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LEGAL INSIGHTS QUARTERLY

June 2019 – August 2019

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Preface to the June 2019 Issue

The Legal Insights Quarterly June 2019 issue sheds light on notable developments, cases and themes within twelve different frameworks. Our intention is to inform the reader on the most contemporary legal questions of this quarter.

The June 2019 issue introduces the Healthcare Law section, which will review amendments of the Ministry of Health to the Guidelines on Cosmetic Claims which have been made following feedback received from cosmetic companies.

The White Collar Irregularities section discusses the most recent Corruption Index of Transparency International and touches upon countries such as Turkey, United Kingdom and Denmark.

The Internet Law section summarizes a recent case of the Constitutional Court regarding freedom of speech. The case, which was widely covered by local media, is deemed a significant precedent in drawing the lines of online content liability, public discussion and expression of religious beliefs.

The Employment Law section elaborates on the renewed severance compensation system and the possible implications of the new system from the perspective of both employers and employees.

Moreover, the Litigation section examines Supreme Court jurisprudence for the concept of a "prudent merchant" and lays down beneficial points as to what that entails in the context of rental agreements.

Finally, the Competition Law section acquaints readers with four significant cases from the past quarter which address issues such as resale price maintenance and cartel behavior.

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

June 2019

Corporate Law
Turkey: Pre-Emptive Rights

I. Introduction
Former Turkish Commercial Code numbered 6762 ("**Former TCC**") as well as the current Turkish Commercial Code numbered 6102 ("**TCC**") have granted pre-emptive rights to the shareholders of joint stock companies ("**JSC**") and limited liability companies ("**LLC**") when there is a capital increase through external resources. Thus, shareholders are able to procure newly-created shares in proportion to the shares they currently own in the company.

Even though the Former TCC also contained provisions which allowed shareholders to use their pre-emptive rights, the TCC has more comprehensive provisions with clear limitations on such rights which aim to protect the shareholding ratio of the shareholders.

II. Pre-emptive rights in JSCs
In order to use pre-emptive rights, there has to be a general assembly resolution regarding capital increase.

Restrictions on the shareholders' right to acquire newly-created shares are regulated with Article 461 of the TCC. Even though the article itself does not contain a provision that specifically prohibits a change in pre-emptive rights with the articles of association of a company, preamble of Article 461/2 expressly prohibits restriction and removal of pre-emptive rights in such a way. On the other hand, the same article allows JSCs to restrict or remove pre-emptive rights provided that they abide by three main rules set forth under Article 461 paragraph 2:

(i) *Just cause*. There must be just cause for restricting/removing pre-emptive rights. The term "*just cause*" is not defined in Article 461 however both the article and the preamble have given several examples which can be listed as follows: public offering, business acquisition, acquisition of subsidiaries, employees' participation in the company, financial interests of the company, and purchase of technology.
(ii) *Affirmative vote of at least sixty percent of the share capital in the general assembly meeting*. Unlike Article 421/1 which requires an affirmative vote of at least fifty percent of the share capital in the general assembly meetings for capital increases, this article requires a heavier quorum. Such difference in quorum further emphasizes legislative intent to preserve shareholders' share ratio in the company.
(iii) *No person will unjustly gain benefit or incur losses as a result of the restriction or removal*. This rule emphasizes the principle of equal treatment and limitation of majority power, alongside the intent to prevent dilution of shares.

Article 461/3 also states that there has to be a resolution of the board of directors defining the principles of the right to obtain new shares and the board must grant at least 15 (fifteen) days to the shareholders to decide whether they will use their pre-emptive right. The resolution is next registered and published in the Trade Registry Gazette and displayed on the company's website. Furthermore, shareholders are allowed to transfer their pre-emptive right to others as per the fourth paragraph of Article 461.

III. Pre-emptive rights in LLCs
Although the Former TCC defined pre-emptive rights in LLCs, it did not contain any provision regarding how to enforce such rights. Therefore, with the same incentives explained above, Article 591 was included in the TCC.

According to Article 591, every shareholder has the right to participate in capital increases, in proportion to their shares. Similar to the provisions regarding JSCs, pre-emptive rights of the shareholders in LLCs can only be

restricted or removed under the circumstances stated below:

(i) *Just cause*. The term "*just cause*" is also not defined for LLCs. However, the examples stated in the second paragraph of Article 591 are similar to the ones listed for JSCs. Such examples can be listed as: business acquisition, acquisition of subsidiaries, and employees' participation in the company.
(ii) *Meeting quorum of at least two-thirds of the share capital and simple majority for decision quorum in the general assembly meeting*. Article 591 refers to Article 621 which regulates special resolutions that require heavier quorum. Such quorum is consistent with the aim to preserve shareholders' share ratio in the company. No person will unjustly gain, benefit or incur losses as a result of the restriction or removal. The aim of this rule is to prevent structural changes within the company that would harm certain shareholders of the LLC and dilute their shares.

IV. Conclusion
Contrary to the Former TCC, the TCC has extended the scope of regulations regarding pre-emptive rights and provided a framework to restrict shareholders' right to obtain additional shares in the company, thus creating an exception that requires stricter conditions.

Banking and Finance Law
Utilization of Non-Cash Loans in Turkey

I. General Overview
For the purposes of protecting the value of the Turkish currency, Turkish lawmakers have introduced various rules and restrictions under the Decree No. 32 on the Protection of the Value of the Turkish Currency ("**Decree No. 32**").

According to foreign exchange laws in Turkey, individuals residing in Turkey are not permitted to obtain foreign exchange cash loans from banks and financial institutions in Turkey or abroad. As a general rule introduced by the Decree No.32, legal entities residing in Turkey are required to have foreign exchange revenue in order to obtain foreign exchange cash loans. However, certain limitations and exceptions to this general rule have been introduced by the Decree No. 32.

The Central Bank of the Republic of Turkey ("**Central Bank**") has also adopted the Capital Movements Circular ("**Circular**"), which came into effect as of May 2, 2018. This Circular determines the rules and principles relating to utilization of foreign exchange cash and non-cash loans from banks and other financial institutions.

Utilization of non-cash loans is subject to a divergent regime introduced by the Circular. Our aim is to reveal the rules and principles regarding utilization of non-cash loans as per the Circular.

II. Utilization of Non-Cash Loans
Pursuant to the Circular, Turkish residents may freely utilize non-cash loans, guarantee and security from abroad. For Turkish resident beneficiaries, non-cash loans may be utilized without banks. However, if non-cash loans are converted to cash loans, they become subject to the restrictions stipulated under the Circular.

Turkish banks and financial institutions are allowed to provide foreign exchange or foreign exchange denominated letters of guarantee, guarantee and security in the following cases:

- Non-cash loans to Turkish residents for foreign resident beneficiaries,
- Non-cash loans to foreign residents for foreign resident beneficiaries,
- Non-cash loans to foreign residents for Turkish resident beneficiaries,
- Non-cash loans to Turkish residents for Turkish resident beneficiaries on the condition that such loans relate to an international tender launched in Turkey,

- Stand-by letter of credit for Turkish resident beneficiaries for sales and deliveries considered as export and foreign exchange earning services and activities, and
- Non-cash loans to Turkish resident on the condition that such loans are given for commercial and professional purposes.

Save for the abovementioned cases, Turkish banks cannot provide bill guarantee for foreign exchange or foreign exchange denominated promissory note whose creditor and debtor are Turkish residents. On the other hand, Turkish banks are allowed to provide foreign exchange denominated letter of guarantee to Turkish residents for Turkish resident beneficiaries.

Capital Markets Law

Public Companies: Significant Transactions Not Leading to Appraisal Right

The Communiqué on Common Principles Regarding Significant Transactions and Appraisal Right ("**Communiqué No. II-23.1**") introduced by the Capital Markets Board of Turkey ("**CMB**") defines a number of significant transactions and significance criteria for public companies, stipulating mandatory principles and procedures that public companies must comply with when performing any transaction that bears the significant transaction characteristics and grants appraisal right to the shareholders in case of occurrence of a significant transaction.

