareholders of an affiliate company are companies established abroad belonging to the same company group (holding), then the High Court of Appeals may possibly conclude that an "*organic link*" exists between these companies in terms of the applicability of the job security provisions.

Consequently, further to the 9th Civil Chamber of the High Court of Appeals' recent decision, the employees of the main company established abroad can also be taken into account when calculating the number of employees of the affiliate company established in Turkey in terms of the applicability of the job security provisions, provided that there is an "*organic link*" between these companies, even if such companies have separate and independent corporate identities.

Litigation

The New Dispute Resolution Method for Commercial Disputes: Mandatory Mediation

The Law on the Procedure for Initiating Execution Proceedings based on Monetary Receivables Arising out of Subscription Agreements ("**Law No. 7155**") was published in the Official Gazette on December 19, 2018. The Law No. 7155 introduces new rules for different legal subject matters, including (but not limited to) the execution and bankruptcy law, concordatum, and mandatory mediation. The codification method of the Law No. 7155 can be characterized as quite unusual, given the fact that Article 1 of the Law No. 7155 describes the purpose of this law simply as "*regulating the procedures and principles for the initiation of execution proceedings based on subscription agreements*," whereas the Law No. 7155 also incorporates a number of articles amending various other laws at the same time. To that end, one of the most eye-catching modifications brought forth by the Law No. 7155 concerns the Turkish Commercial Code No. 6102 ("**TCC**") and the Civil Mediation Law No. 6325 ("**Law No. 6325**"). Accordingly, as per Articles 20 to 23 of the Law No. 7155, it is now mandatory to apply to a mediator before filing a lawsuit for specific types of commercial disputes.

The fundamental amendment herein is that, effective from January 1, 2019, as per Article 20 of the Law No. 7155, the claimant will be required to first apply to a certified mediator for compensation as well receivable claims, before being allowed to initiate a commercial lawsuit. The Law No. 7155 mandates that the mediation process will be completed within six (6) weeks, starting from the date on which the mediator is appointed. However, this mediation term could be extended for an additional two (2) weeks, if necessary. On that note, compared to the mandatory mediation mechanism provided under the employment law, it appears that the lawmaker has considered the potential complexity of commercial disputes and sets a longer time period for completing the mediation phase in these cases. Furthermore, the mediation application must be submitted to (i) the mediation office where the competent judicial authority is located in accordance with the subject matter of the dispute, or (ii) in locations where the mediation office has not been established, the appointed directorates.

It is worth noting that, pursuant to the Law No. 7155, applying to mediation before filing a commercial lawsuit now constitutes a cause of action. From the perspective of procedural law, this means that if the litigant files a lawsuit before applying to a mediator, then the court will refuse to delve into the merits of the case and reject the lawsuit on procedural grounds. Therefore, it is obligatory and vitally important to exhaust the mediation phase prior to bringing one's claims before a court of first instance. However, it should be noted that, as per Article 21 of the Law No. 7155, the mandatory mediation procedure does not apply to pending cases.

As for the appointment procedure of the mediators, pursuant to Article 23 of the Law No. 7155, mediators can be appointed from the Registered Mediators list. A mediator may be selected from this list by an agreement of the parties; however, in other cases, mediator appointments will be made by the authorized mediation office established in the relevant jurisdiction.

Moreover, the mediator shall be required to finalize the mediation procedure if it is unable to reach the parties to the dispute, or if the disputing parties fail to participate into the mediation meetings, or in cases where the parties reach an agreement (or decide not to agree) before the mediator. Once the mediation procedure is completed and finalized, the mediator must duly inform the mediation office of the situation by issuing the final minutes. In the event that the mediation process is concluded because one of the parties fails to attend the first meeting (without presenting a valid excuse), then the non-attending party shall be identified and specified in the final minutes and it shall be held solely responsible for all of the litigation fees, even if that party wins the subsequent lawsuit. On the other hand, in cases where the mediation procedure is concluded due to the fact that both parties fail to participate in the first mediation meeting, each party shall be liable for its own litigation expenses during the course of the ensuing litigation process.

As for the effective date of the Law No. 7155, Articles 10, 20 and 21 came into force on January 1, 2019, whereas Articles 1 to 9, provisional Article 1, and Articles 18 and 19 will come into force on June 1, 2019.

In light of the foregoing explanations, we conclude that the Law No. 7155 not only created a new enforcement system in relation to execution proceedings, but it has also introduced the mandatory mediation process prior to initiating legal proceedings in commercial lawsuits. These procedural modifications concern the fact that the litigation cycles of commercial courts are often quite lengthy and drawn-out in these types of matters, and that such disputes could actually be resolved in a short period of time by employing effective dispute resolution methods. As a result, they are based on the realization that the ability to provide meaningful remedies in a reasonable amount of time is perhaps the most important indicator for measuring confidence in any legal system.

Personal Data Protection Law

The Council of State Stopped the Execution of the Amendment to the Regulation on the Processing and Privacy of Personal Health Data

The Turkish Physicians Association and the Turkish Dentists Association (together referred to as the "**Plaintiffs**") brought an action against the Ministry of Health ("**Ministry**") and the Turkish Data Protection Authority ("**DPA**") before the Council of State requesting the suspension of the execution of the Amendment to the Regulation on the Processing and Privacy of Personal Health Data ("**Amendment**") and certain provisions of the Regulation on the Processing and Privacy of Personal Health Data ("**Regulation**"), which were amended by the Amendment. Although the Ministry and the DPA argued that the legislation in question was in compliance with all the relevant laws, the Council of State granted the Plaintiffs' request and stopped the execution of the Amendment with its decision (No. 2018/1490 E.) on October 9, 2018 ("**Decision**").

