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LEGAL INSIGHTS QUARTERLY

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This collection of essays, provided by ELIG Gürkaynak Attorneys-at-Law, is intended only for informational purposes. It should not be construed as legal advice. We would be pleased to provide additional information or advice if desired.

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Preface to the September 2020 Issue

The September 2020 issue of Legal Insights Quarterly was prepared to provide an extensive look into the upcoming legal issues as well as the foremost contemporary legal agenda in Turkey.

The Capital Markets Law section provides the details of the recent secondary legislation introducing the novel concepts of project finance funding and project-based security.

For the Competition Law section, three most recent and prominent decisions of the Turkish Competition Board are summarized. These include the Board's recent and surprising emphasis on the importance of awareness and consent in information exchange assessments; a non-fine decision on the restriction of information exchange and finally, a high-scrutiny decision on merger control. Further, the Competition Law section includes an overview newly-introduced settlement and commitment procedures, as well as a comparison with the established practice of the European Union on these procedures.

The Real Estate Law section discusses the certain postponed provisions of Turkish Code of Obligations numbered 6098 regarding workplace leases of merchants and legal entities.

The Data Protection Law section sheds light on the Turkish Data Protection Authority's recent decision regarding the exercise of "*right to be forgotten*" on search engines in Turkey

Under the Internet Law section, the much debated amendments on Law No. 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts, is discussed. The amendments sets forth the novel obligations on social network providers with over 1 million daily accesses from Turkey.

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

September 2020

Corporate Law

Conditions for Being Subject to Independent Audit and Consequences of Not-Being Audited

I. General Overview

In Turkey, the general rules and principles regarding independent audit are mainly regulated under the Turkish Commercial Code No.6102 (“***TCC***”) and Decree on the Determination of the Companies Subject to Independent Audit (“***Decree***”).

Accordingly, companies would become subject to independent audit if they are explicitly listed in the Decree or in case they exceed thresholds stipulated under the relevant legislation and those companies might face certain consequences if they are not audited despite being subject to independent audit. In this article, our aim is to reveal companies that are subject to independent audit and consequences of not-being audited.

II. Which Companies Are Subject to Independent Audit?

Companies listed in Annex I of the Decree are subject to independent audit regardless of any threshold and those are as follows:

1. The following companies are subject to regulations and audit of the Capital Markets Board pursuant to Capital Market Law No. 6362;

- Investment institutions;
- Collective investment enterprises;
- Portfolio management companies;
- Mortgage finance corporations;
- Asset leasing companies;
- Central exchange institutions;
- Central custody institutions;
- Data storage foundations;
- Rating Institutions;
- Assessment institutions;
- Joint stock companies whose capital market instruments are traded in the stock exchange or other organized markets or which have offering circular or export document that bear validity period approved by the Capital Markets Board in order to be traded;
- Joint stock companies whose capital market instruments are not traded in the stock exchange or other organized markets; however, which issue capital market instruments except for shares without being offered to public (until the end of the accounting period in which the issued capital market instruments are paid off) or which have offering circular that bear the validity period approved by the Capital Markets Board for this purpose.

2. The following companies are subject to regulations and audit of the Banking Regulation and Supervision Authority pursuant to Banking Law No. 5411;

- Banks;
- Grading institutions;
- Financial holding companies;
- Financial leasing companies;
- Factoring companies;
- Financing companies;
- Asset management companies;
- Companies having qualified shares over financial holding companies as defined in the Banking Law No. 5411.

3. Insurance, reinsurance and pension companies carrying out activities within the scope of Insurance Law No. 5684 and the Individual Pension Savings and Investment System Law No. 4632.

4. Authorized institutions, precious metals intermediary institutions or companies conducting business in manufacturing or trading precious metals, which are allowed

to conduct activities in Borsa Istanbul markets.

5. Licensed warehouse enterprises established in line with the Agricultural Products Licensed Warehousing Law No. 5300, public warehouses established in line with the Public Warehouses Law No. 2699.

6. Media service provider companies having at least one of the following rights or licenses:

- Right to make television broadcasting from land,
- Satellite television broadcasting license, or
- License for cable television broadcasting to multiple provinces.

In addition to the foregoing, the Decree groups other companies into three sub-categories and companies which exceed the threshold value of at least two of the three criteria stated below two financial years in a row become subject to independent audit. Said three criteria are as follows:

- For companies whose capital market instruments are not traded in the stock exchange or other organized markets but are considered as publicly held companies within the scope of Capital Market Law No. 6362 relevant criteria are as follows:
- total assets worth of TRY 15 million
- having net sales revenue of TRY 20 million
- employing 50 employees

1. For companies listed in Annex II of the Decree relevant criteria are as follows:

- total assets worth of TRY 30 million
- having net sales revenue of TRY 40 million
- employing 125 employees

- Companies listed in Annex II of the Decree are as follows:
- Companies at least 25% of their share capitals are directly or indirectly owned by public professional organizations, unions, associations, foundations, cooperatives and superior institutions thereof;
- Companies publishing daily newspapers throughout the country;
- Except for the call center companies, companies that are subject to regulation and audit of Information Technologies and Communication Authority within the scope of the relevant Turkish legislation;
- Companies carrying out operations under the regulations of Energy Market Regulatory Board;
- Except for the companies listed under Annex I;
- Excluding subsidiaries and companies which are inactive or whose activities are suspended temporarily or revoked, subsidiaries of the Saving Deposit Insurance Fund ("TMSF") and the companies whose supervision and management are taken over by TMSF within the scope of the relevant Turkish legislation;
- Public economic enterprises and their subsidiaries carrying out activities under the relevant Turkish legislation and companies at least 50% of share capitals of which are owned by municipalities.

2. For any other companies which are not listed above:

- total assets worth of TRY 35 million,
- having net sales revenue of TRY 70 million
- employing 175 employees

The companies which have exceeded the threshold value of at least two criteria

stated above two financial years in a row, become subject to independent audit beginning from the following financial year.

The companies will no longer be subject to independent audit if those remain (i) under the threshold values two financial years in a row or (ii) at least 20% less than the threshold value of at least two of the three criteria in a financial year. The companies which are subject to independent audit must appoint an independent auditor for each activity year and in any case before the end of the activity year in which the independent auditor would fulfill its duties.

III. What Are the Consequences of Not-Being Audited?

Under Article 397/1 of the TCC, independent auditor must audit financial statements and activity reports of the companies which are subject to the audit.

According to Article 424 of the TCC, general assembly resolution related to approval of balance sheets lead to release of board members, unless otherwise stated in the resolution. However, if certain issues are not indicated in balance sheets at all or as required or balance sheets include certain issues that prevent revealing position of the company accurately and this has been made consciously, approval of balance sheets cannot be considered as release of board members. Therefore, board members cannot be released based on unaudited financial statements. Moreover, profit cannot be distributed and share capital cannot be increased or decreased based on such unaudited financial statements.

It is also worth mentioning that in accordance with Article 553/1 of the TCC, board members may be held liable against the company, shareholders and creditors of the company, if the company, shareholders or creditors of the company suffer any losses, as the company has not been audited, although it is subject to independent audit under the relevant legislation.

Moreover, as per Article 1524 of the TCC, companies which are subject to independent audit must create a website and allocate a section for the announcements that need to be made by the company under the laws. In this respect, the board of directors of the company must announce the newly-appointed independent auditor on the company's website.

According to Article 562/12 of the TCC, a judicial fine corresponding to a time period starting from 100 days to 300 days shall be imposed on the board members of the companies subject to independent audit but has not created a web-site. This judicial fine would be respectively from (i) approximately between TRY 2,000 (~ EUR 232) and TRY 10,000 (~ EUR 1,160), when calculated over the maximum daily rate of TRY 100 (~ EUR 11) - the minimum daily amount is TRY 20 (~ EUR 2,3) to (ii) approximately between TRY 6,000 (~ EUR 697) and TRY 30,000 (~ EUR 3,490), when calculated over the maximum daily rate of TRY 100 (~ EUR 12) - the minimum daily amount is TRY 20 (~ EUR 2,3) depending on the court's decision.[1]

Furthermore, a judicial fine corresponding to up to 100 days shall be imposed on those who have not put the required content on such web-site as stated under Article 1524 of the TCC. This judicial fine would be up to approximately between

[1] Euro figures within this article are provided on estimates based on the currencies at the time of writing.

TRY 2,000 (~ EUR 232) and TRY 10,000 (~ EUR 1,160), when calculated over the maximum daily rate of TRY 100 (~ EUR 11) - the minimum daily amount is TRY 20 (~ EUR 2,3).

IV. Conclusion

In conclusion, conditions for being subject to independent audit are explicitly listed in the relevant legislation and the companies subject to independent audit under the laws must appoint an independent auditor for each activity year. As there are severe consequences triggered by not-being audited despite being subject to independent audit, companies must thoroughly assess whether they fall under the relevant legislation related to independent audit and if they are subject to independent audit, they must appoint an independent auditor for each activity year and in any case before the end of the activity year in which the independent auditor carries out its duties.

Banking and Finance Law

Turkish Legislators Enable Electronic Execution of Certain Agreements

I. General Overview

The Law No. 7247 Amending Certain Laws and Decrees ("***Law No. 7247***") was published in the Official Gazette dated June 26, 2020 and numbered 31167. The Law No. 7247 introduces many changes, including agreements that may be executed electronically for certain financial transactions. In this article, we will summarize the amendments made to the Banking Law No. 5411 ("***Law No. 5411***"), the Law No. 5464 on Bank Cards and Credit Cards ("***Law No. 5464***"), the Law No. 6361 on Financial Leasing, Factoring and Financing Companies ("***Law No. 6361***"), the Capital Markets Law No. 6362 ("***Law No. 6362***"), the Payment and Securities Settlement Systems, Payment Services and Electronic Money Institutions No. 6493 ("***Law No. 6493***") for entering into such agreements electronically.