In light of the above, simply put, a transaction which is regarded as a significant transaction must be approved at the shareholders level in a general assembly meeting. In such a case, the shareholders, who attend the general assembly meeting and vote against for the proposed transaction and had their against votes recorded in the meeting minutes, are able to exercise the appraisal right separately to sell their shares to the company and leave the partnership, after certain procedures. Moreover, the Communiqué No. II-23.1 has exempted a number of significant transactions from the foregoing and generally applied rule. In other words, the Communiqué No. II-23.1 has exceptionally listed some significant transactions that do not lead to appraisal right for the shareholders. Furthermore, in the event of such a significant transaction, the transaction may be approved by the board of directors rather than the general assembly unless the nature of the transaction itself requires adopting a general assembly resolution. This article, will handle exceptional transactions with significant characteristics.

As per Article 12 of the Communiqué No. II-23.1, the significant transactions not leading to appraisal right for the shareholders are as follows:

- Any mandatory transaction of a public company in accordance with any other applicable legislation (*i.e.* merger, demerger required by Banking Regulation and Supervision Agency ("**BRSA**") pursuant to the Banking Law No. 5411);

- Any transaction of a public company whose management control is held by a public institution;

- Removal of the privileges granted to the shareholders free of charge or limitation of those in terms of matter and scope;

- Changing or termination of investment trust status and accordingly changing the privileges;

- Any transaction of a public company which requires mandatory takeover bids or results in voluntarily takeover bids upon approval of the CMB;

- Any demerger transaction of a public company whose shareholding structure is kept as is upon the demerger and incorporation of a new company as part of the transaction;

- Any merger or demerger transaction of a public company realized as per the simplified procedure;

- Any transaction of a public company conducted in accordance with the decision of a judicial authority as per the Enforcement and Bankruptcy Code No. 2004 or for collection of any public receivable;

- Any transaction of a public company where the target asset is taken back immediately by means of financial leasing,

- Any transaction of a public company having the lease certificate characteristic or related to an asset transfer to issue asset-backed, mortgage-backed or warranted securities;

- Lease of the assets or establishment of a right in rem on those assets which are included in a real estate investment trust's portfolio;

- Establishment of a right in rem on behalf of a public company and in favour of the entities which are subject to full consolidation of the public company;

- Any asset transfer transaction of a public company whose balance sheet affirms that one-half (1/2) of its share capital remains uncovered, provided that the target asset does not have economic value, a special purpose independent auditor report confirms that the asset transfer will recover the share capital loss and the CMB approves the transaction;

- Any merger or winding up transaction of a special purpose acquisition company;

- Any asset transfer transaction of a public company to non-related parties, provided that at least 90% of the fund to be gained by the transaction would be used for repayment of the cash bank loans and/or debts arising from the debt instruments already issued;

From a capital markets law perspective, the lawmaker aims to protect the shareholders as much as possible. In this regard, appraisal right is one of the CMB's protective measures in favour of the shareholders. However, as outlined above, in some instances, the CMB considers the interests of public companies more important and does not find characteristics of the foregoing exceptional significant transactions sufficient to exercise the appraisal right.

Competition Law / Antitrust Law

The Turkish Competition Board Fines Sony Turkey for Resale Price Maintenance on Online Sales Channels

The Turkish Competition Board ("**Board**") has published its reasoned decision[1] on the investigation initiated against Sony Eurasia Pazarlama A.Ş. ("**Sony Turkey**") concerning allegations that Sony Turkey determined online resale prices of its distributors. While the name of the complainant is not disclosed, the allegations indicate that the complainant is a former distributor of Sony Turkey. The Board concluded that Sony Turkey's alleged behaviour indeed violated Article 4 of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**") whereas the rapporteurs and the President of the Board (through its dissenting opinion) opined to the contrary.

Sony Turkey is a Turkish subsidiary of Sony Corporation and is active in consumer electronics. As identified by the Board, consumer electronics is an umbrella term to define many electronic products that are commonly used by individuals including TVs, audio devices, video cameras, DVDs, game consoles and accessories as well as washing machines, refrigerators, microwaves, etc. As part of its general explanations on the consumer electronics sector, the Board

[1] The Board's decision dated November 22, 2018, and numbered 18-44/703-345.

identified five main distribution channels, namely: (i) fast consumed goods retailers (the mass channel), (ii) technology super stores, (iii) traditional resellers, (iv) specialised computer stores and (v) telecommunication stores of Turkcell, Vodafone and Türk Telekom. The Board emphasized the fast-changing consumer behaviour in the industry and pointed out a trend towards technology super stores from traditional resellers as well as an increase in online sales. While the reasoned decision acknowledged that the Board's previous practice is to define narrower markets for the overall consumer electronic sector based on consumer use such as the "refrigerator market", it refrained from a conclusive market definition since the assessment of the facts of the case will not change under any market definition.

The Board's substantive assessment depends heavily on the documents obtained during onsite inspections at Sony Turkey and the premises of some of its major distributors. The case material consisted of various internal and external e-mail correspondences, the majority of which are related to the distributors' online price levels on platforms, such as n11.com and hepsiburada.com, who offer products which are below Sony Turkey's recommended prices. Some of the correspondences indicated that retailers who did not follow the recommended prices concerning their online sales would be identified and their incentives would not be paid. According to the reasoned decision, many of the e-mail correspondences obtained by the case handlers indicated that online price levels were monitored by sales teams and managers. In addition, some of the internal e-mail correspondences suggested Sony Turkey were warning distributors about low price levels, especially on online sales platforms. Last but not least, the decision indicated that few of the external e-mail correspondences between Sony Turkey sales team and distributors contained warnings made to distributors to *correct* their prices. On the other hand, the decision provides that the distributors' complaints on market prices were not always responded by Sony Turkey and, in fact, there were a few instances where Sony Turkey's sales team explicitly referred to the Law No. 4054 and underlined that it would be illegal for Sony Turkey to interfere with resale prices of any of its resellers. Moreover, one of the e-mail messages sent by a company executive to the sales team indicated that the sales team had trainings on the implementation/enforcement of Law No. 4054. This point is also noted in the reasoned decision, yet the Board did not take this into account while determining the administrative monetary fine.

As a result of its assessment, the Board decided that Sony Turkey has (i) monitored the price levels in online platforms, (ii) expected compliance with its recommended resale prices, and (iii) has the ability to threat the distributors with withholding incentive payments in case of non-compliance (*still, there was no quantified finding that Sony Turkey did actually act on such threats and refrained from making incentive payments even in cases where price differences were detected*). Against this background, the Board concluded that the said conduct of Sony Turkey has restricted distributors' ability to autonomously determine their online prices.

Consequently, the Board noted that online prices can easily be tracked and this increases price transparency that can facilitate restriction of competition. The Board stated that this deprives the distributors of the ability to behave independently in determining their own resale prices. While the Board acknowledged that the turnover generated by online sales was relatively small in proportion with Sony Turkey and its distributors' overall turnover and that this could have indicated that the effect of restriction would be limited; it attributed importance to online prices beyond their capacity of effect on trade. The Board asserted that online prices strengthen price competition in offline trade as even consumers

shopping from brick and mortar shops have the ability and incentive to check online prices and impose competitive constraints on offline resellers' prices with online price lists.

Lastly, the Board briefly evaluated the possibility of granting Sony Turkey an individual exemption[2] under Article 5 of the Law No. 4054 and concluded that an individual exemption cannot be granted on the basis that Sony Turkey's conduct would not result in improvement of Sony Turkey's distribution channels nor would it cause better and improved products or services for the benefit of consumers. To the contrary, the Board resolved that determining the resale prices would cause restriction of inter-brand competition and thereby increase prices for end-users.

In light of the above, the Board, with majority, decided that Sony Turkey has violated Article 4 of the Law No. 4054 by determining the online resale prices of its distributors and imposed an administrative fine of TRY 2,346,618.62. The Dissenting Opinion by Prof. Dr. Ömer Torlak (President of the Board) provides that (i) distributors autonomously determined their prices, (ii) there was no conclusive evidence that Sony Turkey implemented a resale price maintenance scheme including any penalties imposed on any of its distributors, (iii) Sony Turkey has various distribution channels, (iv) the prices of distributors were indeed different than the recommended prices and (v) intra-brand competition is strong in the market. Therefore, Mr. Torlak concludes that he dissented from the Board's decision on violation.

[2] Upon Sony Turkey's objections regarding the need to apply rule of reason and make an effects based analysis, the Board has asserted that only in extreme circumstances resale price maintenance can be justified as it is an object restriction within the meaning of Article 4 of the Law No. 4054 and the case in hand did not pose such exceptional cases to urge the Board to conduct effects based approach.