According to the Decision, the Plaintiffs stated that the Regulation had come into force on October 22, 2016, and the Council of State had stopped the execution of the Regulation, which was issued without obtaining the opinion of the Turkish Data Protection Board ("**Board**"), and the Ministry had subsequently amended several provisions of the Regulation through the Amendment. Therefore, the Plaintiffs argued that the Amendment subject to the case was related to a legislation, the execution of which had already been halted. Accordingly, the Plaintiffs asserted that such an amendment was improper and inapplicable, as there was already a stay of execution decision regarding the amended legislation, and thus, the Amendment was completely unlawful.

The Plaintiffs further argued that processing health data through such a legislation was also illegal, since the Board had not decided upon the measures that should be implemented for processing personal health data, which concerns the most private and confidential information relating to individuals' health and sexual lives, which cannot be changed during the course of their lives.

The primary issue underlying the Plaintiffs' claims was clearly the fact that the Regulation (and, in a similar vein, the Amendment) required a vast amount/scope of health data to be submitted to a central system without any limitation or predefined purpose, and that such health data would be transmitted in an unencrypted form. In that regard, the Plaintiffs argued that health institutions and organizations, including the Ministry and all other relevant parties, are obligated to comply with the principles set forth under the Law No. 6698 on the Protection of Personal Data ("**DPL**") while processing personal data, and pointed out that it is especially necessary and important to comply with the principle set forth under the DPL stating that any personal data, which is processed, must be (i) relevant, (ii) limited, and (iii) not excessive in relation to the purposes for which it is processed. Consequently, the Plaintiffs claimed that collection of the health data of every citizen in a central system, by requiring all relevant parties that might possess such data (*e.g.*, for providing health care services, as it is in the case of hospitals) to transfer their data to the central system without allowing any exceptions, cannot be considered as personal data processing that is relevant, limited and not excessive in relation to the purposes of processing.

According to Article 5/8 of the Regulation, health service providers will be required to transfer health data to the central health data system in accordance with the procedures and principles designated by the Board and the Ministry, along with the mandatory rules set forth under the DPL. In this regard, the Plaintiffs argued that, although this provision requires compliance with the mandatory rules, principles and procedures set forth under the DPL, and even though it is more feasible and reasonable compared to the former wording of the relevant provision prior to the Amendment, the fundamental illegality of the provision still persists. According to the Plaintiffs, the common ground between Articles 7/1 and 8/1 is that both provisions declare that it is obligatory to transfer personal health data to the central health data system established by the Ministry, without recognizing any distinctions or allowing for any exceptions. The Plaintiffs also pointed out that the Regulation further allows the Ministry to transfer such data to other public institutions and organizations, without setting forth any limits or specifications.

Furthermore, the Plaintiffs noted that, while the Regulation requires people who are responsible for providing health services to process personal health data only within the scope of the particular health services to be provided, this limitation does not appear to be applicable for the administration's access to the central health data system containing all special categories of personal data, which are collected from every available source.

Additionally, the Regulation does not require the anonymization of health data before such data is transmitted to the central system. Moreover, the Regulation does not offer any clarifications for health service providers regarding the categories of data to be shared with the central system, or any explanations as to how the data will be transferred to the central data system. The Plaintiffs argued that no balance had been sought or struck between the transfer requirement introduced for the health service providers and their fundamental confidentiality obligations, and remarked that it posed an obvious data security risk to keep the personal health data of all citizens in a central system without anonymizing such data. Lastly, the Plaintiffs contended that Articles 5/8, 7/1 and 8/1 of the Regulation concerning the transfer of personal data to the central system without any limitations was not consistent with the purposes declared by the Ministry and that these provisions would harm the essence of the fundamental rights of citizens protected under the Turkish Constitution.

Due to the foregoing reasons, the Plaintiffs claimed that issues which should be regulated under national laws were not regulated in any way by the Regulation and the Amendment, and argued that there were no clear, explicit, understandable and framework-specific rules governing the implementation of the obligations set forth under the Regulation. Therefore, the Plaintiffs requested a stay of execution to be granted on this matter.

In the reasoning of its Decision, the Council of State referred to the international legislations on this matter, and concluded that the provisions in the Regulation, which required the processing of health data as a rule (but not as an exception), were against the law. The Council of State reached this conclusion because the exceptions for processing health data only include the ones enumerated under Article 9 of the Convention 108 ("*Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*").

As per Article 25 of the Convention 108, contracting parties have no discretion with respect to modifying these exceptions, and thus, processing health data outside the designated framework and purposes of the Convention clearly constitutes a breach of the Convention, which Turkey signed nearly forty years ago in 1981.

The Council of State also mentioned that the DPL is a framework law that covers and is applicable to all sectors, including public and private institutions, and that the Board has a general authority with regard to controlling and auditing the protection of personal data in all such sectors and areas. Furthermore, the Decision declared that one of the duties of the Board is to express its opinion on the legislations drafted by other governmental institutions or organizations that contain provisions concerning personal data, and that it is necessary to take the adequate measures specified by the Board when processing personal health data.

However, as the Regulation was issued by the Ministry without waiting for the establishment of the Board (and thus, without consulting the Board), the Council of State found the Regulation to be in violation of the DPL, and granted a stay of execution for all of the provisions of the Regulation. In response to this decision, the Ministry argued that (i) the Board members could only be appointed by January 2018, and thus, it was not possible to obtain the Board's opinion on this matter, (ii) the Ministry had begun negotiations on the matter as soon as the Board had been established, and (iii) the Ministry had obtained the oral opinions of the Board members and it had revised the legislation in light of these opinions, before the stay of execution decision was granted.

The Council of State did not find the Ministry's arguments to be sufficient or persuasive, and asserted that it was not legally possible to restore or revive a piece of legislation, which was found to be unlawful and suspended from execution, by making partial amendments to it. The Council of State explicitly stated that a new legislation would need to be drafted and passed in order to ensure full compliance with the laws, rather than making amendments to an annulled legislation. In that regard, the Council of State noted that the Ministry had abstained from implementing the Council of State's previous decision as is and without delay.

