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LEGAL INSIGHTS QUARTERLY

March 2017 – May 2017

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Preface to the March 2017 Issue

In this issue, the labor law section discusses a significant introduction to the Turkish labor law system – the compulsory individual pension system, which came into force on January 1, 2017. The article reviews which employees come under the scope of the new system, the rights of employees, and the sanctions against employers in case of violation.

On the competition law front, this issue explores the Turkish Competition Board's reasoned decision concerning whether the Standardized and Binding Framework Agreement published by the Banks Association of Turkey can be granted an individual exemption.

The telecommunications law section sheds light on the recent announcement by the Information and Communication Technologies Authority concerning an upcoming regulation with regard to the issue of unintended subscriptions and purchases related to value added services and the obligations of operators specified therein.

Finally, on the white collar irregularities front, this issue analyzes the consequences of destroying sensitive information in the course of an investigation.

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

March 2017

Corporate Law

Revocation of the Ultra Vires[1] Principle under the New Turkish Commercial Code No. 6102

Determining the limits of the capacity to have rights and obligations of a joint-stock or limited liability company ("Company") is very crucial since it directly affects the validity of a transaction that a Company performs.

As per the former Commercial Code No. 6762, acts attempted by a Company that are beyond its scope and field of activity were legally deemed void (the "*Ultra Vires* Principle" or the "Principle"). In other words, the capacity to have rights and obligations of Companies were limited to their fields of activity, which are specified in their articles of association, as published in the Trade Registry Gazette of Turkey. This Principle led Companies to provide very detailed explanations as to their fields of activity in their articles of association and also in their trade names. Furthermore, an *ultra vires* transaction could not have been ratified by the board of directors or the shareholders of a Company even if they wished such transaction to be binding for the Company. As a result, none of the parties to the relevant transaction acquired any rights or incurred any debts.

The problem was that *bona fide* third parties would incur losses due to the Principle and it affected the reliability of transactions and markets.

This Principle has been abandoned with the new Turkish Commercial Code No. 6102 ("TCC"), which came into effect on July 1, 2012. This means that a transaction outside the scope and field of activity of a Company is deemed valid and binding for the parties to such transaction, as of the date of entry into force of the TCC. Hence, Companies' capacity to have rights and obligations is no longer limited to their scope and field of activity, as set forth in their articles of association.

Although in principle such a transaction shall bind the Company, in case it is proven by the Company that the third party was aware of the transaction being outside the scope and field of activity of the Company or that they were capable of being aware given the circumstances, the Company shall not be bound by and liable for the said transaction. It should be noted that announcement of the articles of association of a Company in the Trade Registry Gazette of Turkey shall not serve as sufficient evidence alone, to prove such knowledge of a third party, according to Article 371/2 of the TCC. This provision reflects the legislators' view that third parties are not obliged to know the limits of the scope and field of activity of Companies and that only the courts are entitled to make a judgment on this issue.

Article 371/2 of the TCC suggests that the new system protects *bona fide* third parties and places the burden of proof on the Company.

For example, purchase of a holiday resort by a Company operating in the mining sector could be deemed non-binding for such Company and the seller, since the said transaction is not at all related to the field of activity of the Company. Undoubtedly, the relevant court would evaluate the foregoing scenario in case a conflict arises between the parties and decide whether the Company is bound by such a purchase or not.

To sum up, following the entry into force of the TCC on July 1, 2012, Companies are entitled to enjoy all rights and assume all liabilities of their activities, regardless of whether those activities are listed in their articles of association, and transactions outside the scope and field of activity of Companies are deemed valid and binding for such Companies. The main aim of this reform is to protect the *bona fide* third parties. The only exception to this rule arises when a third party

[1] An act "beyond the powers".

knew or should have known that the act was beyond the scope and field of activity of the Company. In such a case, the third party will not be protected by the TCC and its rights arising from such an act will not be enforceable under the law. However, the burden of proof regarding the knowledge of a third party with respect to the scope and field of activity of the Company falls on the Company.

Changes Introduced to the Company Incorporation Procedure

I. Introduction

A new communiqué of the Ministry of Customs and Trade, namely the Communiqué on Signing of Company's Articles of Association before Trade Registry Directorates ("Communiqué"), has been published in the Official Gazette on December 6, 2016, and entered into force as of its publication date.

The Communiqué regulates the procedures and principles relating to the signing of articles of association and signature declarations[2] before trade registry directorates during the incorporation of a company.

II. The Novelties Introduced by the Communiqué

Before the Communiqué, articles of association prepared through the Turkish Central Registration System ("MERSIS") and signature declarations could be signed only before notary publics. Trade registry directorates were not authorized to approve the execution of these documents.

As the first novelty, the Communiqué stipulates that during the incorporation of a company, articles of association must be signed in person, by a representative or by a proxy, as the case may be, before the relevant trade registry directorate, where the headquarters of the company will be located. However, if the founder, representative or proxy holder (collectively referred to as the "applicant") is illiterate, does not speak Turkish, has impaired hearing or vision, or is speech handicapped, the articles of association must be signed before a notary public.

Pursuant to the Communiqué, trade registry directorates seek the following documents during the signing of the articles of association;

- **Tutor or guardian decision of the court** (if the founder is represented by a tutor or a guardian or if she/he is under 18 and will be a shareholder of the company together with her/his parent(s)),
- **Turkish identity card, passport or driving license** (if the founder is a Turkish citizen),
- **Blue card** (if the founder was born in Turkey but she/he has ceased to be a citizen of the Republic of Turkey),
- **Passport** (if the founder is a foreign citizen),
- **Proxy** (if the founder is represented by a proxy holder).

Upon submission of the foregoing document(s) to the relevant trade registry directorate, the identity and authority of the applicant are duly verified by the director of the trade registry.

Accordingly, the articles of association is printed out from MERSIS by the director of the trade registry and signed by the applicant. Then, the director of the trade registry signs and seals the articles of association and dates the document. However, in case the director of the trade registry has any suspicions on power of discernment of the founder due to her/his old age, illness or appearance of the founder, the director may reject the execution of the articles of association.

[2] "Signature declaration" refers to the document which is submitted to trade registry directorates and which includes 3 (three) side-by-side signatures of the company's authorized signatory under the company's title.

Banking and Finance Law

What is More Favorable: A Surety Agreement or a Guarantee Agreement?

The modifications made by the Turkish Code of Obligations No. 6098 ("Code") to surety agreements (known as "*kefalet sözleşmeleri*" in Turkish) was a hot topic of discussion, not only among practitioners, but also among the general public, due to certain changes made by the Code to the procedural requirements of a surety, such as the requirement of obtaining spousal consent. In this article, we first provide a brief overview as to what a security, surety and a guarantee are. Secondly, we analyze the differences between a surety agreement and a guarantee agreement, as our experience suggests that these two are among the most common and significant types of securities sought and received by the banks.

What is a security agreement?

Security agreements are broadly defined as agreements through which a third party undertakes the risk faced by another party.[3] A more specific example would be a situation in which a third party undertakes the risk arising from the non-performance of an obligation by another party.[4] In order to define the scope and limits of "security agreements," what constitutes a "security" should also be defined. A security may be a specific asset, which would be encashed or liquidated if the risk were to arise or it could be the personal undertaking of a third party, through which the recipient of the security becomes entitled to seek recourse from the assets of the undertaking party.[5]

Both a surety agreement and a guarantee agreement are granted against the risk of non-performance of an obligation by a third party and both of them entitle the recipient to seek recourse from the assets of the undertaking party, instead of resorting to the encashment or liquidation of a specific asset.

What is a surety agreement? What is a guarantee agreement?

Article 581 of the Code defines a surety agreement as an agreement through which a surety undertakes to be personally liable to a creditor for the consequences of a debtor's non-performance of its obligations. Although a separate section under the Code deals specifically with surety agreements, a guarantee agreement is not explicitly defined under the Code. As such, the term itself does not signify a single, definite type of agreement. Therefore, the main factor to consider when distinguishing between the two types of agreements would be whether the risk is undertaken regardless of the validity and continuance of a debt. If the risk is undertaken regardless of whether a debt is valid and still in effect, this would point toward the existence of a guarantee agreement.[6] In light of this, if the underlying debt were not deemed valid, then the surety would not be held liable either. On the other hand, a guarantor in the same situation would nevertheless be held liable. As a consequence of the foregoing distinction, while the defenses which may be put forward by the debtor may also be put forward by the surety, the guarantor would not be able to benefit from those defenses,[7] as its obligation is considered to be a separate obligation, and not tied to the underlying obligation of the original debtor. In fact, it is not only a right but a duty of the surety to put forth and argue the defenses which may also be put forth by the debtor, under Article 591 of the Code.