The reasoned decision is an example of recent Board decisions where RPM was considered as a restriction by-object. This somewhat contradicts the ever-increasing trend of treating RPM cases under an effect test.

The Turkish Competition Authority Rejected the Successive Individual Exemption Application for Credit Card Information Storage Services Offered by BKM

The Board published its reasoned decision on Bankalararası Kart Merkezi A.Ş.'s ("**BKM**") request to revisit/reexamine a previous decision[3] ("**Rejection Decision**") where the Board had rejected BKM's individual exemption request for some credit card information storage services.[4]

BKM is a trade association formed by 13 major banks in Turkey. It mainly operates as a payment system operator under Law No. 6493. BKM also offers services such as swap and settlement, online payment solutions, authentication, digital wallet services and credit card information storage.

BKM's credit card information storage service offers a system which is integrated with BKM member banks concerning storage of users' credit card information. This service enables businesses not to request, receive or store credit card information from customers. Instead, BKM acts as an agent by keeping customers credit card information for any type of transactions and store encrypted card information for repeated customer transactions. That way, customers would not be required to submit their credit card details for each transaction. This reduces the risk for businesses in storing sensitive data and their concerns relating to the compliance with the Payment Card Industry Data Security Standards.

[3] The Board's decision dated June 12, 2018, and numbered 18-19/337-167.

[4] The Board's decision dated November 22, 2018, and numbered 18-44/698-342.

Concerning its credit card information storage operations, BKM filed an individual exemption application before the Turkish Competition Authority ("**Authority**") in 2017 regarding its credit card information storage services. The Board granted these services an individual exemption for one year only.[5] The Board emphasized that even though the relevant services offered by BKM enabled overall efficiencies in terms of businesses, banks and customers, it was nevertheless possible that a considerable portion of the existing competition could be hampered in the market and therefore held that further developments must be closely monitored.

Following the one-year term, BKM made another application to the Authority concerning the extension of one-year exemption given in 2017. The Board rejected this request on the basis that BKM's credit card information storage services did not meet the conditions set under Article 5 of Law No. 4054.[6] In the Rejection Decision, the Board noted that although BKM's application was first perceived as a technical progress that is based on a different system than other payment institutions, the one-year period showed that the difference was in fact due to the integration banks provided to BKM, but not to rival payment institutions.

Following this Rejection Decision, BKM, the Turkish Association for Insurance, Reinsurance and Retirement Companies ("**TSB**") and Metlife Emeklilik ve Hayat A.Ş. ("**Metlife**") requested the Board to re-evaluate its Rejection Decision pursuant to Article 11 of Law No. 2577 on Administrative Procedure.

Nevertheless, due to (i) the developments observed in the market in the one-year exemption period, (ii) the existing relations of the banks with BKM and the positions of the other players in the market, and (iii) the structure of the market as well as the predictions of the current and potential competition in the market, the Board decided that its previous decision on the issue was in fact on point and the developments in the market have not satisfied the individual exemption requirements set out under Article 5 of Law No. 4054 in order to extend the duration of the exemption given previously.

In its assessment, the Board stated that it reviewed the one-year exemption period and concluded that a significant portion of the credit card information storage services market is closed to competition on the basis that BKM is the most important player in the market and that neither banks nor other credit card information storage service providers operate in such a way as to compete with BKM. The Board further indicated that while it is possible for banks to provide this service internally or to outsource it, the provision of this service under the roof of BKM, an entity formed by various banks competing at the horizontal level, had a negative impact on competition in the market.

BKM and TSB also brought up a new business model adopted by BKM, where BKM would cease its service delivery at retail level but position itself as a wholesale provider for credit card storage services instead. The Board stated that in case said services were to be provided by BKM to other credit card storage institutions; (i) credit card storage institutions would become dependent on BKM, (ii) provision of this service at wholesale level

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[5] The Board's decision dated March 23, 2017, and numbered 17-11/134-61.

[6] Article 5 of Law No. 4054 sets out four requirements which must be satisfied by the undertakings in order to obtain an individual exemption: (a) ensure new developments and improvements, or economic or technical development in the production or distribution, (b) benefit the consumer from the abovementioned, (c) not eliminate competition in a significant part of the relevant market, (d) not limit competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b).

would reduce credit card storage institutions' incentive to invest in this field, (iii) commercially sensitive information belonging to credit card storage institutions, such as customer information, number of contracted businesses, etc. would be shared with BKM, and (iv) potential problems or flaws in BKM's system would damage the whole system. According to the Board, the termination of BKM's activities at retail level would not cease the foregoing competitive concerns since BKM and said institutions would remain competitors in digital wallet services. As a final remark, the Board highlighted that pursuant to the Rejection Decision, the provision of this service under the roof of BKM instead of banks alone would not create any efficiency in terms of Article 5(a) of the Law No. 4054 and BKM's provision of this service at wholesale level would not alter the situation.

In light of these evaluations, the Board decided not to revoke, alter or dismiss its Rejection Decision. Therefore, the Board rejected the re-examination application requesting extension of individual exemption for the credit card storage services offered by BKM.

The Turkish Competition Board Closed the Pre-investigation against Raw Meatballs Producers for Price Fixing with a 9(3) Letter

The Board published its reasoned decision[7] on the preliminary investigation conducted against raw meatballs (çiğ köfte)[8] producers, in Gaziantep regarding allegations that the relevant undertakings have violated Article 4 of the Law No. 4054.

The decision carries importance given that the Board decided to issue an opinion letter pursuant to Article 9(3) of the Law No. 4054 although there was concrete evidence showing a price fixing agreement, a mechanism for monitoring of that agreement, a punishment mechanism for cheating and the effects of this agreement on the market.

In its evaluation on the relevant product market definition, the Board took into consideration developments in the raw meatballs sector in Turkey and based its competitive assessments on the "raw meatballs production" market. That said the Board decided not to proceed into an exact relevant product market definition. The Board also did not define a relevant geographical market, however took into account that raw meatballs production subject to the complaint takes place in the Gaziantep province.

The Board conducted its analysis mainly based on the document titled "*Raw Meatballs Producers Discussion Meeting*" which took place at the Gaziantep Chamber of Commerce, and which was signed by the representatives of six raw meatballs stores active in the Gaziantep province. The relevant evidence indicates that: (i) starting from a specific date (that is redacted in the reasoned decision), the price of raw meatballs was determined to be fixed at a specific amount (also redacted in the reasoned decision), (ii) 0.5 kg pack of raw meatballs packs sold to stores would be priced at a specific amount (redacted), (iii) the determined price included in the agreement would be applicable in Gaziantep whereas a different minimum price would be applied throughout Turkey, (iv) the producers would not conduct sales under different brands and under the market value, (v) a WhatsApp group would be created in order to report any failure to comply and final, and (vi) a fine of TRY 13,000 would be imposed on those who do not comply with the rules as agreed upon.

[7] The Board's decision dated January 10, 2019, and numbered 19-03/13-5.

[8] A traditional Turkish meatball that is deemed as a sub-category of fast-food sector, which is being served in chain stores around Turkey.

Emphasizing the importance of the difference between the prices applied before and after the execution of the agreement, the Board found that the market prices for raw meatballs had decreased following new entries into the market. However, the Board concluded that the prices were increased through the agreement executed by the relevant undertakings due to cost increases. The Board then observed that the pricing decisions taken during the meeting have been applied by all of the producers whose names are mentioned in the agreement and follow-ups were made via the WhatsApp group; and that the penalty clause was inserted in order to demonstrate that the undertakings were taking the agreement seriously.

Based on these findings, the Board explicitly stated that the relevant agreement establishes the existence of a violation of competition law. That said, the Board referred to Article 9 of the Law No. 4054 pursuant to which the Board may issue an opinion letter to undertakings to terminate the infringement. The Board also referred to the judgment of the Council of State in *Burdur Consumer Protection Association*[9] which states that the Board must initiate a full-fledged investigation if the information and findings necessary to clarify the case subject to the preliminary investigation could not be obtained during the preliminary investigation phase; however it might also decide not to initiate a full-fledged investigation and apply the different measures provided within the Law No. 4054, in cases where (i) no finding of violation could be established, (ii) it is possible to fully shed light on the case during the preliminary investigation phase, (iii) the violation is so minor that initiating an investigation is not needed, (iv) it is also possible to eliminate entirely the effects of the violation and compensate the anti-competitive effects of the violation or (v) the violation is made in markets which are not completely open to competition due to structural and legal barriers.