Accordingly, the Council of State granted the Plaintiff's request and decided to stop the execution of the Amendment and the relevant provision of the Regulation on October 9, 2018. In summary, both the Regulation and the Amendment are currently ineffective and inapplicable legislations, and, according to the Council of State's decision, the Ministry is now required to draft a new regulation from scratch by taking into account the applicable laws and procedures (such as the DPL), along with the Council of State's decisions.

Internet Law

The Constitutional Court's Decision on the Access Ban of a News Article Fostering Public Discussion

The Constitutional Court's decision[14] ("**Decision**") of October 30, 2018, regarding the applicant's allegations with respect to the violation of its right to freedom of expression and freedom of press, resulting from the access ban of a news article on the website of an online newspaper (namely www.bianet.org) was published in the Official Gazette on December 4, 2018.

The applicant in this case was IPS Iletişim Vakfı ("**Applicant**"), which is an online news organization. The news article subject to the Decision concerned the sexual harassment of women in the workplace. The article contended that the rise in the number of women who reach management positions in the corporate world would increase the possibility that women's sexual harassment complaints would be taken more seriously, and thus, argued that sexual harassment incidents could be prevented and reduced as a result. This claim was further discussed and examined in the relevant article through an illustrative example from an airline company. According to the news article, several employees at this particular airline had initiated a sexual harassment complaint against their manager and the owner of the company had taken this complaint seriously and removed the manager from his position at the company. Furthermore, a criminal complaint had subsequently been filed against the manager before the relevant public prosecutor's office. The article also asserted that the fact that the owner of the airline was a woman (who was known as an advocate for women's rights) had had an encouraging and emboldening effect on the employees with respect to voicing their sexual harassment complaints against their manager. The news article also indicated that the public prosecutor had rendered a non-prosecution decision and declined to charge the manager with a criminal offense, and that the manager had subsequently initiated a defamation lawsuit against the complainants, which had been decided in his favor.

After the news article was published, the manager in question applied to the Istanbul 7th Criminal Judgeship of Peace, arguing that

[14] The Constitutional Court's decision with the Application Number 2014/19685, available at *http://www.resmigazete.gov.tr/eskiler/2018/12/20181204-6.pdf*.

the allegedly defamatory article did not reflect the truth, and he obtained an access ban decision regarding the news article. Even though the Applicant filed an objection against the access ban decision, it was rejected by the higher court that reviewed the objection, namely the Istanbul 8th Criminal Judgeship of Peace.

Accordingly, the Applicant filed an individual application before the Constitutional Court on August 26, 2015, claiming that its right to freedom of expression and to freedom of press had been violated.

Before delving into the details of its analysis of the case, the Constitutional Court first determined that the application was admissible and ruled that there had been an interference with the Applicant's freedom of expression. The Constitutional Court then began its analysis of the case by examining whether or not such interference constituted a violation of the Applicant's rights.

In its analysis of the case, the Constitutional Court first referred to Article 9 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**"). Article 9 of the Law No. 5651 is entitled "*Removal of Content from Broadcasts and Access Bans*" and it was the basis of the access ban decision rendered by the lower court regarding the news article on the Applicant's website.

The Constitutional Court first noted that an access ban decision based on the Law No. 5651 should only be granted in urgent cases arising from a "*prima facie violation*," where the violation is apparent without the need for a detailed examination, such as when nude photos or videos of an individual are published online, and an individual applicant may seek judicial relief from civil or criminal courts instead of criminal judgeships.

The Constitutional Court further stated that the relevant content in this case related to an important public issue (*i.e.*, the mistreatment and sexual harassment of women in the workplace), and thus, the news article served the public interest and had high informative value. The Constitutional Court indicated that, even though some time had passed since the incidents in question had occurred at the airline company, considering that this was an ongoing/current public issue, broadcasting the relevant news article (which contributed to a significant public discussion) still served the public interest. Moreover, the Constitutional Court emphasized that the news article also included information with respect to the public prosecutor's non-prosecution decision regarding the manager and the defamation lawsuit which had been decided in favor of the manager and against the complainants.

The Constitutional Court also asserted that the Istanbul 7th Criminal Judgeship of Peace had failed (i) to provide a convincing rationale for its decision regarding the urgent need to access ban the news article or (ii) to establish the *prima facie* violation, by noting that the news article in question had been published in 2006 and that the complainant had requested an access ban decision 9 years later. The Constitutional Court also declared that the manager had other and more effective remedies that he could seek, such as filing a lawsuit before civil or criminal courts, instead of obtaining an access ban decision from a criminal judgeship as a preliminary injunction, which is granted and implemented for an indefinite period of time.

In conclusion, the Constitutional Court found that the application regarding the violation of the Applicant's right to freedom expression and freedom of press was rightful (*i.e.*, had merit), and decided to send a copy of the order to the Istanbul 7th Criminal Judgeship of Peace to rectify the consequences of the violation, and also ruled that an amount of 2,206.90

Turkish Liras must be paid to the Applicant for legal costs.

Advertisement Law

Turkey Abandons Comparative Advertisements

In January 2015, the Turkish Ministry of Customs and Trade issued the Regulation on Commercial Advertisements and Unfair Commercial Practices ("**Regulation**") on the principles and procedures pertaining to advertising activities, which repealed and replaced the previous regulation that had been in effect since 2003. The Regulation lifted the ban on comparative advertisements and included a provision that allowed the use of competitors' names, trademarks, logos and other distinguishing marks or expressions, along with competitors' trade names and business names in comparative advertisements, provided that such advertisements complied with the provisions set forth therein, under Article 8 of the Regulation.