One other consequence of an obligation arising from a surety agreement being attached to the underlying debtor's obligation is that the surety becomes a successor to the creditor up to the amount it performs the obligation on behalf of the debtor (Article 596 of the Code). The guarantor, on the other hand, would only

[3] 6098 sayılı Türk Borçlar Kanunu Çerçevesinde Kefalet Sözleşmesi (*Surety Agreements within the Scope of the Turkish Code of Obligations No. 6098*), Burak Özen, p.1.
[4] ibid, p. 2.
[5] ibid, p. 5.
[6] ibid, p. 6, p. 23.
[7] ibid, p. 27.

be able to seek recourse from the debtor, if the agreement between itself and the debtor stipulates so.

Lastly, the Code stipulates detailed procedural requirements for a surety agreement. Article 583 of the Code seeks that the surety agreements shall be made in writing and the maximum amount, for which the surety will be liable, shall be stipulated. The relevant provision of the law also rules that certain matters shall be put in writing by hand-writing (as opposed to sureties signing standardized texts, to make sure that the sureties become aware of the liabilities they are putting themselves under). The aforementioned issue of *spousal consent* is also one of them. Article 584 of the Code is the relevant provision with respect to the spousal consent, which must be obtained prior to entering into a surety agreement. The relevant article was amended shortly after the Code went into force, and now sets forth an exception for the shareholders or managers of a commercial enterprise, regarding the surety agreements they will enter into with respect to the relevant commercial enterprise. Spousal consent shall not be sought for such surety agreements.

Consequences

In light of the foregoing, creditors may prefer to enter into a guarantee agreement, as the guarantor's obligation thereunder is separate from the underlying obligation of the debtor (unlike a surety agreement), thus rendering it difficult for the party providing security to avoid performance under the security agreement. That said, whether or not a guarantee agreement can be obtained (as well as the terms and conditions of any such agreement) would be subject to the negotiation power of the parties.

Capital Markets Law

Limitations on Real Estate Investment Companies

Real estate investment companies ("REIC"), investing the real estate projects and/or rights in rem, are strictly regulated by the Capital Markets Authority. The REIC's investments and activities are restricted on several matters with the Communiqué on Principles of Real Estate Investment Companies ("Communiqué"). However, on January 17, 2017, several provisions of the Communique were amended that may allow a bit more free area to the REIC on some areas, such as (i) a REIC may provide security, for the benefit of its 100% affiliate, to secure the credit extended to finance its affiliate's investments on a real estate and (ii) a REIC may lend to its related companies, provided that such amount is lend for the sale of a good or services. In accordance with the Communiqué including the amendments made on January 17, 2017, the most important limitations on real estate investment companies[8] REIC regarding (I) the establishment of encumbrances, (II) borrowing limits, (III) construction works, and (IV) participation in other companies are summarized below:

(I) The Establishment of Encumbrances

Article 30 of the Communiqué regulates that a REIC shall not grant mortgages, rights in rem or other encumbrances or any other restrictions over the real estate in the REIC's portfolio, except (provided that the REIC's articles of association allow such actions):

(1) In flat and revenue sharing projects, if the real estate owners grant construction rights to the REIC or transfer the ownership of the real estate to the REIC free of charge or for a low price, to secure flat and revenue sharing projects;

(2) to finance the REIC's acquisition of a real estate or rights in rem; and

(3) to utilize loans for its investments. Article 22(c) of the Communiqué regulates that a REIC shall not acquire a real estate with

[8] This article does not include the limitations on real estate investment companies investing solely in infrastructural investments and services.

rights in rem or a mortgage or any encumbrance that may directly or materially affect the value of the real estate.

A REIC may develop a project on a real estate with a mortgage, if the amount of the mortgage established thereon does not exceed 50% of the real estate's value, as calculated in the last appraisal report, and the total amount of the mortgage established on the real estate does not exceed 10% of the total assets of the REIC, as disclosed in its most recent financial statements, which must be audited by an independent audit firm and disclosed by the REIC to the public.

With the amendments to the Communiqué made on January 17, 2017, a REIC may provide security, for the benefit of its 100% affiliate, to secure the credit extended to finance its affiliate's investments on a real estate.

(II) Borrowing Limits

Article 31/2 of the Communiqué regulates that a REIC shall not utilize credit exceeding five times its shareholders' equity, as stated in their non-consolidated or solo financial statements prepared and issued by them at the end of the relevant accounting period and disclosed to the public. When calculating the aforementioned credit limits, financial leasing transactions, credits utilized under Article 22 of the Communiqué, and non-cash credits shall also be taken into consideration.

With the amendments to the Communiqué made on January 17, 2017, a REIC may lend to its related companies, provided that such amount is lend for the sale of a good or services.

(III) Construction Works

Article 31 of the Communiqué regulates that a REIC shall not carry out construction works, preparatory, manufacturing, drilling, installation, replacement, improvement, modernization, development, assembly or any other similar works on the REIC's projects. The aforementioned works must be made by a contractor under an agreement regulating the parties' rights and obligations. The agreement to be executed with the contractor shall, at a minimum, cover the contractor's debts, payment conditions, warranties and representations, as well as the conditions of rescission from the contract, the rights of claim of the employer and the conditions of the termination of the contract. The REIC's board of directors should review and confirm the contractor and the provisions of the relevant agreement.

(IV) Participation in Other Companies

Article 28 of the Communiqué regulates that a REIC shall only be allowed to participate in other companies as listed below:

- Operator companies, provided that the participation of REIC in operator companies does not exceed 10% of the REIC's total assets, as stated in the REIC's financial statements issued at the end of the accounting period and disclosed to the public;
- Other REIC;
- Companies established under build-operate-transfer projects;
- Companies established abroad, only in the real estate sector and solely for the purpose of including particular real estates or rights in rem in its portfolio;
- Companies established in Turkey, where the total value of real estate assets or rights in rem is equal to at least 75% of the total assets of the relevant company, as indicated in its financial statements, prepared and issued according to the relevant legislation; and

In companies providing infrastructural services such as road, water, electricity, gas, sewerage, landscaping and environmental services with regard to real estates, rights in rem or real estate projects that are included and/or planned to be included in the REIC's portfolio, but only in the event that such services are required

to be provided only by companies established or to be established solely for the provision of such services, in accordance with the legal requirements set forth in the relevant laws.

Competition Law / Antitrust Law

The Turkish Competition Board Refuses to Grant Individual Exemption to the Exclusivity Agreement for a Key Drug

Daiichi Sankyo İlaç Ticaret Ltd. Şti. ("Daiichi"), a globally active company in the distribution, sale, marketing and importation of pharmaceutical products, and Aksel Ecza Deposu A.Ş. ("Aksel"), a drug wholesaler, entered into a vertical exclusivity agreement ("Agreement"). They jointly applied to the Turkish Competition Board ("Board") for an individual exemption to be granted to the Agreement. The Board published its reasoned decision on November 22, 2016, refusing to grant an individual exemption.

The Agreement was designed to give exclusive authority to Aksel to participate in tenders across Turkey for the drug known as *Simdax*.[9] *Simdax* is used by hospitals to provide support therapy to patients who have undergone coronary bypass surgery.

In defining the relevant product market, the Board referred to the European Pharmaceutical Marketing Association's ATC categorization. The Board asserted that an ATC-3 level categorization would not reflect the entire competitive landscape of the drug, since *Levosimendan* (the active substance in *Simdax*) carries particular features and hospital tenders are usually made on the basis of a specific drug molecule. The Board thus defined the relevant product market collectively, based on the type of sale and the active substance of the drug, and established the relevant market as, "*tender of the products with the drug substance Levosimendan.*"

[9] The Board's reasoned decision numbered 16-30/504-225 and dated September 8, 2016.

The Board noted that the Agreement did not contain any provisions that entailed resale price maintenance. However, the Board found that the exclusivity and non-compete provisions nevertheless amounted to a violation of Article 4 of Law No. 4054. The Board stated that Simdax does not have a generic substitute, and therefore, it is unrivalled in the tender sales market in terms of its active substance. Accordingly, the Board decided that the Agreement could not benefit from a block exemption under the Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("Communiqué No. 2002/2"), as the supplier in this case held a market share of over 40% in the relevant market for *Simdax*. Since the agreement was unable to benefit from the block exemption under Communiqué No. 2002/2, the Board applied an individual exemption test to see if the Agreement was eligible for an individual exemption under the following conditions:

i. The agreement must contribute to the improvement of the production or distribution of goods or the promotion of technical or economic progress,
ii. it must allow consumers a fair share of the resulting benefit,
iii. it should not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and
iv. it should not afford the parties the possibility of eliminating competition with respect to a substantial part of the products in question.

The Board concluded that the Agreement met the first condition, as it contributed to the improvement of the production or distribution of goods or to the promotion of technical or economic progress. The Board noted that the Agreement allowed Daiichi to effectively follow and actively participate in the tenders, and thus ensured the continued and uninterrupted provision of the product. By collecting regular information on tenders, the Agreement enabled Daiichi to adjust its

production, importation and inventory planning accordingly.