II. What are the Changes

Pursuant to the amendments made to the Law No. 5411, Law No. 5464, Law No. 6361 and Law No. 6362, agreements to be entered into with banks, card issuing institutions, financial leasing companies, factoring companies, financing companies, investment institutions, portfolio management companies and their clients may be executed (i) in writing, or (ii) through remote communication devices, or (iii) whether distantly or not, by any information or electronic communication device that enables verification of client's identity and is deemed by the relevant authorities as a written form. This novelty also applies to framework agreements to be executed between payment service providers and their clients within the scope of the Law No. 6493.

III. Conclusion

The Law No. 7247 empowers banks, card issuing institutions, financial leasing companies, factoring companies, financing companies, investment institutions, portfolio management companies and payment service providers to enter into financial agreements with their clients through digital means in addition to conventional means. With these amendments, the Law No. 7247 aims to reduce the need for face-to-face contacts with these companies and institutions in order to keep up with today's technology and avoid the requirement for physical paperwork and wet signature so that relationship with clients may be initiated

and concluded completely through digital means.

Capital Markets Law

New Alternative to Project Funding: Project Finance Funds

The Law No. 7222 on Amending the Banking Law and Certain Laws ("***Law No. 7222***"), published in the Official Gazette on February 25, 2020 and entered into force on the same date, has introduced "*Article 61/B - Project finance, project finance fund and project-based security*" to the Capital Market Law No. 6362 ("***Capital Market Law***"). The Capital Markets Board ("***CMB***") announced a draft Communiqué on Project-Based Securities (III-61/B.1) ("***Draft Communiqué***") to elaborate on implementation of Article 61/B and introduce relevant secondary legislation in accordance with market needs and expectations with an announcement dated July 24, 2020 and requested relevant opinions and suggestions.

Article 61/B defines project finance as providing financing for the projects such as infrastructure, energy, industry or technology investments that entail a large amount of capital with long-term need through project finance funds.

"*Project finance fund*" and "*project-based security*" are new and innovative concepts for Turkish capital markets. In accordance with Article 61/B and its recital, basic functions and mechanism of project finance funds could be summarized as follows: (i) to issue project-based securities for investors regardless of the risks of the issuers to the extent possible and (ii) to raise money and/or acquire assets for financing of large-scale projects. Accordingly, the financing is directly allocated to the projects, not to the issuers, and proceeds and other rights arising from projects are assigned to project finance funds in order to minimize and ease potential risks of the investors (owners of the project-based securities). It is expected by lawmakers that these concepts would create secured, alternative and attractive instruments for both local and foreign investors and provide long-term financing opportunities for public projects as well.

Project finance funds can be incorporated only by duly authorized investment (intermediary) firms. These funds do not have a legal personality similar to typical funds; however, for certain transactions including registration, amendment and annulment to be conducted before official registries (*e.g.* land registries, trade registries), it is deemed and stipulated that project finance funds would have limited legal personality. In other words, any right or asset may be registered before relevant official registries on behalf of duly incorporated and managed project finance funds.

It is also worth noting that assets and rights of project finance funds cannot be disposed, pledged, provided as warranties, seized even for public debts or included in bankrupt's assets in any way until redemption of the project-based securities.

Article 61/B of the Capital Market Law provides a general structure on project finance, project finance funds and project-based securities for introductive purposes. Therefore, it is stated in fourth paragraph of the article that the procedures and principles regarding assets and rights, founders, incorporation process, activity conditions and requirements, management and termination of project finance funds as well as issuance procedures of project-based securities are to be determined and

introduced by the CMB. It is expected that the CMB will introduce final and developed version of the Draft Communiqué until the end of 2020 or at the beginning of 2021.

The Draft Communiqué requires that project finance funds to be incorporated in Turkey and bear "*project finance fund*" phrase in their titles. In addition, the incorporation process would be subject to prior approval of the CMB. The Draft Communiqué also stipulates that there must be a fund committee in project finance funds and it shall consist of three (3) members and at least one of these members should have relevant qualifications of independent members of board of directors in public companies in accordance with the corporate governance regulations of the CMB. In this respect, fund committees would be generally responsible for the duties of representation, management and supervision of audit processes.

Given the roles, duties and liabilities of members of fund committees, it could be inferred fund committees would have general characteristics of board of directors in joint stock companies. It should be noted that the Draft Communiqué also includes other tight rules and requirements with regard to activities of project finance funds to establish a transparent and reliable platform for the investors. These are basically related to issuance principles of project-based securities, features of assets that could be included in the funds' portfolios, allowed expenditures of the funds, procedures and principles of public disclosures, financial reporting and independent audits.

Considering the growing need for financing in various projects, the entry into force and implementation of the communiqué would initiate a new era for project finance and capital markets in Turkey, and also serve as win-win situation for both issuers and investors.

Competition Law / Antitrust Law

Unchartered Territories: A Comparative Study of the Newly Introduced Commitment and Settlement Mechanisms of Turkish Competition Law with the European Union Competition Law

As explained in depth within the previous June 2020 issue of Legal Insights Quarterly [2], the Law No. 4054 on the Protection of Competition has finally been amended by the Grand National Assembly of Turkey. The amendments, which were accepted by the parliament and entered into force on 24 June 2020 ("***Amendment Law***"), introduced numerous novelties to the established practice with the overall aim of bringing Turkish competition law closer to European Union practice. These practices include a different selection mechanism for Competition Authority's cases, introduction of the SIEC [3] test for merger control and numerous procedural tools to increase efficiency of the Competition Authority.

This article aims to shed light on the newly introduced commitment and settlement mechanisms during anti-competitive behavior investigations. It should, however, be noted that the commitment and settlement mechanisms under Turkish competition law is not yet drawn out by secondary legislation or established by

[2] Legal Insights Quarterly, June 2020 issue (*see* https://www.gurkaynak.av.tr/docs/liq/June2020/#PDF/1, last accessed on August 7,2020).
[3] Significant impediment to competition test ("***SIEC test***")

practice. As these mechanisms are inspired by the European practice, this article will examine the EU practice, together with current Turkish legislative framework.

(i) Settlement and Commitment Mechanisms under the Amendment Law

The Amendment Law introduces two new mechanisms inspired by EU competition law which aim to enable the TCA to end investigations without going through the entire pre-investigation and investigation procedures.

The first mechanism is a commitment procedure. This will allow undertakings or an association of undertakings to voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the TCA's competitive concerns under Articles 4 and 6 of Law 4054, prohibiting restrictive agreements and abuse of dominance. Depending on the sufficiency and the timing of the commitments, the TCA can decide against launching a full-fledged investigation following the preliminary investigation or to end an on-going investigation without completing the entire investigation procedure. However, commitments will not be accepted for violations such as price fixing between competitors, territory or customer sharing and the restriction of supply. The TCA will provide the details of these new procedures by secondary legislation and may reopen an investigation in the following cases:

- a substantial change in any aspect of the basis of the decision;
- the relevant undertakings' non-compliance with the commitments; or
- the decision was based on deficient, incorrect or fallacious information provided by the parties.

The new law will enable the TCA, *ex officio* or at the parties' request, to initiate a settlement procedure. Unlike the commitment procedure, settlement could only be offered in full-fledged investigations. In this respect, parties that admit an infringement can apply for the settlement procedure until the official service of the investigation report. The TCA will set a deadline for the submission of the settlement letter and, if settled, the investigation will be closed with a final decision including the finding of a violation and administrative monetary fine. If the investigation ends with a settlement, the TCA can reduce the administrative monetary fine by up to 25%. Other procedures and principles regarding settlement will be determined by the TCA’s secondary legislation. That said, technically both commitments and settlement could be offered in the ongoing proceedings as the Amendment Law is effective as of June 24, 2020.

(ii) Main Differences between the Commitments and Settlement Mechanisms under Law No. 4054

In order to provide more insight on the distinction between the commitment and settlement mechanism under Turkish competition law, below is a comparison of the two mechanisms. However, it must be noted that the secondary legislation is expected upcoming days, in which the below outline is awaited to be made more concrete.

- The commitment mechanism can be reenacted during both the investigation and preliminary investigation phases whereas the settlement mechanism can only occur the initiation of the investigation.
- There is no time limitation for the utilization of the commitment

mechanism whereas the settlement mechanism can be used until the official serving of the investigation report (statement of objections).

- The commitment mechanism does not require for the undertaking in question to admit to the existence of a violation whereas the settlement mechanism requires the admission of the existence and the scope of the violation.
- There is no concrete time limitation for the completion of the commitment mechanism whereas for the settlement mechanism, the Board will set a definitive time period for the undertaking(s) in question to submit a commitment text. Settlement submissions after this deadline will not be taken into account.
- The commitment mechanism is not applicable to hard-core violations (such as price fixing between competitors, territory or customer sharing and the restriction of supply) whereas the Law No. 4054 does not specify a restriction for the scope of application for the settlement mechanism.
- In scope of the settlement mechanism, the undertaking in question cannot appeal the administrative fine and the matters within the scope of the final settlement text. This is not applicable to the commitment mechanism.
- The settlement mechanism may result in a %25 decrease in the administrative monetary fine.

(iii) Commitment Mechanism within the European Competition Law Practice

In order to shed light on the European Union practice, below is a brief summary of how the commitment procedure is conducted vis-à-vis the Commission. At this stage, it is unknown whether the Turkish Competition Authority will follow the below procedure as the secondary legislation has not been enacted yet.