The relevant provision was expected to enter into force on January 10, 2016, but an amendment to the Regulation was published in the Official Gazette of December 25, 2015, postponing the effective date of this provision to December 31, 2016. Later, with yet another amendment, the effective date of the provision was postponed to January 1, 2018. Finally, pursuant to an amendment published on December 31, 2017, the effective date was amended as January 1, 2019. On December 28, 2018, only a few days before the anticipated effective date of the provision, the Regulation Amending the Regulation on Commercial Advertisements and Unfair Commercial Practices ("**Amendment Regulation**") was published in the Official Gazette.

The Amendment Regulation repealed Article 8/2 of the Regulation, which allowed the use of competitors' names, trademarks, logos and other distinguishing marks or expressions, along with competitors' trade names and business names, in comparative advertisements.

The Amendment Regulation also amended the definition of "*comparative advertisement*" as "*advertisements containing comparisons between competitors' products or services for the same purposes and needs*," whereas it had previously been defined as "*advertisements wherein elements relating to competitors' products or services are used impliedly or directly*."

The Amendment Regulation inserted a provision into Article 8/1 of the Regulation prohibiting the use of product names, trademarks, logos, trade names, business names and other distinctive elements belonging to one's competitors in comparative advertisements.

The abrogated predecessor of the Regulation stated that comparative advertisements could only be displayed when: (i) the advertisement in question did not include the names of the goods, services or trademark, (ii) the compared goods and services were of the same type and quality, and satisfied the same demand and need, (iii) the advertisement complied with "fair competition" principles and did not mislead consumers. The repealed regulation did not allow advertisers to use or address a competitor implicitly or explicitly in their advertisements.

The Regulation was expected to permit the use of competitors' names, trademarks, logos and other distinguishing marks or expressions along with competitors' trade names and business names in comparative advertisements, provided, among other things, that such advertisements (i) were not deceptive and misleading, (ii) did not lead to unfair competition, (iii) were based on claims that were objective and provable, and (iv) related to an issue that was beneficial for consumers.

The foregoing changes drained all meaning from the notion of "comparative advertising" and entirely removed comparative advertisements from the Turkish jurisdiction. In other words, the Amendment Regulation brought back the absolute ban on comparative advertisements which use or refer to the trademarks or distinctive elements of one's competitors.

It may be said that the ban on comparative advertisements has its roots in the rules and regulations relating to unfair competition and trademark protection. All unfair commercial practices and commercial practices that violate the principle of "good faith" are prohibited under the Turkish Commercial Code. It should be noted that unfair competition is regulated under the Turkish Commercial Code in an extensive and open-ended manner. The prohibition against unfair competition also covers and applies to comparing a competitor's goods, work products, activities or prices by misrepresenting the facts, in a way to mislead consumers or defame a competitor through unfounded claims, or to benefit from a competitor's fame and reputation, in order to surpass that competitor in the relevant business.

Similarly, the provision allowing the use of competitors' trademarks, logos and distinctive designs or signs in advertisements could have been controversial or raised legal concerns in terms of trademark laws as well. Pursuant to the Law No. 6769 on Industrial Property, a trademark holder is entitled to request the cessation of the use of its registered trademark. In light of the fact that the new provision would have allowed the use of competitors' trademarks in comparative advertisements, it was likely that disputes arising from this provision would have been closely related to and touched on the rules concerning trademarks.

That being said, we observe that lifting the ban on comparative advertising activities in the Turkish jurisdiction could have been a significant step and development for enhancing the competition between businesses in Turkey in favor of consumers, since it may have allowed/enabled transparent comparisons between commercial products, which would have been beneficial for consumers. Such comparative advertisements could have even impacted consumers' consumption habits, preferences and choices. Turkey's comparative advertising adventure has come to a premature end, without even being practically tested in the real world.

E-Money Law

Amendment to the E-Money and Payment Services Regulation

The Regulation on Payment Services and Issuance of Electronic Money and Payment Institutions and Electronic Money Institutions ("**Regulation**") based on the Law on Payment and Securities Settlement Systems, Payment Services and Electronic Fund Institutions No. 6493 ("**Law**") was amended with the Regulation Amending the Regulation on Payment Services and Issuance of Electronic Money and Payment Institutions and Electronic Money Institutions ("**New Regulation**"), which was published in the Official Gazette on October 12, 2018. The amendments entered into force on the same day.

In a nutshell, the significant amendments introduced by the New Regulation are as follows:

- The Turkish Post Office (*i.e.*, "Posta ve Telgraf Teşkilatı Anonim Şirketi") has been designated as an electronic money issuing institution and as a payment services provider.
- Institutions providing intermediary services for invoice payments can now outsource these services to a bank in order to be exempt from the obligation to enter into contracts for intermediary services for invoice payments, without the requirement for an additional authorization to be granted to the banks through a contract.