In this regard, contrary to the opinion of the Investigation Team which indicated that an investigation should be initiated, the Board ultimately decided (i) not to initiate an investigation, (ii) to issue an opinion letter to each of the undertakings subject to the preliminary investigation to refrain from the behaviours that could restrict the competition, and (iii) to inform Gaziantep Chamber of Commerce about the legal consequences of the relevant behaviours.

Behavioral Remedies under Judicial Review: The Court Says "Not Enough"

The 9th Administrative Court of Ankara ("**Court**") ordered stay of execution of the Board's conditional approval[10] to the acquisition of Mardaş Marmara Deniz İşletmeciliği A.Ş. ("**Mardaş**") by Limar Liman ve Gemi İşletmeleri A.Ş. ("**Limar**") (through its wholly owned subsidiary Arter Terminal İşletmeleri A.Ş. ("**Arter**")) which is ultimately controlled by Arkas Group ("**Transaction**"). In short, the Court based its judgment on the finding that the behavioral remedies accepted by the Board were not adequate to address the competition concerns and therefore the Board's conditional approval could not be deemed lawful. Hence, the Court decided that the Board's approval had no legal founding, and implementation of such unlawful act would result in irrevocable damages.

For background information on the Transaction, Limar (through Arter), which is

[9] The 13th Chamber of Council of State's decision dated May 30, 2014, and numbered 2010/4818 E., 2014/2197 K.

[10] The Board's decision dated May 8, 2018, and numbered 18-14/267-129.

ultimately controlled by Arkas Group, notified the Authority of its intention to acquire all shares in Mardaş. Mardaş is active in container handling services, temporary storage (duty-paid) services, guidance and towage services (through its shares in Ambarlı Römorkaj Pilotaj Ticaret A.Ş. ("**Arpaş**")) and supportive services (through its shares in Ambarlı Liman Tesisleri Tic. A.Ş. ("**Altaş**")) at Ambarlı Port (Istanbul). As the acquiring party, Limar provides port services at several ports such as Izmir, Borusan, Limaş, Mersin MIP, Haydarpaşa, DP World Yarımca and Iskenderun Limak. Limar's activities in the Ambarlı region has been carried out under the auspices of Marport Liman İşletmeleri Sanayi ve Ticaret A.Ş. ("**Marport**") which is a joint venture controlled by Arkas Group and MSC Gemi Acenteliği Anonim Şirketi ("**MSC**").

In its assessment, the Board took into account the activities of Mardaş as well as Arkas Group and defined the relevant product markets as "terminal services for container handling concerning hinterland traffic", "terminal services for container handling for transit traffic", "temporary storage (duty-paid) services", "guidance and towage services" and "supportive services of Ambarlı Port". Moreover, the Board also evaluated "container shipping line operations services" and "vessel agency services" of Arkas Group with regards to vertical effects of the Transaction. The Board provided geographical market definitions for each of the relevant product markets.[11]

With regards to horizontal overlaps between the parties' activities, the Board found that competitive concerns arose particularly with regards to container handling services market[12] (i) in the Northwest Marmara sub-region, Marport's (controlled by Arkas Group and MSC) market share was 53.3%, and Mardaş's market share was 8.2% in 2016 whereas (ii) in the Marmara region, Marport's market share was 34.1% and Mardaş's market share was 5.2% in 2016. In this regard, the Board found that (i) the level of concentration in the container handling services market, (ii) the existence of strong competitors and (iii) the expected capacity increases in the nearby ports (along with new entrants) meant that the no single undertaking could hold a dominant position in the market. That being said, the Board noted that the Transaction could lead to creation of collective dominance bearing in mind that (i) Arkas Group's partner in Marport, MSC was also active in the Northwest Marmara sub-region through Asyaport (Tekirdağ), and (ii) three of the four ports in the Northwest Marmara sub-region would be controlled by shareholders of Marport (collective market share reaching 81.2% in the Northwest Marmara sub-region and 51.9% in the Marmara region). Moreover, the Board also took into consideration (i) entry barriers (due to unused capacity), (ii) MSC and Arkas Group being competitors in container transportation market and MSC's agreement with Maersk within the 2M Alliance, and (iii) post-Transaction coordination risks in its assessment and found that these would contribute to the incentives

[11] The Board defined the relevant geographic markets as (i) "Marmara Region" (and Northwest Marmara region as sub-market) for container handling services, and (ii) "Ambarlı Port" for temporary storage (duty-paid) services, guidance and towage services and supportive services of Ambarlı Port markets. The Board noted that although the geographic scope of the market for terminal services for container handling for transit traffic could be deemed as Turkey and the neighboring countries, it would leave the precise geographical scope open for this relevant product market.

[12] The Board found that the concentration level in the temporary storage (duty-paid) services market did not lead to creation or strengthening of a dominance position while also noting that the Transaction would not lead to any competition concerns in the (i) guidance and towage services and (ii) supportive services of Ambarlı Port markets

to coordinate behaviors in the market and, therefore, lead to a collective dominant position by MSC and Arkas Group.

As for the vertical relations, the Board found that the Transaction could lead to input foreclosure in container shipping line operations services (due to cross-shareholdings among undertakings). Particularly, the Board noted that the Mardaş port and the alternative ports (other than Kumport) would be controlled by Arkas Group (and its business partners) and access to these ports would be potentially restricted if Arkas Group decided to engage in discrimination against competing container shipping line operators.

In order to address the Board's concerns, the parties submitted a remedy package comprised of behavioral remedies targeting both horizontal and vertical concerns. With respect to horizontal competition concerns in the container handling services market, the parties undertook to dissociate corporate bodies of Marport and Mardaş (*i.e.*, operational and legal dissociation, such as operating under the direction of different governing bodies, board of directors, general managers etc.; operating from different facilities; not sharing confidential and sensitive information with each other (and also taking additional measures to restrict information flow and introducing independent audit firms for inspection of the information flow); ensuring adequate resources for independent activities; employing different personnel in accounting and legal departments and operating with different tools (such as vehicles, cranes etc.)). Additionally, in relation to the vertical competition concerns in the downstream container shipping line operations services and the upstream container handling services market, Arkas Group undertook several remedies involving (i) not changing the commercial terms, operations and certain services offered to current feeder and/or deep sea liner customers of Mardaş for 36 months from the date of the Share Purchase Agreement, (ii) not amending Mardaş's 2017 Standard Port Services Tariff for 12 months from the date of the Share Purchase Agreement, and (iii) following this 12 month period, determining new tariffs in light of competition in the market and avoid excessive pricing and, upon request, informing the Authority of these prices every six months. Additionally, the parties undertook to provide services to Arkas Group and its business partners' services on the basis of non-discriminatory and objective commercial terms. In order to address the concerns of risk of coordination, the parties undertook to set up mechanisms for the sake of data security of Arkas Group and Mardaş.

Subsequent to the Board's decision, Kumport (a port also operating in Northwest Marmara) filed an administrative lawsuit against the Board whereby suspension of the said decision was also requested due to likelihood of arising of irrecoverable damages from the Transaction. The Court emphasized that proposed remedies were required to eliminate all competitive concerns in accordance with Article 14 of the Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board. As per paragraphs 18 and 19 of the Authority's Guidelines on Remedies that are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions, the Court considered that the behavioral remedies may only be approved in cases that "*behavioral remedies are capable of attaining a level of efficiency similar to that of structural remedies in eliminating competition problems and in cases where an equally effective structural remedy cannot be found.*". In light of this consideration, noting that all of the remedies proposed by the parties were behavioral in essence, the Court found that (i) the proposed behavioral remedies would not eliminate competitive concerns, (ii) no effective implementation and monitoring mechanism was adopted with respect to the remedy package, and (iii) the

Board failed to provide adequate reasoning on how these remedies would address concerns on the creation/strengthening of dominant position and coordination effects stemming from the Transaction. Accordingly, the Court ruled that the remedy package would not be sufficient to address all concerns in the Transaction and ordered stay of execution of the Board's decision.[13]

The Court's stay of execution decision has been appealed before the 8th Administrative Chamber of Ankara Regional Administrative Court ("**Regional Court**"). The Regional Court noted that prior to the date of the Court's stay of execution decision Limar submitted a statement declaring that the parties decided to call off the Transaction due to a disagreement on commercial conditions. In this regard, the Regional Court held that the Court should have established whether (i) the Board has taken a new decision upon being informed of the discontinuation, and (ii) the prior approval decision on the acquisition of Mardaş was still valid. The Regional Court, therefore, annulled the Court's decision and referred the file back for a new decision to be rendered by the Court.[14] Upon annulment by the Regional Court, the Court has insisted on its decision and again ordered a stay of execution with the same reasoning and did not refer to any of the issues raised in the Regional Court's decision.[15]

As a final note, although the Court's first decision on behavioral remedies has been reversed due to a rather procedural matter (*i.e.*, lack of subject matter of the regulatory approval), the Court's insistence of its decision and reasoning draws attention. The Court's assessment of the remedy package in both the reversed and the latter stay of execution decisions sheds some light and provides insights for future cases. We are yet to see how the Board's assessment of behavioral remedies would be affected by this decision.