1. The investigated undertakings expresses interest in submitting commitments;

2. Commission and the undertaking convene in a meeting (State of Play) and the Commission informs the undertaking during this meeting the timeframe for when the commitments will be submitted and the conclusion of the process;

3. Later on, if the Commission agrees that the case can be concluded by way of commitments, the Commission prepares a pre-assessment report to convey its competition law concerns for the case and conveys it to the investigated party. If the commitment procedure is initiated following the servicing of the Statement of Objections, the Commission does not prepare a pre-assessment report as the Statement of Objections correlates to the same content;

4. Once the pre-assessment report is served, the investigated parties have one month to officially submit the commitments;

5. Once the investigated parties submit their commitments, the Commission conducts a market test and makes the short summary of the case and the redacted version of the commitments public in order to enable third parties to submit their opinions;

6. If there is a complainant in the case, the Commission will specifically inform the complainant for its views;

7. A duration no less than one month is provided for third parties to submit their views;

8. The views of third parties are conveyed to the investigated parties and the State of Play meeting is held; additional time is allowed to the investigated party to revise its commitments;

9. The investigated parties revise their commitments; if the content of the commitments are substantially changed, the Commission may repeat the market tests;

10. Once the commitments are finalized, the Commission may decide to render a decision, making the commitments binding and concluding its assessment of the case;

11. If the investigated party does not wish to revise its commitments, the Commission would continue with its investigation of the case;

12. The Commission or the investigated party may at any point retract the commitments.

On an additional note, under European competition law, the investigations that were concluded with commitments, just as normal Commission decisions, is subject to judiciary review, if the annulment of the decision is requested. The relevant case grounds are cited in various sources as (i) the Commission's wrongdoing in strong arming the investigation parties to submit commitments, (ii) the rendering of a different set of commitments in the decision than those proposed by the Parties, (iii) non-abidance to procedural rules and (iv) the Commission strong-arming the undertakings to submit proportional commitments.

However, the appeals are very rare in practice as the commitments are voluntarily submitted and the commitment decisions do not contain a finding of guilt; therefore those undertakings subject of these decisions do not feel the need to appeal in general.

There is no clear indication in scope of Law No. 4054 that there will be no judiciary review after a commitment decision, like there is in the settlement procedure. Therefore, at this stage, it may be assumed that the commitment decisions can be taken to administrative courts.

Furthermore, in course of the commitment process and in scope of the analyses titled "*market test*", the commitments proposed by the Parties are submitted to opinions of third persons. If indeed the Commission is of the view that the commitments will mitigate the competition law concerns provided in the pre-assessment report, in accordance with Council Regulation (EC) No 1/2003, Article 27/4, analyses for the market test will be initiated. During the market test, which could be described as the most significant stage, essential elements of the commitments provided by the parties and subject to the analyses, will be published on the EU Official Journal under redaction and the redacted text of the commitments will be published on the Commission's internet page. A time period no less than one month is provided for third parties to submit their views during the market test stage. A press release is also published. As a result, upon the submission of the commitments, the commitment procedure does not remain confidential and is announced to the public.

(iv) Settlement Mechanism within the European Competition Law Practice

It is important to note that the main difference is that while the settlement before the Commission is only applicable to cartel cases, the process described under

the amended Article 43 of Competition Law can be applied to all infringement types. Therefore, the investigated undertakings may ask the Authority for settlement, irrespective of the nature and type of the alleged infringement. The wording of the relevant provision also gives the Authority the discretion to initiate the settlement proceedings, taking into account judicial economies and efficiencies, as well as any consensus (or lack thereof) regarding the existence and scope of the infringement.

Below is a brief summary of how the settlement procedure is conducted in the European Union practice. It is still unknown whether the Turkish Competition Authority will follow the below procedure as the secondary legislation has not been enacted yet.

Initiation of proceedings

1. Parties are identified and recognized as parties to the proceedings (legal persons that a penalty may be imposed on for an infringement)

2. The initiation of proceedings can take place at any point until the date the Commission issues a statement of objections against the parties or parties express their interest for a settlement in writing. Initiating a formal proceeding against parties in view of settlement is a precondition. The Commission invites each party to confirm its interest in the process.

3. At this point, the Commission becomes the only competition authority that is competent.

4. Parties confirm their interest in writing in two weeks (this two weeks is also the final opportunity for the parties to apply for leniency). This confirmation does not mean that parties participated in an infringement. No liability can be attached to the parties by this confirmation.

5. It is in the Commission's discretion to disregard any immunity application that is submitted after the two weeks of time that is given to the parties.

Commencing the settlement procedure

6. Usually, the Commission's established practice is to set three formal bilateral meetings for the settlement discussions with each of the parties.

7. Information on essential elements will be disclosed in a timely manner. With this, parties will be able to assess whether they have a potential objection or they would settle.

8. Process of settlement discussion does not imply the existence of an infringement, the content of it cannot be used as evidence and this process is confidential. In this direction, liability and infringement can only be admitted once the settlement discussion is concluded.

9. The Commission may set a final time-limit of at least 15 working days for the party to introduce a final settlement submission.

10. Parties may call upon Hearing Officers during this procedure for effective exercise of the rights of defence.

Settlement submissions

11. If parties are willing to settle, they must make a formal request.

12. Parties cannot unilaterally revoke the settlement requests that have provided them unless the Commission does not meet the settlement requests.

13. Final decision should impose a fine which does not exceed the maximum amount indicated in settlement submission.

The applicable reduction on the monetary fine amount in case of settlement differs significantly. The Commission offers a reduction of 10% of the fine for settling a case, for each settling party. Under the current Turkish framework, -the settlement mechanism may result in a %25 decrease in the administrative monetary fine.

Another substantial distinction relates to the right to bring administrative proceedings against the settlement decisions issued, before the relevant courts. The settlement procedure before the Commission does not prejudice the parties' right to appeal after the settlement. To that end, even after a settlement is reached with the Commission, the relevant undertakings could still appeal the Commission's decision to the General Court.[4] On the other hand, Article 43(8) of Law No. 4054 explicitly stipulates that the settling parties cannot appeal the Board's decisions in the aftermath of the settlement as explained above.

(v) Conclusion

This article contains a brief summary of the developments in Turkish jurisdiction as well as the practices of European Commission.. It is well known that the Law No. 4054 was amended to bring the Turkish competition law practice closer to the European practice. However, as of August 2020[5], the secondary legislation which will define how these amendments will be applied in practice. All in all, it is an exciting time to be a competition law practitioner in Turkey.

Persistent scrutiny over previous merger control filings continues: The Board imposes two administrative fines to Brookfield Asset Management Inc. for gun-jumping and false and misleading information

The Turkish Competition Board's ("***Board***") reasoned decision[6] on imposing two separate administrative fines on Brookfield Asset Management Inc. ("***Brookfield***") as per Article 16(a) and Article 16(b) of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***") due to the findings that (i) Brookfield completed the acquisition of the power solutions business of Johnson Controls International plc ("***JCI***") without notifying the Board and its approval and that (ii) Brookfield submitted false and misleading information regarding its Turkish turnover figure was recently published.

In its assessment of gun-jumping, the Board compared the closing and notification dates; and consequently found that Brookfield notified the transaction at hand approximately 5 months after the closing, which took place on April 30, 2019. The Board also acknowledged that the contemplated transaction was notified before the European Commission and was unconditionally approved on February 14, 2019[7]. Although Brookfield argued that it realized that the JCI transaction actually required a mandatory merger control filing

[4] For instance, in Case T-95/15, the General Court annulled the fine for the first time on an appeal against a settlement decision of the Commission, finding that the Commission failed to explain why Bong AB, Groupe Hamelin SA and Printeos SA received different reductions to their penalties while their involvement was analogous (Case T-95/15, Judgment of the General Court of 13 December 2016, Printeos and Others v Commission).

[5] At the time of writing.

[6] The Board's decision dated April 30, 2020 and numbered 20-21/278-132

[7] The European Commission's decision of February 14, 2019 and numbered COMP/M.9224.

before the Authority, when assessing a separate transaction involving the acquisition of sole control over JCI's subsidiary Johnson Controls Autobatterie GmbH & Co. KgaA ("***JC Autobatterie***") by Brookfield,[8] the Board concluded that the contemplated transaction of JCI indeed was subject to a mandatory merger control filing before the Authority.

In addition, even though Brookfield indicated that it had no Turkish turnover pre-transaction (in 2018), the Board noted that Brookfield notified the Authority in 2015 regarding its acquisition of Graftech[9]. In light of this previous *Brookfield/Graftech* acquisition, the Board enquired whether Graftech generated any turnover in Turkey. Accordingly, it determined that Graftech indeed had certain activities in Turkey and as such, Graftech's 2018 Turkish turnover could be attributed to Brookfield, yet this particular turnover was not included in Brookfield's Turkish turnover. Upon the confirmation that Graftech was still under Brookfield's control, the Board concluded that Brookfield misinformed the Authority, when it submitted to the Authority that it had no activities and turnover in Turkey.

As a result, while the Board ultimately approved the transaction, the Board imposed two separate administrative monetary fines of 0.1% of the annual turnover of Brookfield for gun-jumping under Article 16(b) of the Law No. 4054 and for providing false and misleading information under Article 16(a) of the Law No. 4054.

[8] The Turkish Competition Board granted unconditional clearance to JC Autobatterie transaction through its decision dated 22.11.2019 and numbered 19-41/679-293.

[9] Turkish Competition Board's decision dated June 30, 2015 and numbered 15-27/296-81.

The Turkish Competition Board concluded its preliminary investigation highlighting the importance of not restricting online sales once again

In recently published *Yataş Doğtaş* decision [10], the Board assessed the allegations that Yataş Yatak ve Yorgan Sanayi Ticaret A.Ş. ("***Yataş***") and Doğtaş Kelebek Mobilya Sanayi ve Ticaret A.Ş. ("***Doğtaş***") have violated Law No. 4054 by determining dealers' resale prices, fixing discount rates and limiting payment methods of their dealers.

In relation to the market, the Board stated that there are many players with small, medium and large scales in the Turkish furniture market. The Board also classified the undertakings operating in the furniture sector into following three groups: (i) no-name small scale firms having less concept stores and limited product types, (ii) underground economy (the Board stated that these two groups consist of 65-70% of the market) and (iii) branded undertakings operating country-wide. The Board stated that with its Istikbal, Bellona and Mondi brands, Erciyes Anadolu Holding is the leading player in the market. The Board defined the relevant product market based on the product groups. Accordingly, the Board defined the following markets: (i) bed, (ii) sofa bed, (iii) home textile, (iv) modular furniture and (v) sitting room sets.