- With Article 8/5 of the New Regulation, the Banking Regulation and Supervisory Agency (“**Agency**”) has been imposed with the obligation to conduct an examination with regard to the management structure, personnel, technical equipment and order of registry and documents of the payment and electronic money institutions, subsequent to the evaluation of the information and documents following license applications mandatory for providing payment services or issuing electronic money.
- Institutions can conduct the activities regarding the payment services set forth under Article 12(1) of the Law, as long as such activities are limited to the ones specified in the license applications. Obtaining the permission of the Banking Regulation and Supervisory Board (“**Board**”) has become compulsory regarding the activities contemplated for providing payment services, which are not shown on the license application but regulated under Article 12/1 of the Law.
- Two additional services have been added to the operational domain of payment institutions: (i) subsidiary services that supplement the payment services, such as card reservations, processing card information, and preventing misconduct and fraud in order to deliver payment services and to ensure that the activities of the payment service providers are safe and secure, and (ii) educational and advisory services regarding electronic money issuance or payment services in relation to rendering payment services.
- Two additional services have been added to the operational domain of electronic money institutions: (i) subsidiary services that supplement the issuance of electronic money or payment services, such as card reservations, processing card information, and preventing misconduct and fraud in order to deliver payment services and to ensure that the activities of the payment service providers are safe and secure, and (ii) educational and advisory services regarding electronic money issuance or payment services in relation to (i) exporting of electronic money, or (ii) rendering payment services.
- The Board is now entitled and authorized to introduce a requirement for the relevant institutions to maintain additional equity in order to continue their businesses.
- In cases where an institution conducts its business through a representative, the representative has been prohibited from providing payment services through sub-representatives using the titles of “agency,” “distributor,” or other similar names.
- The Agency has now become authorized to grant additional time regarding the submission of the independent audit report of the year-end statements of such institutions, in cases where the Agency finds it necessary and appropriate, upon the institution’s request.
- Funds that are received via a “point of service” (as defined under the “Communiqué on the Management and Auditing of Information Systems of Payment Institutions and Electronic Money Institutions”) will now be transferred to the electronic money reservation account when the funds are transferred to the electronic money institution’s account or when they are otherwise made ready for the use of the electronic money institution. The transfer period of these funds to the electronic money reservation account cannot exceed five (5) business days from the date of issuance of the electronic money.
- As per Article 28/2 of the Regulation, institutions providing intermediary services for invoice payments may keep a guarantee as a lease certificate, instead of a domestic government bond, at the Central Bank of Turkey. Moreover, in case an institution keeps the guarantee as a lease certificate or as a domestic government bond at the Central Bank of Turkey, and the guarantee loses at least 10% of its market value, the institution is obliged to complete

(*i.e.*, supplement) the guarantee to 1 million Turkish Liras within ten (10) business days and also required to notify this to the Agency.

Finally, the branches or agencies of institutional representatives (that provide payment services) were required to sign a written contract with the relevant institution by December 31, 2018.

Real Estate Law

Regulation on the Determination of Investment Zones

The Regulation on the Determination of Investment Zones ("**Regulation**") was published by the Ministry of Industry and Commerce ("**Ministry**") in the Official Gazette on December 1, 2018, and entered into force on the date of its publication.

The scope and purpose of the Regulation is to determine available areas for organized industrial sites, industrial estates, technology development zones, and free trade zones, in order to expedite their establishment process, and to determine the procedures and principles for building the infrastructures of those areas that are considered to be suitable for this purpose. The Regulation sets forth which relevant bodies of the Ministry will designate the suitable areas and also specifies how they will carry out their duties.

The Regulation has been drafted in accordance with Articles 385 and 390 of the Decree on the Presidential Organization, which was published in the Official Gazette on July 10, 2018 ("**Decree**"), and which regulates the duties and authorities of the Ministry and its directorates. The Minister of Industry and Commerce has stated that, as a result of the Regulation, the planned industrial zones will be completed more rapidly, land procurement costs will be reduced, and the Treasury lands can be evaluated without necessitating expropriation studies.

Article 4 of the Regulation designates the procedure for the preliminary determination of the suitable investment areas. According to Article 4, the Ministry will first carry out a preliminary determination of the investment zones by identifying the non-forest lands and/or unregistered areas belonging to the Treasury, and by identifying areas that are suitable for the environment and land-use plans. Furthermore, private properties can also be incorporated into these areas, if there is a technical requirement to do so in terms of land, planning, and infrastructure integrity.

The Regulation further stipulates and sets forth the procedure for the "location preference survey." As per Article 5 of the Regulation, the location preference survey of the explored areas, which is the second step after the preliminary determination, will be conducted by the Ministry at the relevant sites, and the Ministry will be entitled to obtain any kind of information, documents and maps from the relevant authorities which are necessary for conducting the location preference survey. Article 6 of the Regulation enumerates the various sections of the location preference survey, which include the following: (i) introduction, (ii) threshold analysis, (iii) identification of areas and processing of boundaries, (iv) features of the properties, (v) outcome, (vi) sources, and (vii) annexes. Moreover, the Regulation specifies the content of each individual section (Article 7 through Article 11).

The evaluation of the location preference survey report for the suitable investment areas, as well as the finalization and determination of their status, is regulated under the third section of the Regulation. If the location preference survey report submitted to the General Directorate of the Ministry ("**General Directorate**") is approved, then the "threshold analysis map" and the numerical data concerning the site in question will be prepared by the General Directorate and sent to the institutions and organizations included in the annexes (*e.g.*, the Ministry of Commerce, the Ministry of Culture and Tourism, the Ministry of Interior Affairs the Ministry of Defense, etc.) in order to obtain their opinions on the matter. If the relevant institutions and organizations do not submit their opinions within thirty (30) days, except for the areas protected by legislation, they will be deemed to have given an affirmative (*i.e.*, favorable) opinion and assented to the suitability of the site in question.

Article 13 of the Regulation governs the finalization of the site of the investment zone. If affirmative or conditionally affirmative opinions are obtained from all the relevant institutions and organizations, the preparation and approval of the "observational geological survey report," as determined by the Ministry, and the registration of the non-registered areas, if any, shall be carried out by the relevant governorship. In order to ensure that the investment areas can be used in the appropriate manner, an annotation will be added by the governor to the applicable land registry, stating that sales, transfers and assignments to third parties cannot be processed, unless the infrastructure, structure or facility are constructed in accordance with the allocation or sales conditions. The annotation on the land registry will be added after the determination of the status of the investment zone, in case the land is owned by an individual.

Article 14 of the Regulation relates to the determination of the status of investment zones. According to Article 14, the works and operations regarding the infrastructure of the organized industrial sites, industrial estates and technology development zones, whose status is determined by the Ministry, will be carried out under the relevant legislation following their establishment. Article 14 also states that the resettlement location preference process will not be carried out if the use of the investment areas is deemed suitable for the applications submitted before the Ministry in the electronic environment for the establishment of organized industrial sites, industrial estates, technology development zones and free trade zones.