For the second condition, the Board decided that the Agreement did not meet the test of allowing consumers a fair share of the resulting benefit. The Board stated that both the public health expenses and the satisfaction of hospital demands had been taken into account. The Board determined that hospital demand had largely not been met since the Agreement had entered into effect.

For the third condition, the Board concluded that it is not possible for the agreement to eliminate competition with respect to a substantial part of the products in question, since there are numerous pharmaceutical wholesalers active in Turkey.

With regard to the fourth condition, the Board decided that the agreement fell short of satisfying the test, since the Agreement restricted Aksel's participation in tenders involving products that competed with any Daiichi products. The Board noted that this clause prevented Aksel from participating in group tenders where more than one type of drug was required. Because of this clause, none of the other wholesalers could participate in a tender that includes *Simdax* along with other types of drugs, since the agreement also restricted Aksel's ability to sell *Simdax* to other wholesalers to enable them to participate in the group tenders.

Consequently, the Board decided by a majority vote that the Agreement did not meet the cumulative conditions of individual exemption under Article 5 of Law No. 4054. Therefore, the Board did not grant an individual exemption to the Agreement.

The dissenting opinion argued that the Agreement would not restrict competition in the relevant market since it included a clause that allowed Daiichi to appoint another wholesaler to procure *Simdax* when Aksel was not able to. Moreover, the Agreement could possibly lead to positive results after implementation in terms of the number of participated tenders and drugs transmitted to patients and hospitals. As a result, the dissenting opinion concluded that the Board should have granted an individual exemption to the Agreement.

The Board Published Its Reasoned Decision on the Preliminary Investigation Conducted Against the Chamber of Forest Engineering

The Board recently published its reasoned decision on the preliminary investigation conducted against the Chamber of Forest Engineering ("CFE"). The process was launched following allegations that the CFE published minimum price tariffs and imposed sanctions on the members of the profession by prohibiting them from exercising their profession (Reasoned Decision No. 16-33/561-242; October 13, 2016).

The Board first determined that the CFE had been established under a specific law ("Law No. 6235") and conducts its activities subject to the Union of Chambers of Turkish Engineers and Architects ("Union"). It is a professional organization with public institution status, as specified in Article 135 of the Turkish Constitution. The Board noted that the CFE is entrusted with various tasks related to forestry under the Code of Forest Engineering, Forest Industry Engineering and Woodworking Industry Engineering No. 5531 ("Law No. 5531"). The Board concluded that the CFE was a trade association within the meaning of competition law, as defined under Article 3 of Law No. 4054.

In its review process, the Board took into consideration its own precedents as well as the courts' precedents on similar applications by various other trade associations. The Board indicated that one must first assess whether the trade association's practice in question is based on any existing legislation. The Board stated that, so long as the practice remains within the framework of authorities granted by law and the related legislation, the Board

would lack jurisdiction over the matter.[10] However, the Board could still deliver an opinion to the relevant institutions pertaining to the practices that may potentially restrict competition.

On the other hand, the Board's approach differs when the practices in question, which could restrict competition in the market, are not based on a legislative act. In that case, the Board may impose administrative monetary fines on the trade association concerned,[11] file a lawsuit for the annulment of the relevant legislation which constitutes the basis of such practices,[12] or send an opinion for the cessation of the practices in question.[13]

In this case, the Board found that the CFE's alleged practices fell within the explicit authority granted by Article 13 of Law No. 5531, and therefore, a decision could not be rendered due to a lack of jurisdiction. In light of its precedents, the Board refrained from sending an opinion to the relevant institutions. However, it noted that Article 13 of Law No. 5531, which forms the basis of the CFE's practices, had been previously treated as a provision that interferes with market prices. The Board had addressed this matter in its Competition Report titled, "Scanning the Turkish Legislation from a Competition Law Perspective," published by the Competition Authority in 2015.

The Board Published Its Decision on "the Standardized and Binding Framework Agreement Published by the Banks Association of Turkey"

The Board published its reasoned decision concerning the request for negative clearance for the "Standardized and Binding Framework Agreement" ("SBFA"), published by the Banks Association of Turkey ("BAT"). The Board refused to grant negative clearance to the SBFA, as it was found to include anti-competitive restrictions within the meaning of Article 4 of Law No. 4054. The Board did not grant an individual exemption to the SBFA either, as it did not fulfill the cumulative conditions for individual exemption, as set forth in Article 5 of Law No. 4054.[14]

BAT applied for negative clearance for the SBFA, which would be put into mandatory use by each member bank of BAT for providing individual banking services to their customers. BAT's application focused on the following arguments: Firstly, BAT argued that existing legislations already regulated the types of banking services included in the current banking services agreements ("BSAs"). Thus, by excluding the parts covered by the existing regulations, the SBFA would prevent unnecessary repetition and provide explicit standard agreements. BAT also assured the Board that banks would preserve their decision-making mechanisms on competition-sensitive parameters, such as the scope of the services, fees, commissions and interests, among others. In addition, banks would have to offer a separate body of supplementary agreements to their customers for the services and products which were not included in the SBFA. In other words, the SBFA would constitute the most fundamental form of the banking services agreement. Banks would freely choose the scope, terms and conditions of the other banking services that would be separately offered to their customers.

As an alternative argument, the BAT asserted that current BSAs consist of no fewer than 40 to 50 pages of documents and that they involve a variety of different forms of services and products. Customers do not even read these lengthy agreements, nor do they require such services, according to the BAT. The

[10] The 13th Council of State's decision dated January 5, 2010, and numbered 2007/2748 E., 2010/8 K.; the 12th Ankara Administrative Court's decision dated November 19, 2014, and numbered 2014/978 E.
[11] The Board's decision numbered 02-04/40-21 and dated January 22, 2002; the Board's decision numbered 06-79/1021-295 and dated November 2, 2006.
[12] The Board's decision numbered 07-41/453-M and dated May 16, 2007.
[13] The Board's decision numbered 15-42/688-245 and dated December 2, 2015.
[14] The Board's decision numbered 16-26/440-198 and dated August 4, 2016.

proposed SBFA would prevent such a waste of resources (including the time and cost involved in processing such lengthy agreements) and ultimately reduce operational costs. It would also simplify the implementation of such agreements so as to enable customers to more easily and effectively compare competitive indicators for the banking sector, such as fees, commissions, and other costs.

In its assessment, the Board compared the proposed SBFA with the existing BSAs. It then noted that some of the products, services and provisions that were excluded in the SBFA would ultimately enable customers to be informed of the applicable terms of their agreements. The exclusion of such services and provisions would deprive customers of the opportunity to foresee the legal scope and ramifications of the proposed SBFA.

With regard to the application for negative clearance, the Board evaluated the SBFA's purpose and effect on restricting competition and found that, although the SBFA did not necessarily aim to restrict the competition, it would not be possible for the banks to increase their product diversification under the SBFA, as it did not allow any customization depending on the specific needs of the customer. Therefore, the Board concluded that the implementation of the SBFA would restrict the effective competition within the meaning of Article 4 of Law No. 4054.

Subsequent to assessing and denying the request for negative clearance, the Board proceeded to evaluate whether the SBFA fulfilled the following cumulative conditions under Article 5 of Law No. 4054 for an individual exemption: (i) The agreement must contribute to the improvement of the production or distribution of goods or to the promotion of technical or economic progress, (ii) the agreement must allow consumers a fair share of the resulting benefit, (iii) the agreement should not afford the parties the possibility of eliminating competition with respect to a substantial part of the products in question, and (iv) the agreement should not restrict the competition beyond what is strictly necessary to get the aforementioned positive effects.

BAT argued that the SBFA would lead to a number of efficiency gains (such as minimizing operational costs and paper expenditures, which can amount up to TL 1 billion per year), which would then be passed on to and benefit customers as a decrease in credit interest rates. Moreover, BAT also asserted that, as the SBFA was written in a plain and clear language, it would enable customers to easily compare banks in terms of interest rates, commissions, expenses, *etc*., and to choose or change banks accordingly.

With respect to the efficiency gains resulting from the minimization of operational costs benefitting customers, the Board noted that there are several fundamental factors affecting customers' decisions to switch banks. In other words, the Board asserted that customers find other aspects of their relationship with their banks to be just as significant as the costs of switching. In addition, customers are already aware of the costs associated with their banking activities, such as interest rates, commissions, and other expenses. These costs are laid out in an additional information sheet appended to the actual standard BSAs, which are published on the banks' websites. Therefore, the Board concluded that customers are already informed of these parameters and have the opportunity to compare them with those offered by other banks.

The Board further determined that the uniform application of the SBFA could actually restrict consumers' choices and expectations. Since all member banks would be obligated to use the SBFA in their fundamental banking services, customers would be deprived of any alternatives. As a result, the Board asserted that the SBFA would not lead to significant gains in efficiency as proposed by BAT. On the contrary, the uniform SBFA could actually restrict consumer choice, since bank customers would be forced to sign the non-negotiable

BSA with no alternatives. In case the customers refused to sign the uniform agreements, they would be denied all basic banking services.