In its assessment, first of all, the Board examined various agreements Yataş and Doğtaş executed with their dealers. As a result of this the Board concluded that the price lists sent by Yataş and Doğtaş to their dealers are recommended retail prices and that there is no provision in the agreements and the documents seized during the on-site inspection indicating that Yataş and

[10] The Board's decision dated February 6, 2020 and numbered 20-08/83-50.

Doğtaş determine resale prices of their dealers, fix discount rates or limit payment methods. In relation to two documents collected from Yataş, the Board noted that these documents imply that Yataş monitors and interferes with the resale prices of its dealers. The relevant document shows that (i) Yataş was informed about one of its dealers apply lower prices than Yataş's own stores, (ii) one of the Yataş managers responded that he/she will discipline the relevant dealer offering low prices and terminate the agreement with this dealer, if deemed necessary. The Board assessed that the relevant document only relates to an isolated situation specific to Izmir region, noting that there were no other evidence indicating that resale price maintenance within the same region or other regions. The Board also analyzed the resale prices of dealer to see whether Yataş engaged in resale price maintenance. On that front, the Board noted that dealers are free to set their prices different from recommended prices and that they have been able to set prices even below the lowest prices in Yataş's recommended prices in certain situations. Accordingly, the Board decided to reject the allegations noting that there is no evidence indicating resale price maintenance, fixing discount rates or limiting payment methods by Yataş and Doğtaş.

The Board also evaluated whether Yataş and Doğtaş restricted online sales as some of the provisions in their agreements found to be restrictive by the Board in terms of online sales.

The Board first referred to the European Commission's Vertical Agreements Block Exemption Regulation (the "***Regulation No. 330/2010***"), accompanied by the EU Guidelines ("the ***Guidelines***") in terms of online sales. It stated that the following restrictions exclude the relevant agreement from block exemption: i) agreeing that the (exclusive) distributor shall prevent customers located in another (exclusive) territory to view its website or shall redirect the customers to the manufacturer's or other (exclusive) distributors' websites, (ii) cancelling a customer's order if it is noticed from the customer's credit card information that the customer is not located in the exclusive territory, iii) restriction on the proportion of total sales conducted over the internet and iv) agreeing that the distributor shall pay a higher price for products planned to be resold by the distributor online than for products planned to be resold off-line.

The Board indicated that if the restriction on sales does not have an objective justification it would be regarded as competition restrictive behavior by object. Subsequently, referring to the Block Exemption Communiqué on Vertical Agreements (***"Communiqué No. 2002/2"***) the Board noted that a provision restricting online sales of authorized distributors would cause the vertical agreement to fall out of the scope of the Communiqué No. 2002/2 and within this scope, as online sales are primarily categorized as passive sales, restriction of such sales would be deemed as the restriction of passive sales. The Board referred to its *BSH* decision[11] where it confirmed that although the wording of an agreement may not always result in a passive sales restriction, the implementation of the agreement in practice may lead to a *de facto* restriction of passive sales. The Board also referred to its *Jotun* decision[12] where it indicated that although Jotun established a selective distribution system, since it restricts online sales of authorized distributors, it should

[11] The Board's decision dated August 22, 2017 and numbered 17-27/454-195.
[12] The Board's decision dated February 15, 2018 and numbered 18-05/74-40.

alter and renew its dealer agreement to exclude the prohibition of passive sales via internet.

The Board, after assessing the provisions of Yataş's and Doğtaş's agreements noting that provisions which may lead to restriction of online sales and its effect in practice should be evaluated so as to determine whether distributorship agreements of Yataş and Doğtaş benefit the safe harbor of the Communiqué No. 2002/2, found that both Yataş's and Doğtaş's aforementioned agreements do not benefit from the protective clock of block exemption since they both restrict online sales, namely the passive sales. Thus the agreements fell within the scope of Article 4 of the Law No. 4054. That said, the Board conducted individual exemption analysis and decided that Yataş's and Doğtaş's online sales restriction do not satisfy Article 5(a) of Law No.4054, thus such agreements will not be granted individual exemption.

As a result, considering both Yataş's and Doğtaş's market position, the Board decided that there not to initiate a full-fledged investigation and ordered that Yataş and Doğtaş to avoid practices that restrict passive sales, and to alter and renew their dealership agreements accordingly otherwise written opinions should be delivered to Yataş and Doğtaş in accordance with Article 9(3) of Law No. 4054.

Emphasis on "Awareness" and "Consent" in Information Exchange: The Board found that the Unilateral Information Exchange of an Employee of Arçelik does not Violate Article 4 of Law No. 4054

The Authority recently published the Board's decision [13] concerning the full-fledged investigation conducted against Arçelik Pazarlama A.Ş. ("***Arçelik***") and Vestel Ticaret A.Ş. ("***Vestel***"), in order to determine whether the relevant undertakings have violated Article 4 of Law No. 4054 through an exchange of competitively sensitive information.

The decision is noteworthy given that, after evaluating the case file, the Board concluded that since Arçelik was genuinely not aware of any anti-competitive conduct of its employee and the employee shared information without Arçelik's knowledge or consent, there would not be an agreement or concerted practice between Arçelik and Vestel and therefore the conducts of Arçelik's employee subject to the exchange of information would not violate Article 4 of Law No. 4054.

Pursuant to Article 4 of Regulation on Active Cooperation for Detecting Cartels ("***Leniency Regulation***"), through its request of immunity from fines ("***Leniency Application***") dated August 27, 2020, Arçelik alleged that Arçelik and Vestel have violated Article 4 of Law No. 4054 by exchanging competitively sensitive information.

Within the scope of its Leniency Application, Arçelik pointed out that it has been putting an effort into compliance with competition law legislation for a long time

[13] The Board's decision dated January 2, 2020, and numbered 20-01/13-5.

and with the implementation of management responsible for compliance in 2014, efforts and training in that front have accelerated. Arçelik's efforts included (i) providing "*Ethical Conduct Rules and Application Principles*" booklets which set out liability to comply with competition law legislation and "*Competition Law Guide*" which was provided to Arçelik employees in return to their signatures, (ii) e-mail messages from senior management emphasizing the importance of complying with competition law legislation, sent at least on annual basis, and (iii) providing competition law training to the employees in critical positions. Apart from Arçelik's above-mentioned efforts towards complying with competition law, it was also stated that, pursuant to its internal policy, Arçelik does not attend to meetings of undertaking associations without the attendance of an external legal counsel and e-mail messages of certain senior managers have been periodically examined by way of conducting periodic audits within the scope of Arçelik's competition compliance program.

During the periodic audit conducted in February 2017, an exchange of competitively sensitive information towards Vestel was detected. Consequently, Arçelik decided to conduct a more comprehensive internal review. In light of the information obtained from the correspondences examined within this internal review, Arçelik determined that the company was damaged through its employee's information exchange towards Vestel and requested immunity from fines pursuant to Article 4 of the Leniency Regulation within its Leniency Application submitted to the Authority.

Within the scope of its assessment, in order to detect any exchange of competitively sensitive information, the Board conducted on-site inspections in Arçelik and Vestel premises during the investigation period, mainly by way of collecting information and documents including but limited to competitor retail sales data, competitor turnover data, current/oncoming price increase rates, special sales applications and current/oncoming campaigns, etc.

While assessing the information obtained through the Leniency Application and data gathered during the on-site inspections, the Board stated that the nature of the information exchanged is of vital importance for the analysis regarding the legality of the conduct in question. The Guidelines on Horizontal Cooperation Agreements ("***Horizontal Guidelines***"), which qualifies as the main guide on information exchange assessment, sets out that, for information exchange to have restrictive effects on competition within the meaning of Article 4 of Law No. 4054, it must be of a nature to decrease the uncertainty, increase the transparency and ease the corporation in the relevant product market -which was left open since the Board found it ineffective to define a specific product market for the purpose of the relevant case.

Furthermore, the Board pointed out that Article 4 of Law No. 4054 prohibits agreements and concerted practices between undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition. Thus, independent and single-sided actions of an undertaking do not fall within the scope of Article 4 of Law No. 4054. However, it has also indicated that the mere fact that Arçelik's information was unilaterally shared does not mean that there cannot be any concerted practices between the undertakings since Vestel did not explicitly reject the information flow.

That being said, as a result of its detailed assessment on the case and the markets that the undertakings are active in, the Board found that (i) Arçelik was not aware of such information exchange, therefore, (ii) it was not in a position to make its strategic calls based on the information conveyed to Vestel and/or Vestel's strategic behaviour further to the receipt of that information and (iii) the market data did not project any sign or indication of concerted practices between the two undertakings.

Therefore, the Board found that there were no grounds to accept the existence of an anti-competitive agreement or concerted practice between the two companies. It ultimately decided with majority that the information exchanged by the Arçelik employee was against the interest of Arçelik and Arçelik was neither aware of nor had consent for the relevant information exchange; thus the conducts of a single employee within the scope of information exchange would not violate Article 4 of Law No. 4054.

Finally, according to the dissenting opinion of one of the Board members, Arçelik and Vestel did violate Article 4 of Law No. 4054 and thus an administrative monetary fine should have imposed considering that the Board itself determined that unilateral information sharing can also amount to a violation, if the counterparty who received the competitively sensitive information does not explicitly reject the shared information.

Employment Law

Termination of Employment Agreements based on Valid Reasons through Staffing Norm Practice

I. Introduction

In its fight against COVID-19 pandemic, Turkey has adopted the Law No. 7244 on Reducing the Effects of the Novel Coronavirus (COVID-19) Pandemic on Economic and Social Life and the Law on the Amendment of Certain Laws ("***Omnibus Law***"). Article 9 of the Omnibus Law introduced "*prohibition of termination*" for any kind of employment and service agreements, with certain exceptions.

This prohibition prevents termination of employment agreements by employers, based on valid reasons (*for instance, business requirements or underperformance or incompetency of the employee*), health reasons or compelling reasons, which are the most common grounds that employers resort to in face of COVID-19 outbreak.

Nevertheless, due to the economic reflections of COVID-19 outbreak, it is possible for private companies to engage in downsizing and therefore resort to termination of employment agreements based on valid reasons, after the aforesaid prohibition is lifted. Such termination cannot be arbitrary under any circumstances and must meet the criteria required by laws, as well as the established practice of High Court of Appeals.