Employment Law

A Milestone in Turkish Employment Law: Renewed Severance Compensation System

The Finance Minister of the Republic of Turkey has recently announced that the severance payment system, which is potentially the most controversial issue of recent history of Turkish employment law, is going to be structurally revised and implemented by the end of 2019. Not only has this official government announcement given a massive impetus to the final phase of these long-awaited, and much debated, revisions, but it has also re-ignited discussions on the ideal implementation of the severance compensation system. This new modification package basically introduces an establishment of a severance compensation fund to be contributed by employers, where the employees could benefit from it in order to receive a severance payment, regardless of resignation or termination.

As of today, pursuant to Turkish Labor Law No. 4857 ("**Law No. 4857**"), an employee is not entitled to a severance compensation if s/he willfully leaves the employment, and this rule applies for each type of resignation independent from the total seniority of the leaving employee, except those where otherwise is specified (*i.e.* marriage, military service) under still effective Article 14 of abrogated former Labor Law No. 1475. Put differently, an employee is entitled to severance payment, if s/he terminates the employment agreement based on a rightful

[13] The Ankara 9th Administrative Court's decision dated December 19, 2018, and numbered 2018/2277E.
[14] The 8th Administrative Chamber of Ankara Regional Administrative Court decision dated February 13, 2019, and numbered 2019/87.
[15] The Ankara 9th Administrative Court's decision dated March 28, 2019, and numbered 2018/2277 E.

reason as per Article 24 of the Law No. 4857, or if an employer terminates the employment based on a valid reason as per Article 18, or based on a rightful reason as per Articles 25/I and 25/III of the same. Therefore, from a practical standpoint of Turkish employment law, it basically means that, if an employee quits a job, s/he gives up the full amount of severance compensation accumulated over the course of time, to which she/he would be entitled to in case of the foregoing type of terminations.

That being the case, severance payment structure explained above has been a long-criticized issue, pointing out that it is unfair and financially intimidating for an employee, mostly for veterans, who considers to unilaterally cease the employment agreement (*i.e.* resignation) as s/he may receive no amount saved up for many years. Therefore, an amendment package has been on the government's agenda many times, yet not to be implemented until April 2019. Along with the statement by the Finance Minister and following statements by the government authorities, some details of the amendment package have been revealed. Accordingly, the new structure proposes the establishment of a severance compensation fund by the government, where employers are obliged to deposit monthly a specific amount of money, which cannot be withdrawn by the employee before reaching the lower bound seniority. The gist of such mechanism is to allow employees to benefit from the fund as an instrument for attaining severance payment either in case of resignation or termination.

The details of this amendment package have not been made public by the government. Nevertheless, there have already been particular concerns raised by both employees and employers' representatives. To this end, one of the most uttered concerns is that being entitled to severance payment in case of resignation will presumably and significantly increase the number of resignations in a workplace, as there will no longer be a disincentive, which is typically leaving the accumulated severance payment behind, for an employee to maintain the employment relationship, knowing that the s/he will either way gain severance payment. In addition, this amendment is expected to lead to an increase of unilateral termination by employers. The fact is, employers' primary concern that dissuades them from arbitrary terminations in Turkey has always been the obligation of severance compensation payment in case of terminations other than 25/II of the Law No. 4857. However, once the new system is in place, this concern may no longer exist, as in any scenario the employee will benefit from the fund, which would already been funded by the employer. An employers' financial burden will considerably diminish, which expectedly could increase the number of unilateral termination by employers. The third and the last concern is that, no protective mechanism has been introduced by the government yet, for cases where the employers do not fulfill their obligation to contribute to the severance compensation fund. The solution of this topic has been reasonably set out by employees as a condition for the finalization of this amendment, since the mechanism will mostly deadlock if employers stop financing the fund. Therefore overall, despite the recent progress made on this issue, there is still considerable unease regarding particular areas on both employers' and employees' sides.

In conclusion, a new milestone in Turkish employment law in aspect of severance compensation matter is one step away from being realized. Since the government has accelerated the codification procedure of this amendment package, one may expect to hear soon about the official announcement of the details of the severance compensation fund,

which will surely turn over a new page for termination of employment agreements from both employees and employers standpoint.

Litigation

Examination on Various Supreme Court Precedents regarding Rental Agreements to Study the Burden of Merchants' Obligation to Act Prudent in Their Dealings

In business life, the terms of rental agreements are often challenged by parties upon unexpected developments and discoveries that take place after execution of an agreement. But such challenges are less likely to succeed when the challenging party is a merchant. This comes from the burden imposed by the notion of "*prudent merchant*" in commercial law. Below a few Supreme Court precedents show the reflection of that burden onto legitimacy of merchants' claims concerning rental agreements.

(i) A tenant requests for annulment of the rental agreement with the claim that the agreement was formed based on promises that did not later eventuate. The claim is that the leaser promised that the mall in which the rental resides would reach an operating capacity of 80% and various brands would have stores there, none of which were realized. The Supreme Court[16] rules that, as a merchant, the tenant should have evaluated the circumstances both at the time of signing and in the future in a realistic and reasonable way and since the agreement stipulates that half of the rent shall be paid if the operating store capacity goes below 50%, the tenant cannot claim to be deceived into entering into this agreement. - *This decision shows that the merchants are expected to have foresight about future commercial circumstances and should not make claims due to their expectations not being realized, especially in case where a pending project (such as construction of a mall) is concerned.*

(ii) A tenant unilaterally terminates the rental agreement with the claim that the mall, in which the rental resides, has not opened more than one year after signing of the rental agreement and that the leaser abuses its rights borne from the agreement since all provisions therein unreasonably favor the leaser. The leaser argues that according to the agreement it has discretion over determining the opening date of the mall including to change this date if need be, and the tenant cannot make any claims due to the date change. The Supreme Court[17] rules that the tenant, as a merchant, should have shown care and diligence with regards to future investments and projects, and since the tenancy agreement does not stipulate an exact opening date for the mall, late opening cannot be presented as just cause for termination of the rental agreement. - *This decision shows that the merchants are not allowed to rely on the defense that the terms of rental agreements are too one-sided and must be bound with the terms nevertheless.*

(iii) A tenant unilaterally terminates the rental agreement and requests reimbursement of paid rent with the claim that the municipality did not grant license for storage field operation due to the relevant development plan not allowing construction of a storage field. The leaser argues that the agreement explicitly stipulates that the rented place is a commercial area and not being able to secure a license cannot be cause for termination. The Supreme Court[18] rules that the agreement has no term stipulating that the place will be used as storage

[16] Supreme Court for the 6th Circuit, 11.10.2016, 2015/9607 E., 2016/5835 K.

[17] Supreme Court for the 6th Circuit, 25.11.2014, 2014/9080 E., 2014/12984 K.