As to the simplified and clarified language of the SBFA, the Board stated that banks wishing to attract more customers in this manner could simply clarify their current BSAs and clearly inform customers of competitively sensitive parameters, such as interest rates, fees and commissions. Since customers have access to a variety of platforms where they can obtain information on these costs, the Board did not find any causal link between the suggested efficiency gains and the uniform application of the SBFA.

As a result, the Board held that the "Standardized and Binding Framework Agreement Published as a Professional Classification Recommendation by the Banks Association of Turkey" did not fulfill any of the conditions under Article 5 of Law No. 4054, and therefore could not be granted an individual exemption.

The Board Conditionally Granted Individual Exemption to the Exclusive Tender Depository Agreement between Roche Müstahzarları Sanayii A.Ş. and MTS İlaç Dağıtım Tic. A.Ş.

Roche Müstahzarları Sanayii A.Ş. ("Roche") and a pharmaceutical wholesaler named MTS İlaç Dağıtım Tic. A.Ş. ("MTS") entered into an Exclusive Tender Depository Agreement ("Agreement"). They requested an individual exemption from the Board for the Agreement. The Board granted the individual exemption, but conditioned the exemption upon the parties making certain amendments to the Agreement (16-33/569-247, October 13, 2016).

By way of the Agreement and the additional protocol, MTS would be authorized as the exclusive distributor for all purchases and tenders made by the Public Hospitals Administration of Turkey ("PHAT"), the Public Hospitals Association ("PHA"), and other relevant institutions on behalf of the Secretary General of the PHA and university hospitals (including the Social Security Institution), with respect to certain products sold by Roche.

In its decision, the Board first assessed the Agreement under the block exemption provided under Communiqué No. 2002/2. It decided that the 40% market share threshold for the application of the block exemption had been exceeded in this case, so the Agreement could not benefit from the block exemption.

Before making an individual exemption assessment, the Board provided a general explanation regarding the circumstances under which similar vertical agreements between drug suppliers and wholesalers may be deemed to restrict competition. To that end, the Board emphasized that exclusive distribution arrangements would not restrict or hinder the competitive dynamics of the tender channel, due to the large number of drug wholesalers who are active in the tender channel for human medicinal products. Moreover, the Board stated that if the drug suppliers were to enter into exclusive distribution agreements with the same drug warehouses, this might result in the impediment of effective competition, given that the drug wholesalers could not submit alternative bids to the tender. In other words, even if a drug wholesaler were exclusively authorized for various products from different suppliers, it could participate in the tender for only one product. Under such a scenario, competing products would be left out of the tender process merely due to the exclusivity arrangement. Accordingly, the Board indicated that non-compete obligations would run the risk of the competitors' products being excluded from the tender due to such exclusivity agreements.

Moreover, the Board indicated that it was possible (i) for the hospitals to request offers for each group of tender items, and (ii) for the participants to procure and offer a single price for all of the items. By using this type of group tender, all of the drugs offered in the

tender could be procured from a single drug wholesaler. Accordingly, if the group of tender items were to include an original drug which does not have any generic equivalents and if such a drug was included in the exclusive distribution arrangement, only the drug warehouse that is authorized for the exclusive distribution of that drug could offer a bid in the group tender. To that end, the Board emphasized (by way of referring to its settled case law) that group tenders are often left out of the scope of the exclusive distribution arrangements that are subject to individual exemption applications. For the case at hand, the group tenders were indeed left out of the scope of the Agreement by way of an additional protocol.

Subsequently, the Board concluded that the Agreement satisfied the first three requirements for an individual exemption.

However, the Board stated that the Agreement must not be more restrictive than strictly necessary to ensure that the contracted parties are able to obtain the expected benefits, in order to meet the last requirement of qualifying for an individual exemption.

The non-compete clause of the agreement in question included the following statement: "*…shareholders of the Drug Warehouse, shareholders of any company and/or affiliated company directly or indirectly connected to the Drug Warehouse…*" The Board stated that the relevant non-compete clause could be deemed proportionate to the extent that the clause concerns MTS itself and those parties that have a control relationship with MTS. Accordingly, the Board reached the conclusion that the relevant clause should be changed as to not inflict any consequences on persons and companies that do not have control over MTS, as this provision can be deemed disproportionate so long as it binds non-controlling third parties. Moreover, the Board concluded that the statement, "*Drug Warehouse shall not have any interest in and/or will not operate directly or indirectly in the production, sale, distribution and/or marketing of the Competitive Product…*" was unclear, and therefore should be revised to clearly indicate that the warehouse could participate in tenders, but not with competing products.

In light of the foregoing, the Board decided unanimously that the requirements of an individual exemption as outlined above had been met, provided that the proposed amendments would be put into effect. Consequently, the Board unanimously determined that the Agreement would be granted an individual exemption, subject to the amendments in the non-compete clause, as mandated within the reasoned decision.

Labor Law

Compulsory Individual Pension System

An individual pension system was introduced in Turkey in 2001 with the Law on Individual Pension Savings and Investment System ("Law") No. 4632. Since that time, the Law has been amended several times. The most recent amendment was made with the Law on Amendment of the Law on Individual Pension Savings and Investment System ("Amendment Law") which was published in the Official Gazette on August 25, 2016.

The Amendment Law made the individual pension system compulsory for many Turkish employees, with the stated goal of improving the welfare of employees. The compulsory individual pension system ("CIPS") came into force on January 1, 2017, as per the Amendment Law.

1. Employees Covered by the CIPS

All Turkish citizens who are under the age of 45 and are currently working (or will start working) under an employment agreement are within the scope of the CIPS. Furthermore, public sector employees subject to Article 4(c) of the Law on Social Insurance and General Health Insurance No. 5510 are also within the scope of the CIPS, if they are 45 or younger.

Employees will participate in the individual pension system with a pension agreement prepared by their employers in accordance with the Law. Employers should work in cooperation with a pension company that is approved by the Undersecretariat of Treasury to offer compulsory individual pension schemes.

The CIPS does not cover all employees at the moment; however, its scope will be gradually expanding. The system will be in effect for employees who work at workplaces with (i) 1000 or more employees as of 01.01.2017, (ii) 250 to 999 employees as of 01.04.2017, (iii) 100 to 249 employees as of 01.07.2017, (iv) 50 to 99 employees as of 01.01.2018, (v) 10 to 49 employees as of 01.07.2018, (vi) 5 to 9 employees as of 01.01.2019.

If an employer has more than one workplace, the number of employees will be determined for the purposes of this law as the total sum of the number of employees working at all of the employer's workplaces.

2. Employee Contributions to the System

Employee contributions to the CIPS will be 3% of the employee's basis earnings subject to the employee's premium. It should be emphasized that it is not the net earnings that will be taken into account while calculating the employee's contribution; premium, bonus, and some other payments are also considered. The Council of Ministers is authorized to increase the employee's contribution rate up to 6% or decrease it down to 1% or set it at a fixed amount of money. Employees are entitled to request that their employers make a higher deduction from their earnings than the amount agreed upon in the pension agreement. Therefore, an employee's contribution rate, as determined by the Law or the Council of Ministers, provides only the minimum rate, which may be increased if an employee wishes to do so.

An employee's contribution will not be paid to the pension company directly by the employee. Instead, the employer is obligated to deduct the employee's contribution from the employee's earnings and pay it to the pension company on behalf of the employee. These payments must be made by the first business day following the employee's salary pay date at the latest. If the employer does not pay the employee's contribution at all or pays it late, the employer will be liable for the employee's monetary loss, if any.

3. Employees' Right to Withdraw from the Pension Agreement

Employees are entitled to withdraw from the pension agreement within two months after employers notify them of their participation in the compulsory individual retirement system as mandated by the Law. If an employee withdraws from the pension agreement, the employee's contributions and investment incomes, if any, must be paid to the employee within ten business days after the withdrawal date. Pension companies are responsible for managing their funds in a way that protects the value of the employees' contributions during the withdrawal period of two months.

Employees who do not exercise their right to withdraw from the pension agreement are nevertheless entitled to request the suspension of payment of employees' contribution in certain circumstances, as determined by the Undersecretariat of Treasury.

4. Change of Workplace

If an employee's workplace changes and there is a pension scheme within the scope of the CIPS in use at the new workplace, the employee is entitled to transfer his/her accumulated savings and retirement time basis gained (as calculated according to the expired pension agreement) to the new pension agreement offered by the new employer.

If there is no pension scheme within the scope of the CIPS in use at the new workplace, the employee may either continue to pay the employee's contribution within the scope of the pension agreement in effect at the previous workplace, or terminate that pension agreement. The employee must notify the pension company of his/her decision by the end of the month following the change of workplace at the latest.