In this regard, "*staffing norm practice*", which is a settled practice for public institutions and organizations in order to determine employment surplus and increase efficiency at the workplace, might be guiding for companies that face financial difficulties in connection with COVID-19 outbreak and consider resorting to downsizing on that account. In other

words, companies may consider engaging in "*staffing norm practice*" with a view to ensure that their downsizing practice is in line with Turkish labour law.

II. Prohibition of Termination of Employment Agreements in Turkey

Pursuant to Article 9 of the Omnibus Law, which was adopted with a view to reduce the effects of the COVID-19 pandemic, employers are prohibited from terminating any kind of employment or service agreement. Initially, this prohibition was envisaged to be in effect for three months starting from April 17, 2020 (*i.e.* until July 17, 2020) and the President was given the authority to extend this "prohibition of termination" period up to a total of six months (*i.e.* until October 17, 2020).

Subsequently, with the Presidential Decree published on the Official Gazette dated June 30, 2020, the initially envisaged three-month period was extended to four months (*i.e.* until August 17, 2020). Thereafter, Law No. 7252 on the Establishment of Digital Platforms Commission and Amendment of Certain Laws ("***Law No. 7252***") was published in the Official Gazette of July 28, 2020. The amendment introduced by Article 5 of the Law No. 7252 has given the President the authority to extend this prohibition period by three-month periods at most till June 30, 2021.

On a side note, the only exception provided for this prohibition was the employer's right to execute immediate termination with just cause connected to employee's behaviour breaching moral and good faith principles or due to similar cases, as per Article 25/II of the Turkish Labour Code numbered 4857 ("***TLC***") or other applicable laws. Law No. 7252, by amending Provisional Article 10 of TLC, introduced new exceptions to the prohibition of termination of employment agreements. The new exceptions provided for this prohibition are as follows:

- *end of fixed term employment or service agreements;*
- *closure and end of operation of the workplace for any reason;*
- *end of the work in case of service procurement and construction works, which are conducted in accordance with the applicable legislation.*

Lastly, with the Presidential Decree published on the Official Gazette dated July 31, 2020, the prohibition of termination period has been extended for one more month as of August 17, 2020 (*i.e.* until September 17, 2020).

III. Termination of the Employment Agreement based on downsizing

1. Requirement to Present a Valid Reason

As per Article 18 of the TLC, for workplaces that have more than 30 employees, indefinite-term employment agreement of an employee who has worked more than six months, may only be terminated with prior notice for a valid reason on the basis of; (a) incapability (*underperformance*) of an employee, (b) misbehaviour of an employee and (c) conditions of work, workplace or enterprise (*this obligation to present a valid reason for termination is called "job security provision"*).

In such case, pursuant to Article 19 of TLC, the employment agreement shall be terminated in writing and the reason for termination must be clearly and definitely expressed. Furthermore, written defence of the employee shall be taken if the employment agreement is to be terminated for one of the first two [(a) or (b)] of the aforementioned valid reasons.

Moreover, in Turkish labour law, termination based on valid grounds is subject to strict criteria, which are

determined by both the legislation and jurisprudence. In terms of redundancy cases, the steps required by the law and court precedents might be briefed as follows:

(i) genuinely searching for alternative positions to employ the possibly-redundant employee and offering such position, if any;

(ii) documenting a newly-formed organizational chart in order to show the new structure of the company along with available and filled positions;

(iii) taking a board decision that lays out the process to be followed for possibly-redundant employee (*i.e. searching for positions, offering these positions and if there is no alternative position or the position offer is rejected, dismissing the employee*).

Also, it is crucial that actions that are taken due to the business requirement in question must not be arbitrary and must be in compliance with the actions that are taken by the company afterwards. For instance the company, after eliminating a position, must not hire another employee for that position after a short while. So, the actions and policy behind it must be implemented in a consistent manner throughout the company.

That said, "*staffing norm practice*", which is essentially regulated for and conducted by public institutions and organisations, might constitute a guideline for a lawful downsizing of a private company, in order to eliminate arguments indicating that termination of employment agreement was unlawful due to not following the abovementioned criteria and therefore "arbitrary".

2. Staffing Norm Practice

Briefly, staffing norm practice means setting "staff standards" and taking action accordingly. [14] These standards are obtained through two steps [15] : (i) organisational analysis (*i.e.* restructuring an organisation without formation of a new company, by paying regard to new organisational goals and conditions)[16] and (ii) job analysis (*i.e. "the process of collecting information about the tasks a job that is required to be performed and the knowledge, skills and abilities necessary to perform those tasks"*).[17]

Accordingly, while organisational analysis constitutes the basis of a new organisation chart; job analysis identifies the specifics of a job, the conditions surrounding the performance of a job, the qualifications required for duly performing a job, as well as the number of employees necessary to perform a job.[18]

In this regard, staffing norms practice facilitate "quantitatively and qualitatively" determining staff needs in a work organisation, by taking into consideration the total workload of a workplace[19], and a report/study/survey is prepared to establish the findings and conclusions that represents the result of implementation of staffing norms practice.

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[14] Feyza Kalav-İdrisoğlu, "*Staffing Norms Practıce In Turkish Public Administration: A Critical Evaluation*", Thesis, M.S. Department of Political Science and Public Administration, February 2018, p. 51, 52.

[15] *Ibid.*

[16] Jonathan Law, "*A Dictionary of Business and Management*", (5th edn OUP 2009).

[17] N. Joseph Cayer, "*Public Personnel Administration*", (4th edn Canada: Wadsworth Publishing Company 2004), p. 60.

[18] Kalav-İdrisoğlu (n 1), p. 52; Kamil Ufuk Bilgin, "*Kamu Kaynaklarının Etkin Kullanımı İçin Norm Kadro Uygulaması*" (2002), Yaklaşım Dergisi, p. 20-23; Cayer (n 4).

[19] Kalav-İdrisoğlu (n 1), p. 53.

3. Termination of Employment Agreements on the basis of Staffing Norm Practice

Pursuant to Article 20/2 of the TLC, employers bear the burden of proof to demonstrate that the termination in question is based on a valid reason. In case of terminations on the grounds of operational requirements, employers are required to demonstrate that such termination was a consequence of a duly adopted operational decision followed by a serious, non-arbitrary and consistent application of that decision.[20]

In light of the foregoing explanations, companies that expect to go through downsizing – *after the lift of prohibition of termination* – in connection with the economic effects of COVID-19 might consider engaging in staffing norm practice to demonstrate their "serious, non-arbitrary and consistent" approach in termination of employment agreements on the grounds of operational requirements (*i.e. downsizing*).

In this regard, even though staffing norm practice is actually regulated for public institutions and organizations, the jurisprudence of the High Court of Appeals indicates that this practice might be utilised as a criterion in determining the employment surplus also for the companies operating in the private sector.[21]

Accordingly, if a private company decides to engage in staffing norm practice and as a result of this practice it is revealed that staffing norm number is less than the current number of employees, it might terminate certain employees' employment agreements based on a valid reason arising from operational requirements (*i.e. downsizing*).[22] In order to lawfully proceed with termination on the aforesaid grounds, the employer is required to take an operational decision to adopt staffing norm practice and put this decision into effect in an objective and concrete manner in line with the report/study/survey that is the product of this practice; only then it may resort to termination in accordance with the outcome of the staffing norm practice.[23] In other words, employer's mere statement that it made a decision for downsizing and terminated some employment agreements on that account is not sufficient for a termination to be lawful.

In that sense, in a possible dispute, the courts shall evaluate dismissal of employees – *who were deemed to be employment surplus as a result of staffing norm practice* – on (i) consistency, (ii) arbitrariness, (iii) proportionality and (iv) necessity tests; while the courts will not be making review of expediency.[24] In this regard, a staffing norm practice that is conducted and implemented objectively, precisely and consistently, along with a report/study/survey that could be the final product of such practice, would be the proof of the employer's manner of re-

[20] Nurşen Genç Erdem, "*İş Sözleşmesinin İşletme, İşyeri Ve İşin Gereklerinden Kaynaklanan Nedenlere Dayalı Feshi*" (2018), Master's Thesis, Maltepe University, Institute of Social Sciences, p. 111.

[21] The decision of the 9th Civil Chamber of High Court of Appeals numbered E. 2019/7757 K. 2019/21568 and dated December 3, 2019; The decision of the 9th Civil Chamber of High Court of Appeals numbered E. 2018/10609 K. 2019/9447 and dated April 22, 2019; The decision of the 9th Civil Chamber of High Court of Appeals numbered E. 2018/10614 K. 2019/5279 and dated March 11, 2019; The decision of the 9th Civil Chamber of High Court of Appeals numbered E. 2018/4502 K. 2018/22900 and dated December 11, 2018; The decision of the 9th Civil Chamber of High Court of Appeals numbered E. 2018/2519 K. 2018/21168 and dated November 21, 2018.

[22] Erdem (n 7), p. 112.

[23] *Ibid.*

[24] *Ibid*, p. 113.

organisation and therefore operational requirements; since it would speak to all requirements sought by the High Court of Appeals' case-law.

IV. Conclusion

The COVID-19 outbreak had and continues to have severe effects upon pace and quality of our lives. All measures implemented due to COVID-19 outbreak have led to unprecedented occupational repercussions and economical flux, which inevitably have given rise to financial challenges for many businesses. Therefore, it is possible that private companies would adopt operational changes and go through downsizing. Even though downsizing based on operational requirements is not currently an option for employers due to the prohibition of termination in effect in Turkey; after this prohibition is lifted, financial difficulties incurred in connection with the pandemic might require employers to take additional steps, such as termination of employment agreements on valid grounds.

As indicated, in Turkish labour law, termination based on valid grounds is subject to strict requirements, which are determined by both the law and court precedents. In that sense, employers must follow certain steps in order to lawfully dismiss an employee on operational grounds. In relation to a possible downsizing, employers might consider adopting "staffing norm practice" as a guideline, which is a method used to determine employment surplus and thereby increase efficiency in public institutions and organisations. Duly conducted staffing norm practice, along with a report/study/survey that shows the results of this practice, would demonstrate the way which downsizing would be realised and also show the consistency, non-arbitrariness, proportionality and necessity sought by the courts for termination of an employment agreement based on valid reasons.