[18] Supreme Court for the 6th Circuit, 21.12.2015, 2015/2063 E., 2015/11290 K.

field and the tenant, as a merchant, should have made sure that the rented place is eligible for the contemplated purpose of use. - *This decision shows that the merchants are obliged to investigate whether the rented place is fit for their operational purposes or at least include stipulations in the tenancy agreement to secure their rights if the legal conditions necessary for their operations are not achieved.*

(iv) A tenant request for re-determination of the rent amount in line with reason and equity. The Supreme Court[19] rules that merchants committing to short-termed rental agreements (one-year agreements, in this case) cannot ask for re-determination since the agreement can always be renewed under changing circumstances or terminated at the end of that short term. - *This decision shows that the merchants are bound by the rent amount if an agreement is short-term, regardless of it being excessive or not.*

(v) The Supreme Court[20] rules that the stipulation regarding the annual rent increase must be deemed to be binding on the tenant due to being a merchant. - *This decision shows that the merchants are bound by the annual rent increase, regardless of it being excessive or not.*

These precedents are merely a few striking examples of how diligent the merchants must be in their dealings regarding rental agreements. Merchants are expected to show a high standard of care and foresight when entering into rental agreements and are not able to be rid of their obligations simply because the future turned out to be different than what they had foreseen.

[19] Supreme Court for the 6th Circuit, 28.04.2014, 2013/13871 E., 2014/5361 K.

[20] Supreme Court for the 6th Circuit, 07.12.2017, 2017/16658 E., 2017/17273 K.

Data Protection Law

Amendments to Turkish Data Protection Legislation

Amendments have been published in the Official Gazette of April 28, 2019 concerning three different pieces of data protection legislation. The amendments are regarding (i) the Regulation on Erasure, Destruction or Anonymization of Personal Data, (ii) the Regulation on Data Controllers' Registry, and (iii) the Communiqué on Procedures and Principles for Compliance with the Obligation to Provide Information.

- Amendment to the Regulation on Erasure, Destruction or Anonymization of Personal Data

Amendment to the Regulation on Erasure, Destruction or Anonymization of Personal Data[21] ("**Amendment to Erasure Regulation**") introduces three changes. The first amendment is in the definition of "personal data processing inventory". The definition of "personal data processing inventory" has been amended and now reads as: "*The inventory that is established by the data controllers through the association of their personal data processing activities related to their business processes with the purposes of processing personal data and legal reason, data category, transferred recipient groups and data subject group and that is detailed by data controllers by explaining the minimum retention period required to process personal data, personal data intended for transfer abroad and the measures taken to ensure data security*".

The previous definition did not include the "*legal reason*" and "*retention period*" among

[21] The Official Gazette dated April 28, 2019 http://www.resmigazete.gov.tr/eskiler/2019/04/20190428-1.htm (last access date May 9, 2019).

items that should be detailed in the data processing inventory.

The second amendment pertains to Article 7/4 of the Erasure Regulation. The amendment slightly changes the wording in this article as *"data controller is obliged to disclose the method it applies in relation to the erasure, destruction or anonymization of personal data, in its policies and procedures"*. This amendment only added the term "*or*" between "*destruction*" and "*anonymization*".

The last amendment is regards to references in Article 12 of the Erasure Regulation. Previously, Article 12 of the Erasure Regulation set out the data controllers' obligations relating to the erasure and destruction periods and referred to Article 13 of the Law No. 6698 on Protection of Personal Data ("**DP Law**"), which regulates the procedure for application to the data controller. With this new amendment to the Erasure Regulation, Article 12 also includes reference to Article 11 of the DP Law, which gives data subjects the right to request erasure or destruction of their data. Therefore, the first sentence of Article 12 of the Erasure Regulation is amended as "*when the data subject applies to the data controller for the erasure or destruction of the personal data that belongs to him/her as per Article 11 and Article 13 of the Law*".

- Amendment to the Regulation on Data Controllers' Registry

The amendment to the Regulation on Data Controllers' Registry[22] includes six changes. The first amendment is on the definitions of *"contact person"*, *"personal data processing inventory"* and *"data controller representative"*. The change in the definition of "*personal data processing inventory*" is identical with the change made in the Amendment to the Erasure Regulation, as previously explained.

The new definition of "*contact person*" states that the contact person is *"the real person who is notified to the Data Protection Authority ("Authority") during registration to the Data Controllers Registry ("Registry") by the data controllers (for the real or legal persons residing in Turkey), or by the data controller's representative (for the real and legal persons residing outside of Turkey) to ensure the communications to be made by the Authority regarding the obligations of the legal entities within the scope of the DP Law and secondary legislations based on the DP Law"*. In light of this definition, the Amendment to the Regulation on Data Controllers' Registry clarifies the persons who will notify the Authority on the contact person, according to the residency of the data controller.

The definition of "*data controller's representative*" is also amended. The amendment merely changes the reference previously made to Article 11/2 of the Regulation on the Data Controllers' Registry to Article 11/3 of the same regulation, which sets out the contents of the representative appointment decisions.

The second amendment is on Article 5 of the Regulation on Data Controllers' Registry and covers principles and procedures. The amendment adds a provision to Article 5/1/ç stating that "*data controllers, who are obliged to register to the Data Controllers Registry, are obliged to prepare a Personal Data Processing Inventory*".

[22] The Official Gazette dated April 28, 2019 http://www.resmigazete.gov.tr/eskiler/2019/04/20190428-2.htm (last access date May 9, 2019).

Amendment to the Regulation on Data Controllers' Registry also amends the Article 5/1/ğ by revising the term "*maximum period*" as "*maximum retention period*". The amended provision is as follows: "*The maximum retention period necessary for the purposes of processing personal data presented to the Registry by the data controllers and published in the Registry shall be taken into account during the performance of the data controllers' obligation to erase, destroy or anonymize, per Article 7 of the Law.*"

The third amendment pertains to Article 7 of the Regulation on Data Controllers' Registry. The amendment removes "*contact person's name and address*" which was previously information that should be declared to public in the Registry under Article 7/2.

The fourth amendment is on Article 11 of the Regulation on Data Controllers' Registry. Amendment to the Regulation on Data Controllers' Registry amends Article 11/4 by adding a sentence that clarifies the person who will enter their contact person information to the Registry by stating that "*Data controllers residing in Turkey and data controller representatives on behalf of data controllers not residing in Turkey shall enter their contact person information to the Registry during the registration.*" The Amendment to the Regulation on Data Controllers' Registry also removes a sentence set forth under the same provision which previously stated that "*contact person ensures the communication with regards to answering requests directed at data controllers by the data subjects.*"

Amendment to Article 11 also introduced the terms "*who will ensure the coordination*" for specifying the senior manager that will appoint contact person of public institutions or agencies. The current provision is now as follows: "*contact person of public institutions or agencies is the head of department or its superior manager who is designated by senior manager who will ensure the coordination for communication with the Authority and registered before the Registry.*"

Another amendment made to the Regulation on Data Controllers' Registry pertains to Article 13 and it clarifies the starting date of the time period designated for notification of the changes in the enrollment information. Accordingly, in case of changes in the Registry enrollment information, data controllers will inform the Authority within seven (7) days as of the date of the change, through VERBIS.

The last amendment made through the Amendment to the Regulation on Data Controllers' Registry is in the Article 16 and adds "*information on number of yearly employees or yearly financial balance sum*" as one of the criteria that will be considered for the exemptions to the enrollment obligation by the Board.

- Amendment to the Communiqué on Procedures and Principles for Compliance with the Obligation to Provide Information

The amendment to the Communiqué on Procedures and Principles for Compliance with the Obligation to Provide Information[23] ("**Amendment Communiqué**") includes two changes.

Amendment Communiqué introduces a new and shorter definition of data registration system as "*the registration system wherein personal data is processed and registered in accordance with certain criteria*".

The definition of "*data controller's representative*" has also been amended. The amendment merely changes the reference

[23] The Official Gazette dated April 28, 2019 http://www.resmigazete.gov.tr/eskiler/2019/04/20190428-9.htm (last access date May 9, 2019).

previously made to Article 11/2 of the Regulation on the Data Controllers' Registry to Article 11/3 of the same regulation which sets out the contents of the representative appointment decisions, as in the Amendment to the Regulation on Data Controllers' Registry.

Amendment Communiqué also removes Article 5/1(c) of the Communiqué on Procedures and Principles for Compliance with the Obligation to Provide Information. The removed Article 5/1(c) read as the following: "*If personal data is processed in different departments of the data controller for different purposes, obligation to provide information should be complied with separately for each department.*"

In conclusion, the amendments made to the data protection legislation do not introduce substantial or significant changes to the requirements that are already in place. The amendments are apparently made for the purpose of preventing possible controversies in the interpretation of the law and clarifying certain ambiguous points which may have practical consequences.