Applications for the establishment of a free trade zone will be submitted to the Ministry of Trade. If the use of the investment areas determined by the Regulation as a free trade zone is approved by the Ministry of Trade, then the location and boundaries of the free trade zones to be established at these sites will be determined according to the Law No. 3218 on Free Trade Zones.

We observe that the Turkish government now expects to perform the procedure for legally identifying the land on which investment areas will be established within a month. It is also anticipated that the Regulation will minimize the costs associated with the infrastructure work that the investors will carry out, and thus, the Regulation is expected to increase the economic benefits of these investments.

Anti-Dumping Law

Investigations Concluded Without Applying Any Anti-Dumping Duties: Precedents of the Ministry of Trade

The number of cases in which the Ministry of Trade ("**Ministry**") has closed an investigation without applying any anti-dumping duties is considerably low, considering that there have only been six (6) such cases within the past five (5) years. Taking a closer look at the Ministry's investigations, it can be quickly deduced that most of these cases (namely, four out of six) did not include any anti-dumping duties due to the applicants' withdrawal of their applications during the relevant investigation terms. The remaining two cases, however, actually relate to investigations in which the Ministry has made evaluations and completed its reviews, and ultimately decided not to impose any anti-dumping duties. One of these decisions dates back to 2016, while the other one is fairly recent, dating 2018.

Through the Communiqué No. 2017/11 dated May 14, 2017, the Ministry had initiated an investigation, upon receiving the application of Cam Elyaf Sanayii A.Ş. ("**Cam Elyaf**"), Turkey's sole domestic manufacturer of glass fiber, in order to determine whether the prices of glass fiber reinforced materials classified as "*glass reinforced and trimmed yarns shorter than 50 millimeters*" under the CN Code 7019.11.00.00.00, "*cords*" under the CN Code 7019.12.00.00.00, "*of filaments*" under the CN Code 7019.19.10.00.00, "*of discontinuous fibers*" under the CN Code 7019.19.90.00.00, "*reinforcement layers*" under the CN Code 7019.31.00.00.00, "*of weavable fibers (except pipe and tube isolation molds and covers)*" under the CN Code 7019.90.00.10.00, and "*glass fiber mat*" under the CN Code 7019.90.00.30.00 originating from Egypt had been subject to dumping activities. The Ministry conducted its research and reached its assessment based on the data available within the period of January 1, 2014 through to December 31, 2016. The Briefing Report, which was published together with the Communiqué No. 2018/31, dated September 26, 2018 ("**Communiqué**"), indicated that (i) Cam Elyaf had fully cooperated with the investigation and provided all the necessary documents, (ii) six (6) of the exporter companies had completed the question forms, and (iii) Jushi Egypt for Fiberglass Industry S.A.E, which was identified as the company that imports the products subject to the investigation into Turkey, had also duly completed the questionnaire, and had fully cooperated with the Ministry over the course of the investigation.

Through the Communiqué, the Ministry announced that it had concluded the investigation by deciding not to impose any anti-dumping duties on Egypt. According to the Briefing Report, during the course of the investigation, the Ministry had examined the economic data and indicators of Cam Elyaf between 2014 and 2016, and it had concluded that certain economic indicators of the company, such as its capacity utilization rate, unit sale profits (both domestically and overseas), efficiency, stocks, stock circulation rate, and product cash flow, had improved in general, along with its rising level of profitability. The Briefing Report also stated that the company had been horizontally advancing in terms of various indicators, such as domestic sales quantity, industrial cost and commercial cost, and even experiencing some deterioration in certain economic indicators, such as manufacturing, export quantity, employment, and capacity. However, the Ministry also expressed the view that the favorable economic situation of Cam Elyaf, resulting from indexes of both domestic and overseas unit profitability, also had an effect on (and was reflected in) the company's overall financial structure, ensuring that its cash flow and assets remained healthy and steadily progressed. Accordingly, the Ministry decided to close the investigation without imposing any anti-dumping duties on the imports of the products subject to the investigation originating from Egypt, as the totality of the indicators, which were observed to be advancing horizontally and reflecting an overall positive economic state, did not indicate that Cam Elyaf had faced any material damages.

The other investigation that concluded without the imposition of any anti-dumping duties, which dates back to 2016, was related to the imports of biaxially oriented polypropylene films ("***BOPP Films***"), which is classified as "*others*" under the CN Code 3920.20.21.00.19, originating from the People's Republic of China, Egypt, India and Saudi Arabia. This investigation was launched upon the application of two domestic manufacturers in Turkey, namely "Süper Film Ambalaj Sanayi ve Ticaret A.Ş." and "Polinas Plastik Sanayi ve Ticaret A.Ş." Similar to the glass fiber reinforced materials case, the Ministry reasoned that the related imports had not caused any deterioration for the domestic manufacturers and that, conversely, the domestic manufacturers had actually experienced some improvement with regard to their basic economic indicators. Therefore, the Ministry determined that the results of its investigation did not indicate any material damage within the domestic industry, and thus decided to close the investigation without applying any anti-dumping duties.

White Collar Irregularities

2018 FCPA Enforcement Actions and Highlights

Overall, 2018 was a more active year in terms of Foreign Corrupt Practices Act (**"FCPA"**) enforcement actions compared to 2017. In 2018, the Department of Justice (**"DOJ"**) took a total of 40 enforcement actions,[15] and the Securities and Exchange Commission[16] (**"SEC"**) took a total of 14 enforcement actions.