5. State Contributions and Retirement

Employees will receive a state contribution to be added to their savings, in the amount of 25% of their paid contributions. However, in order to receive the full amount of this state contribution, employees must receive their retirement benefits from the CIPS; otherwise, the state contribution will be partially or fully withheld from the employees, depending on the number of years that they have paid into the compulsory pension system. In addition to the 25% state contribution to employee contributions, the government will also provide a TL 1,000 bonus to the employees' pension schemes if the employees do not withdraw from the pension agreement within the two-month withdrawal period.

If the employee retires and chooses to receive his/her retirement benefits through an annuity contract, the employee will then receive an additional state contribution amounting to 5% of his/her accumulated savings

Employees will be entitled to retire at the age of 65, if they have been involved in the compulsory individual retirement system for at least 10 years.

6. Sanctions against Employers

The obligations of employers within the framework of the CIPS will be subject to the supervision of the Ministry of Labor and Social Security. An administrative fine of TL 100 (for 2017) may be imposed for each violation, if employers do not comply with the duties and obligations provided by the CIPS.

Litigation

Overview of the New Law on Experts No. 6754

The new Law on Experts No. 6754 ("Expert Law") brought fundamental changes to the system of court-appointed experts in the litigation process. It was intended to establish an effective and organized framework by redefining the qualifications required to be deemed an expert, as well as the procedures for the appointment and supervision of experts.

The Expert Law provides regulations for the expert examinations given in judicial, administrative and military jurisdictions; however, it excludes the public institutions that provide expert services and institutions that are authorized to provide expert opinions.

An expert is defined as "a real person or a private law legal person, whose expert opinions are sought, for issues that require specific or technical knowledge" in Article 2 of the Expert Law. Article 3 sets forth the fundamental principles attached to being an expert. These principles dictate that an expert (i) must be independent and impartial, (ii) cannot delegate any aspect of the expert work to any other expert or third party, and (iii) is legally obligated to keep the file confidential. The court can appoint an expert only after determining that the issue in question requires specific or technical knowledge to be settled. The court, however, cannot seek expert opinions for issues that can or should be resolved with the general knowledge, experience or legal knowledge that a judge is expected to possess. The general rule is that the court may seek an expert opinion for any specific matter only once, but if the report needs further examination or clarification on certain points, then the court may request an additional expert report to resolve all outstanding issues.

This legislation aims to keep the experts out of the assessment of legal matters during the litigation process, as this task properly belongs to the judge. Although the Civil Procedural Law No. 6100 ("CPL") already stipulates that the court can appoint an expert only for issues that require specific or technical knowledge to be resolved, in practice, the courts have routinely appointed experts from the legal profession who provided opinions on legal matters, with the caveat that the discretion with regard to legal matters vests solely in the judge, in order to ensure compliance with the CPL. But this well-established practice evidently undermined what the CPL intended, *i.e.*, that the legal matters should remain exclusively in the domain of judge, as dictated by the Turkish Constitution. Thus, to keep

the experts from providing legal views, the Expert Law prohibits persons employed by the legal profession from being registered in the Expert Registry - from which the courts are obliged to appoint experts - and further states that they cannot be appointed as experts unless it is certified that they have another profession besides the law. The CPL has also been amended in light of this rule. By amending the CPL and passing the Expert Law, the legislator endeavors to ensure that experts are excluded from expressing opinions on legal matters and that the legal aspects of cases are left exclusively in the judges' domain, as they should be. These twin developments will bring forth a significant change to civil law proceedings in Turkey.

Furthermore, the Expert Law introduces three new bodies to the expert system: (i) Expertise Consultative Committee, (ii) Directorate of Expertise, and (iii) Expertise Regional Committee. The Expertise Consultative Committee is responsible for the due execution of the expertise system and offers solutions to problems encountered during the provision of expertise services. The Directorate of Expertise serves to ensure efficiency and productivity in expertise operations and, to that end, defines principal professions and sub-professions for expertise purposes, sets the ethical principles of expertise services, determines the standards for expert reports and keeps the Expert Registry. The Expertise Regional Committee's duties comprise ruling on the enrollment/disenrollment of experts in the Expert Registry, categorizing experts according to their professions, supervising experts and assessing their performances.

Intellectual Property Law

A Milestone for Industrial Property Rights: The New Law

For many years, in order to cover any rights pertaining to trademarks, patents, designs, utility models and geographical indications, one had to look at an assortment of decree laws instead of consulting a single, united code. This long lasting disharmony has finally come to an end as of January 10, 2017, with the publication of Industrial Property Law No. 6769 ("IPL") in the Official Gazette. The IPL introduces many reforms and regulates trademarks, geographical indications, designs and patents in detail and in compliance with European Union regulations. The fundamental reasons for enacting this law are specified in the preamble to the IPL. Establishing a responsive system in order to substantially increase the number of applications for industrial property rights, harmonizing the Turkish legislation with EU Law and abolishing the inconsistencies in the law are the key objectives that led to the establishment of the IPL.

With regard to trademarks, the scale of signs that are intended to be registered as trademarks is considerably expanded through a new basic requirement that such signs must show clear and precise subjects instead of using the previous representation criteria. Moreover, the announcement period for trademark applications has been reduced, so that property rights might be granted within the shortest time possible, as per Article 18 of the IPL. Furthermore, according to Article 5 of the IPL, if a notarized consent letter indicating the consent of the previous trademark owner is submitted to the institute, a trademark application for the said trademark cannot be rejected.

A new procedure has been introduced with respect to applications for design registration and objection. In this context, a simplified and shortened application process has been implemented. As per Article 56 of the IPL, any design will be protected under this law if it is new and distinctive. However, unseen parts of a device are excluded and, therefore, cannot be registered as design under the same article.

Regarding patents, the two-pronged system, (*i.e.*, one patent system with examinations and a separate patent system without examinations) has been eliminated. Moreover, amended articles pertaining to the competence of courts and sanctions, as well as compulsory licensing requirements, superseded the

controversial regulation stipulated under the Decree Law on the Protection of Patent Rights No. 551. Accordingly, increase in the number of grounds for compulsory licensing is expected to eliminate the discrepancy and to provide a roadmap for the disputed topics as to whether compulsory licensing is applicable for them. Plus, numerous articles from decree laws has been gathered together and the harmonized set of rules regarding the competence of courts and sanctions have been stipulated. Henceforth right owners under the IPL no longer have to look at an assortment of decree laws to decide which court is competent and which sanction is stipulated for infringements.

Lastly, the IPL brings forth a set of reforms with respect to geographical indications, such as establishing an authorized body to exercise control over issues related to geographical indications. Moreover, a much less costly announcement system has been brought to action through Article 38/5 of the IPL. To this end, applicants are no longer obliged to announce their geographical indications in the Official Gazette (or any gazette with a wide circulation), since a new bulletin has been established in Article 2/ç of the IPL, which is a useful tool for announcing applications of any kind arising from the IPL. The Turkish Patent and Trademark Authority (the amended name of the Turkish Patent Institute, pursuant to Article 2/e of the IPL) manages the bulletin.

In conclusion, industrial property rights have been gathered together in one compact code, along with more comprehensive regulations and operational rules. With the enactment of the IPL, the Decree Law on Protection of Patent Rights No. 551, the Decree Law on Protection of Industrial Designs No. 554, the Decree Law on Protection of Geographical Indications No. 555 and the Decree Law on Protection of Trademarks No. 556 have all been abrogated. On the other hand, it should be noted that the enforcement date of certain articles of the IPL has been postponed and will be entering into force at a later date.

Pharmaceutical Law

Recent Updates on Pharmaceutical Practices: Introducing the Product Tracking System

In 2014, the Turkish Medicine and Medical Device Institution's ("Institution") New Year's resolution list included two remarkable items: (i) Ensuring people's access to safe human medicinal products, and (ii) battling the grey economy. In order to do achieve these goals, the Institution, with the collaboration of Turkey's Scientific and Technological Research Council, has rolled up its sleeves to establish the Product Tracking System ("Tracking System"), which would enable the tracking and auditing of imported and locally manufactured human medicinal products.

After a working process of nearly three years, the Institution announced on its website (on January 1, 2017) that, for company activations and control of the data transferred from the Turkish Medicine and Medical Device National Data Bank, the Tracking System would be available for medical device companies' use, as of the date of the announcement. The Institution's guide for using the Tracking System can be found at uts.saglik.gov.tr.

- Current Status of the Tracking System

The announcement mentioned above included the following updates regarding the current status of the Tracking System:

(i) Company information of manufacturers, importers and distributors that had registry certificates in the Turkish Medicine and Medical Device National Data Bank system on December 18, 2016, (regardless of whether such companies were registered under the Data Bank as of December 18, 2016), company user information, registered certificate information, registered product information (including company, document and product links) are transferred to the Tracking System.

(ii) Information and documents relating to the Opticianry Institutes, Custom Made Prosthesis Orthesis Institutes, Hearing Aid Implementation Institutes and Dental Prosthesis Laboratories registered under the Core Funding Management System and Pharmacies registered under the Institution's data base are not transferred to the Tracking System, since these institutions do not possess documents and products which will be used under the Tracking System. Updates regarding the transfer of these institutions' information will be announced in the upcoming days.