Internet Law

The Constitutional Court's Decision Fostering Freedom of Expression against Contents That Are Said to be Insulting Religious Beliefs in Satirical Contents

The Constitutional Court published an important decision concerning content liability in the internet medium on the Official Gazette of April 11, 2019. In the Constitutional Court's decision[24] ("**Decision**") of March 7, 2019 on an individual application, the applicant alleged that his right to freedom of expression and freedom of press were violated due to his conviction based on the crime of insulting religious beliefs in an article broadcasted in a newspaper's website.

The applicant ("**Applicant**") was the editor and the responsible manager of a national newspaper's website. The contents subject to the Decision were two articles written by a person who introduces him/herself as "God".

According to the Decision, the editorial board of the newspaper decided to publish popular social media accounts' articles and contacted these accounts, including an account using "God" as its user name. In the two articles written by the relevant social media account on August 3, 2013 and August 10, 2013, the writer was pretending to be "God", as the author of the articles as first-person interpretation.

The contents of the articles were displayed on the website of a newspaper and were written by a person impersonating "God", and included satirical statements such as "*Even though the leftist wing of the country does not like me, writing in this newspaper will improve our relationship, however the rightist wing never proposed me to write in their newspapers even though they always use my name everywhere*" and "*the hell is a scary place and it is extremely hot, however it is way more secure and fair than Turkey, as everybody burns freely and together without any personal differences. The only difference between hell and Turkey is that hell is hotter, however this may change during the course of summer*".

Istanbul Public Prosecutor's Office initiated an investigation against the Applicant, after receiving reports from the public due to these articles and filed a criminal case against the

[24] The Constitutional Court's decision with the Application Number 2015/1570, available at http://www.resmigazete.gov.tr/eskiler/2019/04/20190411-10.pdf (last access date May 13th, 2019).

Applicant due to insulting religious values adopted by certain part of the public. Accordingly, Istanbul 2nd Criminal Court of First Instance decided to (i) sentence the Applicant for seven months and 15 days, and (ii) suspension of the pronouncement of the verdict on November 25, 2014. Applicant's objection to this decision was also rejected on December 11, 2014.

Accordingly, the Applicant filed an individual application before the Constitutional Court on January 26, 2019 with the application number 2015/1570 by claiming that his freedom of expression and press has been violated.

The Court started its evaluations by stating that the Applicant's request is based on whether the conviction of the local court (which found that publishing the articles constituted the crime of publicly insulting religious values) violates freedom of expression. The Constitutional Court further stated that in order to evaluate whether convicting the Applicant and granting suspension of the pronouncement was necessary in a democratic society, the contents of the statements, the position of the Applicant, the effect of these contents on other people's rights and on public order, and whether the measures in this regard meet a social need should be looked into.

The Constitutional Court stated that in the articles published by the Applicant on the website, the author criticizes Turkey's current social and political situation satirically by using the name "*God*" and states that, when the statements used in the articles are evaluated without decontextualizing; the articles mention of discomfort in the current order of the country and criticizes the government practices. In this regard, the Constitutional Court states that the articles serve to a public discussion.

The Constitutional Court also states that, even though the articles are considered as inconvenient by people who are the member of monotheistic religions at the first glance, it is not possible to argue that the articles include harmful, offensive and inappropriate statements for others. The Constitutional Court further indicates that satirical publications, which are critical statements, are under the protection of freedom of expression, even if they are considered as "*worthless*" or "*unbeneficial*" by others. Accordingly, even though there is an obligation to avoid statements that do not benefit public discussion and that are in harmful nature towards others, it is also important to balance the conflicting rights. Finally, the Constitutional Court refers to the reports received from the public and indicates that there is no objective danger to sentence the Applicant and thus, there is no relevant and adequate reason revealing that sentencing the Applicant for seven months and 15 days is necessary.

The Constitutional Court also evaluated Istanbul 2nd Criminal Court of First Instance's decision on suspension of the pronouncement of the verdict and stated that such verdict does not decrease the weight of intervention to the Applicant's freedom of expression. The Constitutional Court further states that the concern for sanction has a disincentive factor and may cause the Applicant to refrain from expressing his thoughts and conducting press activities. Therefore, considering that main duty of press is to ensure a proper democracy, the Constitutional Court emphasized that sentencing the Applicant may suppress the contribution of press to public discussion for the benefit of the public.

Consequently, the Constitutional Court decided that Applicant's freedom of expression and press has been violated. The Constitutional Court stated that there is legal benefit in re-trial of the Applicant in order to cease the

consequences of the violation, which was caused by the local court, and the local court should revoke the court decision that caused the violation, and grant a decision that will be appropriate for the consequences of the violation.

In conclusion, the Constitutional Court unanimously decided that (i) the application based on the violation of freedom of expression and press is rightful and admissible, (ii) that the freedom of expression and press protected under Article 26 and Article 28 of the Turkish Constitution has been violated, (iii) to send a copy of the order to Istanbul 2nd Criminal Court of First Instance to recover the consequences of the violation, and (iv) that a total amount of TRY 2,701.90 be paid to the Applicant for legal costs.

The Constitutional Court's decision constitutes an important precedent in terms of content liability in the internet medium, in the direction of the freedom of expression and speech, particularly considering that the issue relates to contents which might be deemed sensitive among the public.

Telecommunications Law

ICTA's Decision on Value Added Telecommunication Services

The Information and Communication Technologies Authority ("**ICTA**") rendered a decision ("**Decision**") on Value Added Telecommunication Services provided through 888/989 numbers on January 3, 2019.

The Decision states that ICTA receives numerous consumer complaints indicating that consumers receive messages directing them to 888/989 numbers for obtaining bank loans or retrieving monetary gift they allegedly won. According to the complaints, upon calling the relevant numbers, consumers are charged with high telephone bills despite not having received what has been promised to them in the messages.

According to news sources[25], swindlers use schemes similar to the following to conduct fraudulent activities: Consumer receives a phone call indicating that they are outside of the door and they have a package to deliver. At that moment, the phone conversation is interrupted. When the consumer calls the phone number, the number redirects to a number starting with "0888" and the consumer is kept waiting on the line for a number of minutes. Since 888/989 numbers are part of the Value Added Telecommunication Services, their cost per minute is significantly higher in comparison with regular services, namely TRY 25 per seven (7) seconds. Consequently, consumers receive a high telephone bill.

Due to rising consumer complaints related to fraudulent calls and messages in Turkey, ICTA rendered the Decision with the aim to prevent such fraudulent activities.

ICTA ordered telecommunication service providers to obtain consumers' consent as to their telephone lines being open to make calls towards 888/989 numbers within two (2) months starting from the date of notification of the Decision, if the consumers have not already provided their consent through call centers, online centers, SMS or otherwise, in writing.

The Decision further indicates that if telephone lines for which consent has not been obtained in the given period, telecommunication service providers should disable those lines' capacity to call 888/989 numbers.

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[25] *See* https://www.cnnturk.com/ekonomi/turkiye/btkdan-888-numarali-onlem?page=2 (Last accessed on May 3, 2019)

In terms of new phone service subscribers, their telephone lines will be deemed to be closed to make calls towards 888/989 numbers by default. These telephone lines will only be able to call the relevant number after telecommunication service providers obtain the subscribers' consents through call centers, online centers, SMS or written application. Telecommunication service providers are also obliged to enable consumers to close their lines to outgoing calls in terms of 888/989 numbers through the use of the foregoing methods.

Pursuant to the Decision, consumers whose phones are disabled will be provided with a free of charge announcement if they attempt to call the 888/989 numbers, indicating that their lines are disabled for their attempted call. The announcement will also inform the consumers about the ways in which they can enable their telephone lines for outgoing calls towards 888/989.

While the Decision has been welcomed by many for its consumer protection aspect, the ICTA has imposed a new set of obligations on telecommunication service providers requiring actions to be taken.

Anti-Dumping Law

WTO accepts Thailand's Request for Establishment of a Dispute Panel to Rule on Duties Imposed by Turkey on the Import of Air Conditioners

On April 11, 2019, Thailand's request for the establishment of a dispute panel to rule on Turkey's duties against Thailand was accepted by a meeting of the Dispute Settlement Body ("**DSB**")[26] of the World Trade Organization ("**WTO**").