Litigation

Mediation Process Became Mandatory for Disputes Related to Consumer Law

As a part of the Turkish Judicial Reform, the Law Amending the Civil Procedure Law and Certain Laws No. 7251 is published in the Turkish Official Gazette on July 28, 2020. In addition to the amendments on several regulations, such as Turkish Civil Procedure Law and Administrative Procedure Law, a major development in consumer law also took place.

Turkish Judicial System has been adopting an approach to include the mediation process before the litigation proceedings and the first reflection of this approach was seen in commercial disputes having a financial claim. As of July 28, 2020, the lawsuits relating to disputes that fall into the jurisdiction of consumer courts are made subject to mediation process as well; thus applying to mediation process is deemed as a pre-requisite for filing such lawsuits, which means that "not applying" would result in rejection to the lawsuit.

I. The requirement to be subject to the mandatory mediation process

The amended Article 73/A/1 (a) of Consumer Protection Law regulates that (i) disputes that fall within the scope of the consumer arbitration committee's duty, (ii) objections to the consumer arbitration committee's decisions, (iii) lawsuits mentioned in Article 73/6 of Consumer Protection Law, mostly injunction orders,

(iv) lawsuits regarding suspension of production or sales and recall of goods from market, and (v) disputes having the nature of consumer actions and arising from real rights regarding real estate are not subject to mandatory mediation.

1. Disputes that fall within the scope of the consumer arbitration committee's duty

In Turkish Consumer Law, there is a system having two phases, separated based on the financial value of the claim. As per Article 68 of Consumer Protection Law, claims having a value higher than TRY 10,390 can be brought only before court through lawsuits. In line with this exception, Article 73/A/1 (a) of Consumer Protection Law, regulating the mandatory mediation process, provides that the disputes that fall within the scope of the consumer arbitration committee's duty, which pertain to the claims having a value lower than TRY 10,390, are not subject to mandatory mediation.

2. Objections to the consumer arbitration committee's decisions

The first phase, which falls within the scope of the consumer arbitration committee’s duty, can still evolve into a lawsuit if the party against whom the committee decides objects against the decision. In such a case, the opposition is examined by the consumer court. The mandatory mediation process is not applicable for consumer lawsuits that are born from a proceeding pursued by the consumer arbitration committee.

3. Lawsuits mentioned in article 73/6 of Consumer Protection Law

As per Article 73/6 of Consumer Protection Law; consumer organizations, relevant public bodies or the Ministry of Customs and Trade are entitled to initiate lawsuits before consumer courts to impose an injunction order, or to detect, prevent or suspend an unlawful situation in cases that generally concern the consumers and in cases where there is a risk that a situation contrary to relevant laws may arise (*This authority to file lawsuits does not include the lawsuits stemming from provisions of unfair commercial practices and commercial advertisement*) The mandatory mediation is not applicable for the type of lawsuits mentioned here; these lawsuits can be filed without the need for applying for mandatory mediation.

4. Lawsuits regarding suspension of production or sales and recall of goods from market

The Ministry, consumers, or consumer organizations are authorized to file a lawsuit to inspect whether a series of goods offered for sale are defective, to suspend production or sale of such, to remedy defect, and to recall such from those who are holding such goods for sale. Based on the clear provision of the amended regulation of mandatory mediation in Consumer Protection Law, these lawsuits are left out of the purview of mandatory mediation.

5. Disputes having the nature of consumer actions and arising from real rights regarding real estate

The exception requires (i) the nature of the dispute to be related to consumer actions and (ii) the dispute to have arisen from rights regarding real estate. With reference to the wording and basic interpretation rules in Turkish Law, both these requirements should be present at the same time for this exception to be applicable.

II. Consequences of not attending the mediation meetings

The mediation proceeding regarding consumer lawsuits is subject to the Law on Mediation in Civil Disputes. Article 18/A/11 of the Law on Mediation in Civil Disputes dictates that if the mediation process is concluded with a party not attending the first mediation meeting without a valid excuse, this party will be kept liable for all litigation costs and cannot be entitled to attorney fee even if the court results in favor of that non-attending party. That said, Article 73/A/2 of Consumer Protection Law protects the consumer from such outcome connected to non-attendance and stipulates that the consumer who did not attend the first mediation meeting is not liable for the litigations costs and attorney fee if the consumer loses the case. The counterparty of the consumer does not benefit from this exception though.

III. Lawsuits subjected to the mandatory mediation process

The provisional clause of Consumer Protection Law rules that mandatory mediation is not applicable for the consumer lawsuits pending before first instance courts, Regional Court of Appeals or High Court of Appeals. In other words, the first consumer lawsuit that shall be subject to the mandatory mediation will be the lawsuit that is initiated as of July 28, 2020, *i.e.* the date of the mandatory mediation provision being published in the Official Gazette.

IV. Conclusion

Turkish legal system welcomed another mandatory mediation process that targets the disputes falling into the jurisdiction of consumer courts, with certain exceptions to that scope. Consumer lawsuits can be of low claim amount by nature but brings a significant workload on the consumer courts nonetheless, and adding the pre-step of mandatory mediation process before going into court for such disputes might be effective in reducing this workload, especially when it comes to claims of low amounts. Because it is reasonably possible for parties to settle if they have a proper venue to discuss the disputed matter, as they would also be considering that the legal proceedings consumes time, energy and money.

Real Estate Law

Changes in the Turkish Rental Law upon Entry into Force of the Postponed Articles of the Turkish Code of Obligations

I. Introduction

The entry into force of certain provisions *(i.e. Articles 323, 325, 331, 340, 342, 343, 344, 346 and 354*) of the Turkish Code of Obligations numbered 6098 ("***TCO***") had been postponed for workplace leases of merchants and legal entities until July 1, 2020 with the Provisional Article 2 of the Law No. 6217 on the Amendment of Certain Laws for the Acceleration of Judicial Services ("***Law No. 6217***").

In cases where TCO did not have a provision regarding the issue at hand, relevant provisions of the lease agreement and in case there is no provision on the agreement, abrogated Code of Obligations numbered 818 ("***aCO***") and with aCO's reference, Law No. 6570 on Real Estate Leases ("***Law No. 6570***") were applicable.

As of July 1, 2020, with the entry into force of 9 postponed articles, the analysed articles below will govern the workplace leases of merchants and legal entities.

II. Explanations and Evaluations regarding Postponed Articles

1. Assignment of lease relationship (Article 323)

There was no regulation regarding the assignment of lease agreements in aCO which was applicable in case there is no provision in the lease agreement. Therefore, parties could agree on such a provision preventing transfer of the lease agreement with their free will, and the lessor could avoid providing his consent for transfer of the lease agreement.

As of July 1, 2020, lessors will be bound with Article 323 of TCO, and they will be obligated to provide their consent regarding transfer of the workplace lease agreements unless there is a valid/just cause. Also, as of July 1, 2020, such regulations prohibiting the transfer of the workplace lease agreement will be deemed to be void. However, in case of transfer of the lease agreement, former lessee transferring the agreement, who is deemed to be relieved from his obligations against the lessor, shall be severally liable with the lessee taking over the lease agreement until the end of the lease agreement and yet for maximum 2 year period in any case.

2. Return of the leased property before the term of the contract (Article 325)

In accordance with Article 325 of TCO, in case the leased property is returned before the term of the contract, the lease agreement shall, nevertheless, continue for a reasonable time in which the leased property may be leased under similar conditions. However, the Article provides an alternative way of early termination in case the lessee finds a new lessee who is capable of fulfilling the obligations under the lease agreement and is willing to duly take over the lease relationship. In such a case, the lessee's obligations under the lease agreement shall be deemed to terminate immediately.

Prior to Article 325 of TCO, there was no clause regarding return of the leased property before the term of the contract in aCO. However, with the precedents of High Court of Appeals, liability of lessee had been limited for a reasonable period of time in which the property may be leased under the same circumstances.

3. Extraordinary termination based on substantial grounds (Article 331)

Even though Article 331 of TCO is postponed until July 1, 2020, since aCO contains a similar clause (Article 264 of aCO), even before Article 331 of TCO came into force, parties could terminate the lease agreement based on probable cause for fixed-term workplace lease agreements. As of July 1, 2020, the workplace leases for indefinite terms may also be terminated based on probable cause making the continuation of the rental relationship unbearable based on Article 331 of TCO, with a slight difference. As per Article 264 of aCO, if the lease period was more than one year, the compensation amount to be paid in case of the termination by the party terminating the agreement could not be less than the six-month rental price. However, in accordance with Article 331 of TCO, the amount of indemnity will be determined by the judge considering the specifics of the case.

4. Prohibition of linked agreement (Article 340)

There was no provision in aCO which corresponds to Article 340 of TCO. Pursuant to this article, if formation or continuation of a lease agreement pertaining to residential and workplace leases is linked to assumption of an

obligation that is not related to the use of the leased property and not in the interest of the lessee, such agreement linked to the lease will be deemed invalid.

5. Security deposit by the lessee (Article 342)

As per Article 323 of TCO, which will be effective only on the lease agreements to be concluded after July 1, 2020, the deposit amount cannot exceed a "three-month lease amount". Furthermore, the deposit amount shall be deposited to a bank account, not to be withdrawn without the lessor's consent. The bank shall return the deposit only on the grounds of the parties' mutual consent, finalization of enforcement proceedings or a final court decision.

6. Prohibition of changes to the detriment of the lessee (Article 343)

Article 343 of TCO is a reflection of the principle of interpretation in favour of the lessee and provides a momentous protection for the lessee. Article 343 stipulates that the lease agreements shall not be amended to the detriment of the lessee, except for determination of the lease amount. By way of example, condensation of the payment terms or increase of the lessee's maintenance obligations are prohibited within the scope of Article 343.