According to the FCPA Blog's "2018 FCPA Enforcement Index," 16 companies paid a total of $2.89 billion to resolve FCPA cases in 2018, including resolutions with the DOJ and the SEC, as well as DOJ declinations with disgorgement.[17] As anticipated over the past few years, the Yates Memo might have arguably shown its effect, as 32 out of the 40 enforcement actions taken by the DOJ concerned real persons, most of which were related to multiple bribery schemes involving PDVSA, a Venezuelan state-owned oil and natural gas company. In terms of the sectoral concentration of FCPA enforcement actions in 2018, we observe that a wide array of sectors was affected by these actions, including the investment banking, petroleum and technology sectors.

[15] See *https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2018*
[16] See *https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml*
[17] See *http://www.fcpablog.com/blog/2019/1/2/2018-fcpa-enforcement-index.html*

DOJ Declination Decisions

In April 2018, the DOJ closed its investigation with regard to the Insurance Corporation of Barbados Limited (**"ICBL"**). According to the DOJ, ICBL had paid approximately $36,000 in bribes to Donville Innis, a member of the Parliament of Barbados and the country's Minister of Industry, International Business, Commerce and Small Business Development, in exchange for government contracts worth $93,000 in profits. Under the terms of the declination pursuant to the DOJ's Corporate Enforcement Policy, ICBL paid the DOJ about $93,900 in disgorged profits.

In April 2018, the DOJ closed its investigation with regard to Dun & Bradstreet, which is a company that provides commercial data and analytics services for businesses. According to the U.S. government, two Dun & Bradstreet subsidiaries in China had made bribery payments to Chinese government officials. In its resolution with the SEC, Dun & Bradstreet agreed to pay over $9 million in disgorgement. According to the DOJ, the declination decision was based on, among other factors, (i) Dun & Bradstreet's identification of the misconduct, (ii) its prompt and voluntary self-disclosure, (iii) thorough investigation, (iv) full cooperation, and (v) the fact that it had reached an agreement with the SEC to disgorge profits, despite the acts of bribery committed by the employees of Dun & Bradstreet's subsidiaries in China.

In August 2018, the DOJ closed its investigation with regard to Guralp Systems Limited (**"GSL"**), an engineering company based in the U.K., even though there was evidence of violations of the FCPA arising from the payment made by GSL to Heon-Cheol Chi, the director of the Earthquake Research Center at the Korea Institute of Geoscience and Mineral Resources. According to the DOJ, several reasons had led to the declination decision, such as GSL's (i) voluntary disclosure of the misconduct, (ii) significant remedial efforts, and (iii) being the subject of an ongoing parallel investigation by the U.K.'s Serious Fraud Office for violations of law relating to the same conduct and its commitment to accepting responsibility for that conduct with the Serious Fraud Office.

DOJ Enforcement Actions

In March 2018, Transport Logistics International Inc. ("**TLI**"), a company providing services in the field of transportation of nuclear materials, agreed to resolve criminal charges in connection with a conspiracy involving the bribery of an official at a subsidiary of Russia's State Atomic Energy Corporation for awarding uranium transportation contracts, and also agreed to pay a $2 million criminal penalty. TLI entered into a three-year deferred prosecution agreement ("**DPA**") with the DOJ. As per the DPA, the $2 million penalty amount is based on TLI's financial inability to pay the penalty set forth under the U.S. Sentencing Guidelines. TLI also committed to cooperate fully with the ongoing investigation, and to continue to implement a "compliance and ethics" program designed to prevent and detect violations of the FCPA and other anti-corruption laws throughout its operations.

In March 2018, Eberhard Reichert, a former Siemens AG executive who had worked for the company between 1964 and 2001, pleaded guilty and entered into a plea deal with the DOJ, for conspiring to violate the FCPA's anti-bribery, internal controls, and books and records provisions. The charges in this case involved making bribery payments to officials in ten countries, including Argentine government officials, for $1 billion worth of contracts for creating and producing national identity cards, and using shell companies controlled by intermediaries to disguise and launder the funds.

In April 2018, Panasonic Avionics Corporation ("**Panasonic Avionics**"), a subsidiary of the multinational electronics company, Panasonic Corporation ("**Panasonic**"), agreed to pay a criminal penalty of $137,400,000 to resolve charges arising out of a scheme to retain consultants of its U.S. in-flight entertainment unit in the Middle East and Asia for improper purposes, and to conceal payments to third-party sales agents between 2007 and 2016, in violation of the accounting provisions of the FCPA. According to the investigated party's admissions and court documents, Panasonic Avionics had knowingly and willfully caused Panasonic to falsify its books and records with respect to Panasonic Avionics' retention of consultants for improper purposes. Panasonic Avionics also entered into a DPA with the DOJ, which requires the company to be supervised by an independent monitor for at least two (2) years.

In June 2018, Société Générale S.A. ("**Société Générale**"), a global financial services company based in Paris, France, and its subsidiary, SGA Société Générale Acceptance N.V., agreed to pay a combined total penalty of more than $860 million to settle with criminal authorities in the United States and in France, in order to resolve charges arising out of bribery payments to government officials in Libya. Société Générale entered into a DPA with the DOJ and it also reached a settlement with the Parquet National Financier ("**PNF**") in Paris. The United States will credit $292,776,444 that Société Générale will pay to the PNF under its agreement, equal to 50% of the total criminal penalty payable to the United States. According to the DOJ, this is the first coordinated resolution with French authorities in a foreign bribery case.[18]

In August 2018, Legg Mason Inc. ("**Legg Mason**"), an investment management firm based in Maryland, entered into a non-prosecution agreement ("**NPA**") with the DOJ by agreeing to pay $64.2 million to resolve charges relating to violations of the FCPA in

[18] See *https://www.justice.gov/opa/pr/soci-t-g-n-rale-sa-agrees-pay-860-million-criminal-penalties-bribing-gaddafi-era-libyan*

Libya, as well as a civil penalty of $34 million to the SEC, in order to disgorge $27.6 million of ill-gotten gains and pay $6.9 million in prejudgment interest to settle the SEC's case. According to the DOJ and the SEC, Permal Group Inc., a former subsidiary of Legg Mason, partnered with a French financial services company to solicit investment business from Libyan state-owned financial institutions and engaged in a scheme to pay bribes to Libyan government officials through a Libyan middleman in order to secure investments. As a result of the bribery scheme, Legg Mason was awarded investments by the Libyan financial institutions, in the amount of $1 billion.