To provide a procedural background, the dispute settlement procedure of the WTO is governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes ("**DSU**"). The DSU proceeds through three main stages: (i) consultation, (ii) adjudication, and, if necessary, (iii) implementation. Accordingly, the consultation stage is established in order for parties to reach an amicable solution. If the consultation fails to settle the dispute, upon the complainant's request from the DSB, a panel is established. The panel issues reports which lead to an implementation phase in which parties may adopt three positions as per the panel's report: (i) compliance with the recommendations of the panel/the appellate body (*implementation*), (ii) in case of non-compliance with the recommendations in due time, affected party's request for compensation payment (*payment of compensation*), and (iii) in case of non-compliance with the recommendations and non-payment of the compensation, affected party's request for authorization to introduce retaliatory measures against the offending country (*retaliatory measures*).

The dispute panel was launched upon Thailand's request against anti-dumping measures by Turkey on imports of air conditioners which originate from Thailand, with Thailand claiming the duty violates Turkey's obligations under global trade agreements. On November 16, 2016, Thailand imposed provisional anti-dumping duties between 7.09% and 38.52% on imports of non-alloy hot-rolled steel flat products from Turkey, along with further measures imposed on Brazil and Iran, within the course of the expiry review investigation. Consequently with the Thai authorities' finding of material injury to domestic producers as a result of the investigation, definitive anti-dumping duties at a rate of 21% between June 7, 2017 and June 6, 2018, at a rate of 20.87% between June 7, 2018 and June 6, 2019, and at a

[26] World Trade Organization, News and Events accessible from: https://www.wto.org/english/news_e/news19_e/dsb_11apr19_e.htm (last accessed on May 9, 2019)

rate of 20.74% between June 7, 2019 and June 6, 2020 were imposed, according to the information provided by the Turkish Ministry of Trade. Following this decision, Turkey requested compensation pursuant to the Articles 8.1 and 12.3 of the WTO's Agreement on Safeguards, but this request was rejected by Thailand. Thus, Turkey imposed an additional anti-dumping duty of 9.27% on imports of air-conditioners from Thailand as "*substantially equivalent concession*". In response, Thai authorities resolved to discontinue the anti-dumping duties imposed on imports of non-alloy hot-rolled steel flat products from Turkey until June 6, 2020, being the ending date of the duties.

Thailand presented its first request for a panel stating that the additional duties imposed by Turkey were inconsistent with the obligations under GATT and the Agreement on Safeguards, and the tariffs were imposed in response to Thailand's earlier decision to extend safeguard duties on imports of non-alloy hot-rolled steel flat products for an additional three years.

Thailand expressed that it had engaged in consultations with Turkey but that the two sides could not come to a mutual agreement. Turkey blocked Thailand's first request at the DSB meeting on February 25, 2019 by stating it regretted Thailand's decision to seek a panel and that the request was premature since they have not yet exhausted all possibilities to arrive at a mutually convenient solution, adding that Turkey was ready to continue constructive discussions with Thailand.

Thailand presented its second request for a dispute panel and at the DSB meeting on April 11, 2019, upon which the WTO members agreed to Thailand's request to establish the panel. In other words, consultations between Thailand and Turkey with respect to Turkey's duties on the imports of air conditioners from Thailand have failed to settle the dispute and a panel was established. The panel, by way of hearing written and oral arguments from both parties will issue an interim report followed by the final report, expected within the next nine months. As per Article 12(9) of the DSU, the period from the establishment of the panel to the circulation of the report to the members will not exceed this time period.

White Collar Irregularities

Transparency International's Corruption Perceptions Index of 2018 Demonstrates a General Decline

On January 30, 2019, Transparency International published the Corruption Perceptions Index 2018 ("**Index**") which reflects the perceived levels of public sector corruption in non-governmental organizations and representatives of the business world on a scale from 0 (highly corrupt) to 100 (very clean). The Index has become a reliable observation of worldwide corruption levels. The Index ranks 180 countries and territories by their perceived levels of public sector corruption based on how corrupt a country's public sector is perceived to be. The rankings are based on a combination of corruption surveys and assessments of businesspeople and experts collected by various institutions through a range of methods. The end results and expert opinions are evaluated by Transparency International for the purpose of composing the Index. In certain countries these opinions and results are gathered face-to-face, while in other countries, such as Turkey, the data is collected through computer-assisted telephone interviewing.

There is little change compared to the 2017 Index, with more than two-thirds of countries having scored below 50 and the average score being 43. New Zealand and Denmark are

ranked the highest, with scores of 88 and 87 respectively, and the three bottom countries are Somalia, Syria and South Sudan with scores of 10, 13 and 13 respectively. The data shows that despite some progress, for example countries like the United Kingdom, Côte d'Ivoire and Senegal which significantly increased their Index ranking, the generality of the Index seems to be in decline as most countries appear to be struggling with corruption exposure. The full report states that "*since 2012, only twenty countries have significantly improved their scores, including Estonia and Côte D'Ivoire, and sixteen have significantly declined, including, Australia, Chile and Malta*".

Following a slow decline between 2015 and 2017 and a rather significant decrease over the past few years, Turkey was able to increase its Index score from 40 to 41 in 2018, but demonstrated an overall decline in ranking. According to Transparency International's clarification, Turkey's increase in score results from the inclusion of one of the nine surveys taken into consideration while calculating the results, which had not been included the previous year. Against the legislative changes that have been undertaken by Turkey with regards to anti-corruption in recent years, it is argued that efforts to enforce and implement these changes have not been sufficient.

With regard to the general decline the Index demonstrates for these relevant jurisdictions, Transparency International notes that *"the ratings reflect the deterioration of rule of law and democratic institutions, as well as a rapidly shrinking space for civil society and independent media"*. The Index also adds that, as a general note, populist politicians are likely to raise corruption levels in countries. It is also argued that violations relating to the rule of law, press freedom, civil society strength, freedom of association and speech have concerning outcomes for corruption perception.

Healthcare Law

Ministry of Health Amends the Guidelines for Cosmetic Claims

The Turkish Medicine and Medical Devices Agency ("**Agency**") of the Ministry of Health issued an announcement on February 8, 2019 declaring that Version 5.0 of Guidelines for Cosmetic Claims ("**Guidelines**")[27] has been published.

The Agency stated that the amendments within the latest version were implemented due to feedback received from cosmetic companies regarding the increased costs of new package designs and on the inclusion of disclaimers such as "*does not contain paraben / phthalate / alcohol / SLES, SLS, dye*" on packages as a marketing policy and in line with consumer requests.

Accordingly, several provisions within the Guidelines have been amended, removed or introduced and can be summarized as follows:

- Legal requirements cannot be displayed on the images of the product or its price tag and package as an extra quality or benefit.
- Removed from the Guidelines is the article governing that a specific opinion on a claim cannot be utilized in a manner to verify the claim if there are contradicting opinions on that claim.
- Within Version 4.0 of the Guidelines, manufacturers were required to determine convenient and sufficient methods to verify claims and submit these methods to the Agency's evaluation, whereas the amended Guidelines do not require such evaluation of the Agency.

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[27] The Guidelines can be accessed at https://www.titck.gov.tr/duyuru/kozmetik-firmalarinin-dikkatine-08022019173049 (last accessed on May 9, 2019)

- Tests that are run by companies concerning *ex vivo* or *in vitro* studies are now required to be conducted within supervised laboratory environments which provide the necessary conditions, and to include predicting results with regard to *in vivo* effects.
- Cosmetic efficacy testing on humans is required to be conducted with the target population and with defined terms of inclusion and exclusion of volunteers.
- Usage of scientific information is now only possible if the information relates to the cosmetic product, its components, combinations or claims. Moreover, the Guidelines enable the use of market data that supports a cosmetic product's claim.
- Claims pertaining to a product's exclusion of a certain component or components can now be used on the condition that the certificate analysis received from laboratories that meet the standards of TSE ISO IEC 17025 has been submitted to the Directorate of Cosmetic Products Department during the application stage of the product.
- Conditions pertaining to the usage of hypoallergenic claims have been removed through the amended Guidelines and now only indicate that usage of hypoallergenic claims are deemed inappropriate, since they cannot ensure a product will not cause allergies in any circumstances.

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