Even though this article is listed among the postponed articles for workplace leases of merchants and legal entities, Article 9 of Law No. 6570 corresponds to this provision; therefore, entry into force of this article has not brought any changes in practice.

7. Determination of the rent amount (Article 344)

The first sub-paragraph of the Article 344 of TCO provides that periodical increase rate designated by mutual agreement of the parties cannot exceed the 12-month average of the consumer price index changes of the previous rental year.

As per sub-paragraph 2 of Article 344, in case parties could not agree on a periodical increase rate, the court shall determine an equitable increase rate not exceeding 12-month average of the consumer price index changes of the previous rental year by considering the consumer price index of previous year and the conditions of the leased property.

Regardless of being agreed on a periodical increase rate, for the lease agreements longer than 5 years or renewed after the fifth year, the court shall determine the rent considering the 12-month average of the consumer price index changes of the previous rental year, conditions of the leased property and rents of similar properties. It should be highlighted that, unlike sub-paragraph 2 of this article, the 12-month average of the consumer price index changes of the previous rental year is not binding for the court in determination of the rent, but only a criteria for such determination.

The gist of this legislation is to determine the rent amount, which falls behind the market value, in a reasonable way. The sub-paragraph also clearly states that there is no need to place an article about this in the lease agreement as this article shall still be implemented regardless of the agreement including such a regulation. Once the rent amount is determined by the court as per this sub-paragraph, the rent will be increased in following 4 years as

per the first and second sub-paragraphs of this article and then a court determination as to the rent can again be requested for the fifth year.

Finally, the last sub-paragraph indicates that in case the rent has been determined in foreign currency, i.e. any currency other than Turkish Lira, then the rent cannot annually increase, unless 5 years pass, preserving the occasions where the adaptation of the agreement is a necessity as per Article 138 of TCO. However, while determining the rent in foreign currency, the Law on the Protection of the Value of Turkish Currency No. 1567 and the Communiqué on the Decree No. 32 on the Protection of the Value of Turkish Currency should be certainly taken into account since it has been prohibited to determine the rent in or indexed to foreign currency subject to specific conditions stipulated in the Decree. It should also be noted that the new rent can be determined pursuant to sub-paragraph 3 of this article yet the newly determined rent should be in Turkish Lira, unless determination in foreign currency is agreed by both parties, as per the settled practice of the High Court of Appeals.

8. Prohibition of regulation to the detriment of the lessee (Article 346)

As per Article 346 of TCO, the only financial obligation that the lessee can undertake is acknowledged as (i) the rent and (ii) secondary expenses, which was also an embraced practice by Article 16 of Law No. 6570. That said, Article 346 of TCO, effective as of July 1, 2020, widened the scope of this principle by forbidding penalty and maturity clauses to the detriment of the lessee.

9. Limitedness of the grounds of action (Article 354)

In accordance with Article 354 of TCO the lessor is not entitled to file a lawsuit against the lessee, claiming the eviction of the leased property, based on any reason other than the ones listed under Articles 350 – 352 of TCO. Although this article has been postponed until July 1, 2020 to be implemented on lease agreements of merchants and legal entities subjecting work places, Article 8 of Law No. 6570 covers the same principle and considers opposite agreements invalid. Therefore, the entry in force of this article does not change the present practice.

III. Conclusion

Entry into force of these articles evaluated under this article will have considerable effect on workplace leases of merchants and legal entities. That said, due to application of aCO and Law No. 6570 with the reference of Law No. 6217 and aCO respectively, some of the current practices will continue. However, taking into consideration that some of the postponed articles did not have an equivalent in aCO or Law No. 6570, entry into force of these articles will bring along various theoretical and practical questions. The concrete application of these provisions will be determined through the precedents of the High Court of Appeals.

Data Protection Law

Turkish Data Protection Authority's Decision on Right to be Forgotten

Turkish Data Protection Authority ("***DPA***") recently published a decision regarding exercise of the "right to be forgotten" on search engines in Turkey. The DPA stated in its announcement of the decision that they have evaluated the applications submitted before the DPA with regard to the requests on de-indexing web search results and within the scope of the "right to be forgotten" and decided on the following:

(i) The "right to be forgotten" is evaluated within the scope of Article 20 of the Turkish Constitution and Articles 4, 7 and 11 of the Law No. 6698 on Protection of Personal Data ("***DLP***") along with the Regulation on Erasure, Destruction or Anonymization of Personal Data.

(ii) Individuals' right to request prevention of broadcasting contents concerning them when their names and surnames are used on web search is considered as a "*de-indexing request*",

(iii) Web search engines should be considered as "*data controllers*" within the scope of the DPL,

(iv) Web search engine operator finds the information broadcasted on the internet automatically, systemically and regularly and then saves such information through its indexing programs and organizes and lists this information as web search result, discloses and provides such data to its users in certain circumstances and thus; these activities should be considered as "*data processing activity*" per DPL,

(v) Individuals may primarily convey their de-indexing requests to the search engines and they (a) may file a complaint before DPA in case search engines decline or do not respond to these requests and (b) also may apply to available judicial remedies,

(vi) The form of application, information and documents to be requested from the individuals for the foregoing applications will be determined by the search engines,

(vii) While evaluating the de-indexing requests, a balance test should be made between the data subject's fundamental right and freedoms and public interest, and the criteria published by DPA should also be considered in each case, and

(viii) Search engines should take the necessary steps in order to ensure that Turkish citizens are able to use communication channels with regards to conveying their requests within the scope of this decision and use their right to be forgotten through the websites.

In addition to several Turkish law precedents relevant to this matter, the DPA also referred to the European Court of Justice's *Costeja* decision of 2014, Article 29 Working Party's Opinion on the Guidelines on the Implementation of the Court of Justice of the European Union Judgment on *Costeja* Case as well as Article 17 of the GDPR which governs "*Right to erasure ('right to be forgotten')*".

The DPA's announcement includes a guidance document setting out the criteria to be taken into account while evaluating the requests for exercising the right to be forgotten, which is generally in line with Article 29 Working Party's Opinion on the Guidelines on the Implementation of the Court of Justice of the European Union Judgment on *Costeja* Case.

Internet Law

Amendment Law on Social Networks

A recent law proposal which provides significant changes to the Law on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts ("***Law No. 5651***") was published on the Grand National Assembly of Turkey's ("***TBMM***") website on July 21, 2020 and on the Official Gazette on July 31, 2020 ("***Amendment Law***"). The Amendment Law primarily introduces obligations on social network providers with over 1 million daily accesses from Turkey.

I. Obligations Introduced by the Amendment Law

1. Social Network Provider Definition

The Amendment Law defines social network provider as real persons or legal entities that enable users to create, view or share content such as text, images, sound, location for social interaction purposes on the internet medium.

2. Obligation to Appoint a Representative

The Amendment Law obliges foreign based social network provider ("***SNP***") which secures more than one million daily access from Turkey to assign at least one person as its representative in Turkey, who will be capable of meeting the requests, notifications or notices that will be sent by the Information Communications and Technologies Authority ("***ICTA***"), Access Providers Union ("***APU***"), and judicial or administrative authorities, and responding to the applications to be made by individuals within the scope of the Law No 5651, and fulfilling other duties therein. In case the representative is a real person, this person must be a Turkish citizen.

SNPs must include contact information of the representative in an easily visible and directly accessible manner on their website. SNPs are also obliged to report this person's identity and contact information to the ICTA.

The Amendment Law suggests a 5-tiered sanction mechanism that would apply respectively in case the SNP continues to violate this obligation within the given periods: (i) administrative monetary fine of 10 (ten) million Turkish Liras, (ii) additional administrative monetary fine of 30 (thirty) million Turkish Liras (*in case the obligation is not fulfilled within 30 days*), (iii) prohibition for the resident tax payers to place advertisements on the social network provider (*in case the obligation is not fulfilled within 30 days as of the second monetary fine*), (iv) bandwidth throttling up to 50% (*in case the obligation is not fulfilled within 3 months as of the advertisement ban decision*) and (v) bandwidth throttling up to 90% (*in case the obligation is not fulfilled within 30 days as of the first bandwidth throttling*).

3. 48 Hours to Respond to Individual Requests

Pursuant to the Amendment Law, SNPs which secure more than one million daily access from Turkey are obliged to provide a positive or negative response to the applications made with regard to the content that falls under the scope of Article 9 and 9/A of Law No. 5651 within 48 (forty eight) hours starting from the submission of the applications. In addition, negative responses should be given with the reasoning.

Administrative fine of 5 (five) million Turkish Liras might be imposed on SNPs which fail to comply with this obligation.

4. 24 Hours to Enforce Court Orders

The Amendment Law provides that SNPs will be liable for all of the damages arising from failure to remove or block access to content which is deemed unlawful with a judge or court order, within twenty four (24) hours.

5. Reporting Obligation

The Amendment Law requires domestic or foreign based SNPs which secure more than one million daily access from Turkey notify ICTA semi-annually on the reports in Turkish language including statistical and categorical information (i) regarding implementation of removal of content and/or access ban decisions and (ii) regarding the applications that fall within the scope of the applications based on Article 9 and Article 9/A of the Law No. 5651.

The Amendment Law also requires publication of the applications based on Article 9 and Article 9/A of the Law No. 5651 on SNP's own website by redacting the personal data in these reports.

Administrative fine of 10 (ten) million Turkish Liras might be imposed on SNPs which fail to comply with this obligation.

6. Data Localization

The Amendment Law introduces data localization requirements and obliges domestic or foreign based SNPs which secure more than one million daily access from Turkey to take the necessary measures to keep the personal data of the users in Turkey, in Turkey.

7. RTBF Reference

The Amendment Law also allows judges to decide on not associating the applicant's (whose personal rights are violated due to the content broadcasted on the internet) name with the websites subject to the decision. Per the Amendment Law, the decision will also indicate which search engines will be notified by the APU.

8. Notification Procedure

The Amendment Law enables notification of the administrative monetary fine decisions through electronic means to the foreign counterparts and indicates that this notice (i) has the capacity of the notification regulated under the Notification Law numbered 7201 and (ii) will be deemed to have been made at the end of the fifth day following the notification date.