(iii) While registrations under the Medical Device National Data Bank, which comply with the barcode rules of "GS1" and "HIBC" institutions, are transferred, product registrations with temporary barcodes are not transferred to the Tracking System.

(iv) Distribution liaisons between companies are not transferred to the Tracking System.

- What Should Medical Device Companies Do at This Stage?

Medical device companies (*i.e.*, manufacturers, importers, and distributors) should log in to the Tracking System and activate their company registries as of January 1, 2017. However, the announcement specifies that companies that are not duly licensed within the scope of the Regulation on Sale, Advertising and Promotion of Medical Devices, will not be able to engage in any transaction through the Tracking System.

Furthermore, companies' activation of their registries will pave the way for access to their registered user, document and product information. In this respect, users should cross check the accuracy of the information under the Tracking System with the information transferred from the Medical Device National Data Bank. The relevant authorities will have to be notified about any deficient and/or incorrect data thus detected through the Tracking System's fault-notification interface.

- Future of the Medical Device National Data Bank.

At this stage, operations will continue to run through the Medical Device National Data Bank, until the Tracking System is fully operational. The Institution will make a separate announcement regarding the deactivation of the Medical Device National Data Bank.

Telecommunications Law

Turkish Telecommunications Authority Takes Action to Prevent Unintended Subscriptions and Purchases Related to Value Added Services

In recent years, the rapid development and growth of the telecommunications sector boosted innovation and led to an inevitable convergence in the information and communications technologies. This convergence of technologies produced an increasing variety of value added services ("VASs"). VASs can be described simply as those services beyond the core services of an operator, which are made available to consumers, usually at a low cost, and which help to promote the primary business.

The regulatory authorities, legislators and even the operators may lag in adapting themselves to the new requisites of the ever-evolving nature of telecommunication technologies, which eventually produce an ever-increasing number of VASs. Consumer complaints play an important role in triggering the required adaptation processes.

On December 12, 2016, the Information and Communication Technologies Authority ("ICTA"), which is the main regulatory and supervisory authority for the telecommunications sector in Turkey, issued a press release introducing a new regulation based on the increasing number of complaints received from consumers. These complaints were mainly focused on the unexpectedly high bills that consumers receive, due to subscriptions and purchases which they had made unintentionally.

Consumers come across certain websites while surfing on the internet, which direct or subscribe them to other services (VASs), and they may involuntarily subscribe to such services or make purchases without actually understanding the conditions, prices and termination procedures that they are agreeing to. Consumers usually do not even know or are not provided with the information regarding the identity of the relevant service's provider. These unintended subscriptions and purchases sometimes happen when a consumer just intends to close an ad that appears on his/her screen. When the costs of these subscriptions and purchases are reflected on their invoices, consumers object to them or file complaints against those who, in their view, cheated them out of their money. In most of these cases, such VASs are not provided by the operators themselves, but by third parties who are not under the supervision of the ICTA. This has relieved the operators from liabilities arising from such services so far.

However, due to the increasing number of complaints received, the ICTA decided to set out the conditions and liabilities pertaining to VASs that are provided through electronic communication services. Accordingly, the ICTA issued the "Principles and Procedures on Protection of Consumer Rights in the Provision of Value Added Electronic Communication Services" ("VAS Principles"), which aim to establish transparency at all stages of subscriptions and purchases pertaining to VASs, ensuring that the consumers are informed of the terms and conditions of services and the prices of subscriptions. The VAS Principles also create a legal framework to ensure that the consumers' intention in whether or not to subscribe to or purchase VASs may be clearly determined.

VAS Principles do not directly impose obligations on the providers of VASs, but instead require the disputes to be resolved by the operators and further obliges the operators to provide consumers with certain information and verification or approval procedures, which will allow them to decide whether or not to subscribe to a VAS with free will, regardless of whether that service is provided by the operator or by a third party.

VAS Principles provide the operators with obligations to prevent unintended online subscriptions as a result of the consumers' closing down of an ad or promotion appearing on the screen. If a consumer does purchase an unintended subscription, there are rules for preventing the subscribed operator from directing the consumer to a third party for recourse, and obliging the operator to find a solution to the complaint.

VAS Principles clarify that the obligation of informing the consumer of the price and service conditions of the VASs, as well as the burden of proof with regard to the consumer's consent, is on the operator. Consumers will have the right to be reimbursed for the payments they make for the unintended subscriptions, if the operator fails to comply with its obligation to provide information and to prove consent procedures.

Consumers will be able to ask the operators to disable their accounts for mobile payments or VASs, per the VAS Principles. Most importantly, the procedures for purchasing or cancelling VASs are regulated separately and in detail for purchases conducted through the internet, SMS, mobile internet/WAP, and incoming/outgoing calls. Below are brief summaries of each procedure:[15]

- VASs purchased through the internet:

The service provider will be obliged to give information about the name and conditions of the service, the price, and a space for the consumer to provide a mobile number if they wish to purchase a subscription or a one-time service. The service provider will send an SMS including the price of the service along with a password, and the consumer will insert

[15] https://tuketici.btk.gov.tr/tr-TR/Haber/katma-degerli-hizmetler accessed on 12 February 2017.

that password into the relevant website. Once the password is confirmed, the consumer will be charged for the purchase.

- VASs purchased through mobile internet/WAP:

Consumers will click on the "confirm" box to purchase a service through the internet/WAP website, wherein detailed information will be given based on the service provided. Then, the consumer will insert the password, which is generated through the operator that the consumer is subscribed to, into the relevant space.

Alternatively, the consumer may provide his/her mobile phone number to the relevant website and receive an SMS including the password, which will later be inserted to the relevant part in the page accessed through mobile internet/WAP for the purchase of the VAS.

- VASs purchased through SMS:

For one-time purchases, the consumer will insert a keyword required for the purchase of the service in an SMS message, send it to the number provided by the operator and will purchase the VAS. For subscriptions, a two-step verification system is required, which will consist of two SMS messages requiring consent in two stages.

- VASs purchased through phone calls:

Information regarding the services provided and the pricing mechanism will be provided to the consumer and the consumer may request listening to the information once again, all free of charge. The purchase will be completed if the consumer provides his/her confirmation or waits for the signal. The consumer will then purchase the service and fees will be reflected on the subscriber's bill.

VAS Principles also set forth cancellation procedures to be followed regarding the foregoing purchase and subscription processes.

It appears that the VAS Principles will impose significant obligations on the operators and will require them to amend their current procedures, which might require time and investment. Therefore, the effective date of the VAS Principles was established as June 30, 2017, giving the operators an adequate transition period to put the required structures into place.

Data Protection Law

"Legitimate Interests" of the Data Controller as an Exception to the Explicit Consent Requirement Under Turkish Data Protection Law

Law No. 6698 on the Protection of Personal Data ("DP Law"), which came into force on April 7, 2016, requires obtaining a data subject's explicit consent for processing personal data - as a general rule - which is in line with Article 20/3 of the Turkish Constitution. Having said that, the DP Law introduced certain exemptions to this general principle. One such exemption is the processing of personal data for the "legitimate interests" of the data controller. In certain cases, requiring explicit consent for each case may hinder the natural flow of business or the processing of personal data, as the latter may be an inseparable part of the business.

Data Protection Directive 95/46/EC ("Directive")[16] also regulates the aforementioned exception and states that certain personal data may be processed without the explicit consent of the data subject where processing is necessary for the purposes of the legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject, along with other exceptions to the general principle. Likewise, according to Article 5/2(f) of the DP Law, personal data may be processed without the data subject's

[16] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML accessed on 13 February 2017



explicit consent "if processing is necessary for the purposes of data controller's legitimate interests, provided that data subject's fundamental rights and freedoms are not violated." As data protection legislation is quite new for practitioners in Turkey, application of the aforementioned exception in the EU would be helpful in interpreting the "legitimate interests" exemption.

Article 29 Data Protection Working Party (which is composed of representatives of the national data protection authorities in the EU), adopted an opinion on April 9, 2014,[17] focusing on the legitimate interests of the controller, and providing guidance on how to apply this exception for processing personal data without the data subject's explicit consent. Article 29 Data Protection Working Party states that a "balance test" should be carried out before relying on this provision and asserts that the elements to consider when carrying out the balancing test should include the following: (i) The nature and source of the legitimate interest and whether the data processing is necessary for the exercise of a fundamental right, is otherwise in the public interest, or benefits from recognition in the community concerned, (ii) the impact on the data subjects and their reasonable expectations about what will happen to their data, as well as the nature of the data and how they are processed, and (iii) additional safeguards which could limit undue impact on the data subject, such as data minimization, privacy-enhancing technologies, increased transparency, general and unconditional right to opt-out, and data portability.