In September 2018, Petróleo Brasileiro S.A. ("**Petrobras**"), a Brazilian state-owned and state-controlled energy company, entered into an NPA with the DOJ, and also reached an agreement with the Brazilian authorities, agreeing to pay a combined total of $853.2 million in penalties to resolve charges relating to violations of the FCPA. To resolve the SEC investigation, Petrobras agreed to pay an additional $933 million in profit disgorgement and prejudgment interest. According to the DOJ and the SEC, Petrobras executives, who consisted mostly of company board members, facilitated bid-rigging and bribery schemes by enabling their contractors to inflate the contracts for their infrastructure projects, where the contractors made facilitating payments to the Brazilian politicians and political parties responsible for appointing the Petrobras executives to their positions in exchange for the inflated contracts.

SEC Enforcement Actions

In March 2018, Kinross Gold Corporation ("**Kinross Gold**"), a Canada-based gold and silver mining company, paid a civil penalty of $950,000 to settle the SEC's charges for violating the FCPA's books and records and internal accounting controls provisions, arising from the company's repeated failures to implement adequate accounting controls for two African subsidiaries. According to the SEC, Kinross had acquired two African mining companies in 2010, operating in Mauritania and Ghana, which lacked the requisite anti-corruption compliance programs and internal accounting controls. Kinross Gold was able to implement adequate controls within three (3) years; however, the company failed to subsequently maintain these controls. For example, Kinross Gold awarded a logistics contract to a company preferred by Mauritanian government officials. Furthermore, it paid vendors and consultants without ensuring that the payments were consistent with its anti-bribery compliance policies.

In March 2018, Elbit Imaging Ltd. ("**Elbit**"), an Israel-based company operating in the real estate, medical imaging, hotels, shopping malls, and retail sectors, agreed to pay a $500,000 penalty to the SEC to resolve charges relating to violations of the FCPA's books and records and internal accounting controls provisions. Elbit and its indirect subsidiary, Plaza Centers N.V., made large amounts of payments to third-party offshore consultants and a sales agent, according to the SEC. These payments were made for services related to a real-estate development project in Romania and the sale of a large portfolio of real-estate assets in the U.S., without knowing if the contracted services were actually provided. The companies also failed to correctly record these payments in their books and records, in a manner that fairly and accurately reflected their true nature.

In July 2018, Beam Suntory Inc. ("**Beam**"), a subsidiary of Suntory Beverage & Food Ltd., based in Chicago, which is a subsidiary of Suntory Holdings of Osaka, Japan, paid the SEC $8.2 million to resolve charges relating to violations of the FCPA, stemming from the improper payments made by its Indian subsidiary to government officials in India. According to the SEC, Beam's Indian subsidiary had used third-party sales promoters and distributors to make illicit payments to government employees between 2006 and 2012, in order to (i) increase sales orders, (ii) process license and label registrations, and (iii) facilitate the distribution of Beam's distilled spirit products.

In September 2018, one of the biggest pharmaceutical companies in the world, Sanofi S.A. ("**Sanofi**"), based in Paris, France, agreed to pay $25.2 million (comprising a civil penalty of $5 million, $17.5 million in disgorgement payments, and $2.7 million in prejudgment interest) to resolve charges relating to violations of the FCPA's books and records and internal accounting controls provisions, as a result of its subsidiaries in Kazakhstan and the Middle East bribing officials to win business contracts. According to the SEC, the bribery schemes spanned multiple countries and involved illicit payments to government procurement officials in Jordan, Lebanon, Syria, Bahrain, Kuwait, Qatar, Yemen, Oman, and the United Arab Emirates, in order to be awarded tenders and to increase prescriptions of its products. In March 2018, the DOJ had closed its four-year FCPA investigation without deciding to bring an enforcement action.

In September 2018, United Technologies Corporation ("**United Technologies**"), a Connecticut-based company providing high-technology products and services to the building systems and aerospace industries, settled charges with the SEC that it had violated the FCPA by making illicit payments in its elevator and aircraft engine businesses. United Technologies agreed to pay $13.9 million to resolve charges that its actions had violated the FCPA. According to the SEC, its subsidiary, Otis Elevator Co., had made payments in bribes to Azerbaijani officials to facilitate elevator equipment sales in Baku, and had also paid a Chinese sales agent in order to obtain confidential information from a Chinese official to help win engine sales contracts from a state-owned Chinese airline.

In September 2018, Stryker Corporation, a company based in Michigan operating in the medical device sector, agreed to settle with the SEC and pay a $7.8 million penalty to resolve charges relating to the FCPA's books and records and internal accounting controls provisions. According to the SEC, Stryker's internal accounting controls were not sufficient to detect the risk of improper payments in sales of Stryker products in India, China, and Kuwait, and Stryker's Indian subsidiary had failed to maintain complete and accurate books and records. Stryker had also been charged by the SEC back in October 2013, with respect to bribery payments made by its subsidiaries in five different countries to doctors, health care professionals, and other government-employed officials in order to obtain new business or retain existing business relationships.

On November 19, 2018, Vantage Drilling Company ("**Vantage**") agreed to pay $5 million to the SEC in disgorgement for violations of the FCPA's internal accounting controls provisions, regarding its failure to properly implement and maintain a system of internal accounting controls related to its use of third-party marketing agents. According to the SEC, Vantage lacked sufficient internal accounting controls in relation to the heightened risk of engaging in business operations in the oil and gas industry in Brazil.

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