9. Provisional Article

The Amendment Law provides a transition period with regard to the obligation to respond to individual requests within 48 hours and states that SNPs shall complete the necessary work to fulfill their obligations within 3 (three) months.

The Amendment Law entered into force as of July 31, 2020 except for the provisions related to SNPs". Provisions related to SNPs (*i.e.* Articles 1, 6 and 7 of the Amendment Law) will become effective on October 1, 2020.

Once the provisions as to "social network providers" become effective (*i.e.* October 1, 2020), there will be another transition period of 3 (three) months for complying with the obligation to respond to individual requests within 48 hours (*i.e.* January 1, 2021). As for the reporting obligation, the first report will be submitted to the ICTA in June 2021.

Telecommunications Law

ICTA's Decision on Consumer Complaints Regarding Obtaining Approval/Consent for Instant Notifications

The Information and Communication Technologies Authority ("***ICTA***") rendered a board decision numbered 2020/DK-THD/084 ("***Decision***") regarding instant notifications (such as pop-up, push notification *etc*.) sent to subscribers' device screens due to the consumer complaints, on March 24, 2020. The Decision sets certain obligations on operators who are willing to offer consumers services which have legal and financial consequences (*e.g.* tariff change, tariff sale, commitment, consent on processing of personal data, *etc*.) and where approval and/or consent is obtained from consumers through instant notification screens (such as pop-up, booster, push notifications and *etc*.) sent via SIM applications, internet websites, mobile applications and similar mediums.

Due to rising complaints from consumers about the instant notifications sent by the operators (like pop-up, push notification etc.) to subscribers' device screens for tariff/campaign change, tariff/package sales, participation in a campaign, commitment, invoice or payment type change for transition to prepaid line, consent to process personal data and such to fulfil financial and legal obligations, ICTA rendered a Decision for protection of consumer rights. ICTA rendered its Decision to prevent such aggrievement on the consumers' part, in accordance with Article 4 (*Principles of the electronic communication*), Article 6 (*ICTA's duties and authorities*), Article 12 (*Operators rights and obligations*), Article 48 (*Protection of consumer and end user*), Article 49 (*Providing transparency and notifying*) and Article 51 (*Processing of personal data and protection of privacy*) of the Law No. 5809 on Electronic Communication, Article 5 (*Consumer rights*), Article 6 (*Transparency and notifying*), Article 7 (*Establishment and content of subscription agreements*) and Article 8 (*Application of subscription agreements*) of the Consumer Rights Regulation Regarding the Electronic Communication Sector and within the framework of other relevant legislation. However, ICTA stated in the decision that the transactions related to the scope of services which are indicated in ICTA Board's decision of December 21, 2016 numbered 2016/DK-THD/496, on the protection of consumer rights on value added electronic communication services, are excluded from the scope of this Decision.

Prior to this new implementation adopted by the ICTA, in practice some operators were sending instant notifications (such as push notifications) to consumers in return for selling services and this caused consumers to inadvertently click on such push notification for services they are actually not interested in buying and/or subscribing. ICTA, as a reaction to several complaints emerging on the matter, created a progressive solution.

The Decision states that operators -defined as *companies that provide electronic communication services and/or electronic communication network and operate its infrastructure within the framework of authorization-* requesting consent for processing of personal data and suggesting a change regarding a tariff/campaign, tariff/package sale, participation in a campaign, committed package purchase, transition to postpaid/prepaid line and

similar transactions which require legal and financial consequences are obligated to fulfill the following;

1. In cases where approval and/or consent is obtained through instant notification screens (such as pop-up, booster, push notifications and etc.) sent via SIM applications, internet websites, mobile applications and similar mediums, the approval and/or consent will be valid if the operator fulfills the conditions below;

(a) carrying out the information and other obligations in the notification screen as set out in the legislation in force,

(b) sending a one-time password which will be confirmed by the subscribers via a text message or through the instant notification screen and

(c) the minimum transaction name and any other information required to be made within the scope of the legislation are included in the text message or on the instant notification screen mentioned in clause (b) of this Article,

2. An option to be presented to the subscriber in each notification screen such as "cancel/no/etc." so the subscriber can exit the relevant notification screen, and

3. After the approval and/or consent, informing the subscriber that the related transaction has been carried out will be sent with an SMS to the subscribers.

Based on ICTA's decision on the matter, operators will not only be required to act in accordance with the relevant legislation and fulfill the obligations indicated therein, but also will have the subscribers confirm a one-time password and allow them an option for rejection of the relevant services.

Anti-Dumping Law

Anti-Dumping Measures Expired in 2020 and to Expire Within the First Half of 2021

The Ministry of Trade ("***Ministry***") has announced, through the Communiqué on the Prevention of Unfair Competition in Imports No. 2020/15, dated July 24, 2020 ("***Communiqué***"), the anti-dumping measures that expired in 2020 and will expire in the first half of 2021, unless an expiry review investigation is initiated. The Communiqué entered into force as of its publication date.

Accordingly, the anti-dumping measures implemented with the Communiqué No. 2015/11, dated May 10, 2015, concerning supported link chains or other welded link chains, originating from the People's Republic of China which had been put into effect in 2015, expired in 2020.

In addition, several ongoing anti-dumping measures, which had been put into effect in 2016, will expire as of the first half of 2021, unless an expiry review investigation is initiated. Information on these anti-dumping measures and the relevant Communiqués are listed below:

- Communiqué No. 2015/51, dated January 14, 2016, concerning polystyrene categorized as others, originating from the Arab Republic of Egypt, will expire as of January 14, 2021.
- Communiqué No. 2016/2, dated February 12, 2016, concerning only certain room fan coil units originating from the People's Republic of China, will expire as of February 12, 2021.
- Communiqué No. 2016/11, dated April 12, 2016, concerning sodium formate originating from the People's Republic

of China, will expire as of April 12, 2021.

- Communiqué No. 2016/7, dated April 17, 2016, concerning cotton (not carded or combed) originating from the United States of America, will expire as of April 17, 2021.
- Communiqué No. 2016/10, dated April 17, 2016, concerning only glass cooker, pan, teapot lids originating from the People's Republic of China, Indonesia and Hong Kong, will expire as of April 17, 2021.
- Communiqué No. 2016/13, dated April 20, 2016, concerning flanges, elbows, bends and others originating from the People's Republic of China, will expire as of April 20, 2021.
- Communiqué No. 2016/18, dated May 24, 2016, concerning certain textiles or textile products from artificial or synthetic fibres originating from the People's Republic of China, will expire as of May 24, 2021.
- Communiqué No. 2016/19, dated June 19, 2016, concerning transmission chains, components and others originating from the People's Republic of China, will expire as of June 19, 2021.
- Communiqué No. 2016/15, dated June 24, 2016, concerning painted plates not further worked than surface-treated or simply cut into shapes other than rectangular (including square) and others, originating from the People's Republic of China, will expire as of June 24, 2021.

The final anti-dumping measures will expire within five years following the enforcement date of the relevant measures or finalization date of last review investigation.

Local manufacturers of the relevant products, or real persons/legal entities who act on behalf of the domestic industry may apply for expiry review investigation by claiming that dumping and damage will continue or reoccur with the expiration of the relevant measure.

The written applications for expiry review investigation must be completed before the Ministry at least three months prior to the expiration date of the relevant measures with sufficient evidence. Expiry review investigation is initiated if the application is deemed valid (*i.e.* if there is sufficient evidence proving that dumping and damage will continue or reoccur with the expiration of the relevant measure).

The relevant measures will be applicable and in force until the completion of the expiry review investigation. In principle an investigation takes 1 year, but this period can be extended for another 6 months if deemed necessary.

White Collar Irregularities

EU Practices on the Protection of Whistleblowers during the COVID-19 Outbreak

The Council of Europe has developed legal instruments for protecting individuals who report or disclose information on acts and omissions in the workplace that represent a serious threat or harm to public interest. Several stories being emerged in the global media about whistleblowers being silenced against during the COVID-19 pandemic, has brought special attention to Recommendation CM/Rec(2014)7 and EU Whistleblowing Directive on the Protection of Whistleblowers both setting out the framework to facilitating whistleblowing protections.

Recommendation no. CM/Rec(2014)7 [25] ("***Recommendation***") was adopted by the Committee of Ministers of the Council of Europe on April 30, 2014. It stresses the vitality of whistleblowing and protection of whistleblowers in preventing wrongdoings in the workplace. It addresses key principles around whistleblowing to ensure the following:

- diverse channels are available to report and disclose information that is potentially harming public interest,
- effective mechanisms are run to maintain an environment wherein such disclosure and reports are processed promptly,
- whistleblowers are entitled to certain rights including keeping their identities confidential.

The EU Whistleblower Directive ("***Directive***") [26] entered into force on December 16, 2019. Pursuant to this Directive, EU member countries are required to enact conforming national legislation on whistleblowers by 2021. Directive brings a high level protection to whistleblowers across many sectors. As per the Directive, reports to the public are protected when they concern imminent harm to public interest.

In some countries cases wherein several doctors and nurses have been fired and disciplined for expressing worries about their work conditions, also in relation to a lack of personal protective equipment, required certain responses to public accountability. Accordingly, as the current crisis highlights, every time a whistleblower is silenced, the risk to public health and safety increases proportionately.

Furthermore, the Council of Europe's Group of States against Corruption (GRECO) acknowledges the crucial role of whistleblowers in managing the increased risk of corruption during the COVID-19 outbreak. In this regard, the protection of whistleblowers in the health sector is explicitly listed as a key competency in the fight against corruption and gross mismanagement during the pandemic.

To conclude, importance of protecting access to information in the context of a global emergency, when so many lives and livelihoods are at risk should not be underestimated. Protecting whistleblowers during pandemic is vital to keeping us all safer and informed.

[25] Can be accessed from https://rm.coe.int/16807096c7 (last accessed on September 3, 2020).
[26] Can be accessed from https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018PC0218 (last accessed on September 3, 2020).

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