Under DP Law, first of all, the interests of the data controller must be "legitimate" and considered as such by the applicable laws. The data controller's legitimate interests may arise in numerous cases where they are not specifically prohibited by laws. For example, a company may collect job applications and process the personal information contained within CVs to evaluate the job applications, without obtaining the explicit consent of the job applicants. Nevertheless, the data controller may not rely on this exception indefinitely or without limitations. Using the same example, personal information found within CVs should be processed in accordance with the general rules under the DP Law. As per Article 4 of the DP law, personal data must be (i) processed lawfully and fairly, (ii) accurate and where necessary kept up to date, (iii) processed for specified, explicit and legitimate purposes, (iv) relevant, limited and not excessive in relation to the purposes for which they are processed, and (v) kept for only as long as specified by the relevant legislation or is necessary for the purposes of processing.

Moreover, the data controller may benefit from the legitimate interests exception only if "fundamental rights and freedoms of the data subject are not violated." The fundamental rights and freedoms of individuals are set forth in the Turkish Constitution (along with international treaties), which include but are not limited to the right of privacy.

DP Law requires that fundamental rights and freedoms of the data subject are taken into account and weighed against the legitimate interests of the data controller, but, contrary to the Directive, the provision does not include any reference to the data subject's "interests". Under the Directive, Member States may determine the circumstances in which personal data may be used or disclosed to a third party in the context of the legitimate ordinary business activities of companies and other bodies. Therefore, the DP Law's scope of processing personal data based on legitimate interests without obtaining the data subject's explicit consent is broader than the Directive's. On the other hand, the Directive provides that personal data may be processed for the purposes of the legitimate interests of the data controller or third party or parties to whom the data are disclosed, whereas the DP Law does not refer to the legitimate interests of third parties and the parties to whom data are disclosed.

[17] http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp217_en.pdf accessed on 12 February 2017.

Finally, the exception explained herein should not be treated as a "last resort" by data controllers and it should not be automatically pursued. For each separate data-processing case, a test should be applied by the data controller to assess the balance between the data controller's legitimate interests and the data subject's fundamental rights and freedoms.

Internet Law

The Constitutional Court's Decision on the Annulment of Certain Provisions of the Internet Law Entered into Force on January 28, 2017

In 2014, 121 deputies of the Republican People's Party ("CHP") applied to the Constitutional Court for the annulment of certain provisions of Law No. 5651, the primary Internet law in Turkey, along with certain provisions of other laws, such as the Tax Procedure Law and the Public Tender Law.

The Constitutional Court partially accepted the request of CHP with its decision No. 2014/87 E. and 2015/112 K., and annulled certain provisions of Law No. 5651 on December 8, 2015. The decision of the Constitutional Court was published in the Official Gazette on January 28, 2016. Some of those provisions were annulled on the decision's publication date in the Official Gazette.

However the Constitutional Court decided to annul the provisions below by stating that, for these provisions, the annulment decision will be effective in one year following the publication of the decision in the Official Gazette:

1. Article 4/3 of Law No. 5651, which reads as follows: *"Content provider delivers the information requested by TIB which fall under the scope of TIB's performance of duties assigned by this Law and other Laws, to TIB as requested and takes the measures notified by TIB."*

The Constitutional Court decided on the annulment of this provision by stating that the relevant provision was not clear and foreseeable and stated that this section was in violation of Article 20 of the Constitution, as it violated the constitutional rights of individuals through data processing undertaken without obtaining the explicit consent of the relevant persons.

2. Article 5/5 of Law No. 5651, which reads as follows: *"Hosting Provider is obliged to deliver the information requested by TIB in the requested form and take the measures notified by TIB."*

This provision was annulled by the Constitutional Court as this provision granted an uncertain authority to the Presidency of Telecommunications and Communication ("TIB") in terms of (i) the conditions of conveying the information requested by TIB, (ii) the nature of the information to be requested by TIB, and (iii) how long the relevant information would be held by TIB.

3. Article 6/1(d), which reads as follows: *"Access Provider is responsible for delivering the information requested by TIB, in the requested form and for taking measures as notified by TIB."*

This provision was also annulled by the Constitutional Court with the same reasons as for Article 5/5 above.

4. Since Article 6/1(d) above was annulled, the Constitutional Court also annulled the administrative fine that would be imposed for not complying with the obligation to deliver the requested information, by annulling "subsection (d)" under Article 6/3.

During the one-year transition period, the TIB was shut down and its authorities were transferred to the Information and Communication Technologies Presidency ("ICTA") by Decree No. KHK/671. Therefore, all references to the TIB in the foregoing provisions shall be applicable to the ICTA.

As a result of the annulment, ICTA's authority to collect data from access providers, content providers and/or hosting providers was abolished as of January 28, 2017. Going forward, data collection will only be allowed if it is duly requested in the course of a criminal investigation and/or prosecution.

Advertisement Law

Turkey Amends Its Advertisement Regulation

Turkey's principal regulation regarding advertisements, the Regulation on Commercial Advertisement and Unfair Commercial Practices ("Regulation") was amended with another regulation published in the Official Gazette on January 4, 2017, effective immediately. Parties who advertise their products and services, advertisement agencies, and the media that publishes such advertisements are required to abide by the Regulation.

The most significant amendments to the Regulation concerned: (i) Comparative advertisings, and (ii) the burden of proof with respect to assertions made in advertisements. Aside from these key changes, other amendments were made concerning the disclosure requirements for advertisements which use marketing techniques that give consumers the right to participate in a lottery or a prize competition by collecting a certain number of coupons or labels, or by purchasing the advertised product. Previously, the advertiser was obligated to declare (i) the beginning and end dates of the promotion, (ii) the method of announcement for the lottery results, and (iii) the dates and conditions regarding the delivery of the service products. The amendment is vague as to whether "the method of announcement for the lottery results" should be disclosed—the requirement itself has been deleted, but it has been replaced with the "disclosure of conditions regarding the delivery of the service or the goods or the disclosure of the announcement method of such."

Another novelty introduced by the amendment concerns the regulation of advertisements regarding electronic communication services. Generally, the amendments impose an obligation to disclose to the consumer that the connection speed promised in the advertisement can be subject to change due to infrastructure-related issues and to avoid creating the perception that all consumers may access the speed levels achieved under laboratory conditions.

- Amendments Regarding Comparative Advertising

Before the amendment, the provisions with regard to comparative advertisings were going to enter into force as of December 31, 2016. The new amendment postponed this date to January 1, 2018. Comparative advertisings will remain to be prohibited until then.

Compliance with the principles set out by the Advertisement Board has been added as one of the conditions under which comparative advertisements can be made. This amendment has naturally brought about the expectation that the Advertisement Board will eventually draft principles under which comparative advertisement can be made.

Although the trademark, brand, logo, commercial titles or other distinctive marks or expressions of the competitors can be used in comparative advertisements, this latest amendment prohibits the use of testimonials by real persons or institutions in comparative advertisements. Previously, this provision was supposed to enter into force as of December 31, 2016. With this latest amendment, the entry into force of this rule has been postponed until January 1, 2018.

Further, the new amendments emphasize that food supplements cannot be subjects of comparative advertisements under any conditions. The provision was expanded to state that declarations regarding health benefits cannot be used for comparative advertising

purposes in food commercials; while declarations regarding nutritional benefits can only be compared in compliance with the relevant legislations. Price comparison advertisements are not allowed for those sectors where price regulations and obligations/restrictions on participants with significant market power are determined by the administrative authorities.

- Amendments on Burden of Proof

The new amendments have relaxed the requirements for meeting the burden of proof in advertisements and thus brought a more lenient approach for advertisers. Previously, assertions made in all advertisements were required to be proven with reports obtained from universities, accredited testing institutions, or independent research institutions. With the said amendments, this mandatory requirement has been modified to apply only for comparative advertisements. For non-comparative advertisements, the rule is changed and this high standard of proof will only be required where deemed necessary. However, it should be noted that all assertions must be proven through information and documents with scientific validity.

- Conclusion

The amendments regarding the burden of proof will be especially beneficial for those who are subject to the Regulation. As for comparative advertisements, the future is expected to bring further principles, as the Amendment states that those advertisers who wish to engage in comparative advertisements should comply with the (as yet unwritten) principles set out by the Advertisement Board.

Real Estate Law

The New Planning Procedures for Protected Areas

Turkey's main regulation with respect to planning procedures for protected areas, the Regulation on Plan Preparation for Protected Areas ("Regulation") was amended with another regulation published in the Official Gazette of December 6, 2016, and entered into force as of its date of publication. The Regulation sets out the criteria for the preparation and approval of zoning plans for protected areas, such as national parks, natural parks, and natural protected areas. These amendments have sparked controversy, with many environmental associations alleging that the amendments will lead to a lower degree of protection and preservation of the protected areas.[18] According to media reports, an Aegean environmental platform has already filed a stay of execution suit with regard to the amendment.[19] Below is our review of the amendments made to the Regulation:

(i) Previously, both the declaration of an area as a natural protected area or a status change would halt the execution of plans of all scales within the relevant area. With the amendment, a status change in an area would not suffice to stop the execution of all plans. According to the amendment, when the status of an area changes, the plan which was created based on the previous status of the area will continue to be executed within the relevant area.

(ii) Previously, the Regulation stated that, when the status of an area changed or when an area was declared as a protected area, the Ministry of Environment and Urban Planning would re-evaluate its environmental plan decisions and minutes, if any, by taking into account (1) the protection status of the area, (2) the reasoned report with regard to the natural protected area or biodiversity report, and (3) the interaction and transition fields of the protected areas. The amendments repeal the obligation of the Ministry to take into account "the reasoned report with regard to the natural protected area or biodiversity report."

[18] http://www.ayorum.com/haber_oku.asp?haber=4593
[19] https://www.evrensel.net/haber/303722/korunan-alani-korumasiz-birakacak

(iii) One of the most significant amendments to the Regulation concerns the period of application of execution of current zoning plans for areas whose statuses have changed. If the following changes took place in the status of an area, the Regulation would now allow current zoning plans to be applicable until new plans are created: (1) First degree natural protected areas, which are declared to be qualified natural protected areas and sustained protection and controlled usage areas, (2) second or third degree natural protected areas, which are declared to be sustained protection and controlled usage areas. Current zoning plans must be in line with the Regulation on Procedure and Principles with regard to the Identification, Registration and Approval of Protected Areas and principle resolutions determined for the new statutes.

(iv) Another significant change brought about by the amendment is with regard to the preparation period for new zoning plans that are applicable to areas whose zoning statuses have changed. Previously, relevant administrative authorities were required to prepare protective master and implementation plans within 18 months (in accordance with the new status of the area). During this period, provisional protection principles would continue to apply to the area in question. If this plan was not delivered due to mandatory reasons, the period could be prolonged up to 3 years. However, the provisional protection principles could not be enforced during the extension period. The amendments provide an initial period of 3 years for the preparation of the new plan (in accordance with the new status of the area) and allow for an indefinite extension period. Contrary to the previous rule, provisional protection principles would be enforced during the extension period, if any.

(v) Under the Regulation, protective zoning plans must be prepared by taking the habitation of the relevant area into consideration. These plans will either include the interaction and transition fields of the protected areas in the entirety of the natural protected area or in stages deemed appropriate by the General Directorate. The amendment brings an exception to this rule. Under the amended Regulation, constructions and facilities to be built in coastal areas are no longer required to prepare a zoning implementation plan or fulfill the staging requirement for the protected area.

Anti-Dumping Law

Developments in Anti-Dumping Practices: Dumping Investigation against Flat Steel Imports from the People's Republic of China

On December 21, 2016, the Ministry of Economy ("Ministry"), by way of publishing the Communiqué on the Prevention of Unfair Competition in Imports (No. 2016/51) ("Communiqué") in the Official Gazette, has announced that it has initiated an investigation into imports of milled, non-rolled flat steel[20] (thick plaque) from the People's Republic of China ("China").

As per Article 3 of the Communiqué, the investigation covers the period from July 1, 2015, to June 30, 2016.

- Alleged Dumping

Article 6 of the Communiqué stated that, as a result of the comparison between the normal price and unit export price to Turkey, the dumping margin of the thick plaque originating from China was found to be above the ratio for negligible volumes, as stated in Article 28 of the Regulation on the Prevention of Unfair Competition in Imports

[20] Registered under 7208.51.20.10.11, 7208.51.20.10.19, 7208.51.20.30.11, 7208.51.20.30.19, 7208.51.20.90.11, 7208.51.20.90.19, 7208.90.80.10.11, 7208.90.80.10.12, 7208.90.80.20.11, 7208.90.80.20.12, 7211.13.00.11.00, 7211.13.00.19.00, 7211.14.00.21.12, 7211.14.00.29.11, 7211.14.00.29.12, 7225.40.40.00.00, 7225.99.00.00.10, 7225.99.00.00.90 CN Codes. These CN Codes are provided under the Communiqué'8E for informative purposes and are not binding for the Ministry.

("Regulation"), which is akin to and closely modeled after Article 5.8 of the Anti-Dumping Agreement of the World Trade Organization.

- Alleged Damage and Causality

Following the assessment made by the Ministry, it was determined that:

(i) Thick plaque imports from China had increased considerably both during the investigation period as well as in the preceding period,
(ii) Imports from China had not undercut domestic production prices, and
(iii) Domestic production volume, domestic sales, domestic revenues, as well as sales profits from domestic sales and total profit rates had all decreased during the investigation period.

The Ministry, in light of the foregoing findings, concluded that China's alleged dumping with regard to thick plaque imports to Turkey was threatening Turkey's domestic production.

- Questionnaire and Information Submissions

As per Article 10 of the Communiqué, the Ministry will notify all related local importers and foreign exporters and manufacturers regarding the investigation, providing them with a non-confidential summary of the investigation and a copy of the questionnaire for importers or exporters/manufacturers.

Importers and exporters/manufacturers who have not been notified by the Ministry or who have not been able to obtain the notification for certain reasons, can find a copy of the questionnaire on the Ministry's website.

All submissions to the Ministry should be made in Turkish, as stated in Article 10. This rule holds particular importance for foreign exporters and manufacturers, since information or documents which are not provided in Turkish will not be taken into account by the Ministry during the investigation.

- Deadlines

Importers and exporters/manufacturers that are notified of the investigation have to submit their responses to the questionnaire within thirty seven days (including the mailing period) starting from the date the notification was sent.

For importers and foreign exporters /manufacturers who have not been officially notified by the Ministry, this period of thirty seven days starts following the publication date of the Communiqué (*i.e.*, December 21, 2016).

- Non-Cooperation

The Ministry also notes in Article 12 of the Communiqué that non-cooperation (*i.e*, failing to submit the answers in due time and required format, or refusing to give access to the relevant information and documents, or hindering the investigation, or providing false or misleading information) will result in the Ministry's decision to finalize the investigation by taking into consideration only the current information at hand (as per Article 26 of the Regulation). The relevant parties are reminded that non-cooperation or partial cooperation may lead to less favorable outcomes for the concerned parties.

White Collar Irregularities

Legal Issues Concerning Document Retention During Internal Investigations

One of the problems a company may face during an internal investigation is the lack of compliance by its employees with the document retention notices. Document retention notices typically inform the relevant employees that an investigation is ongoing and that they should not delete any electronic or hard-copy information they may have in their possession with regard to the matter at hand. Turkish law does not oblige the employers to send such notices during an internal investigation. However, they are extremely useful in explaining to the

employees what is going on and how they should act. On the other hand, employees usually operate under the misconception that the company computers, mobile phones and other devices provided to them by their employer can be regarded as their personal devices, and that they may use them as they wish. With that understanding, even after they receive a document retention notice from the employer, they may delete data which they believe might be self-incriminating. However, such deletion can have serious consequences on the employment relationship and can even lead to criminal liability for the perpetrators.

A recent UK case brings this issue into the spotlight. According to a Serious Fraud Office ("SFO") press release, an ex Sweett Group executive was sentenced to one year in prison because he destroyed or concealed two mobile phones, which he suspected or was aware that they contained information relevant to the SFO's anti-bribery investigation against his former company, the Sweett Group.[21]

People who do not abide by the document retention notices sent by their companies may risk facing the same consequences as the above-mentioned employee. This is because the Turkish Criminal Code No. 5237 provides that any person who destroys, deletes, conceals, changes or corrupts the evidence of a crime in order to conceal the truth may be sentenced to imprisonment from six months to five years (Article 281). A person can be punished under this Article for concealment of evidence only if he or she did not commit the relevant crime or did not participate in the perpetration of the crime. Hence, if during an official criminal investigation by the public prosecutor (*e.g.*, a bribery investigation), an employee (who did not commit or participate in the relevant crime) "destroys, deletes, conceals, changes or corrupts the evidence" with the belief that such information might implicate herself/himself vis-a-vis the employer, or even out of perceived loyalty to the company, they might be faced with imprisonment.

Even if things do not go as far as criminal prosecution, deleting data which is deemed potentially harmful can have negative consequences with regard to the employment relationship. Today, most multi-national companies incorporate clauses into their employment agreements, requiring employees to abide by the company's code of conduct. Codes of conduct typically include clauses that demand employee compliance with document retention notices. If employees who operate under such conditions delete any data from their company devices following a document retention notice, they will have explicitly and deliberately violated the company code of conduct. This could enable the employer to take disciplinary action against the employees in the best-case scenario. At worst, the employer may terminate the employment agreements of the implicated parties, depending on the severity of the circumstances.

From the employers' perspective, monitoring company devices used by the employees is not an easy task. A recent Turkish Constitutional Court decision (dated March 24, 2016) did confirm the employer's right to monitor corporate e-mails; however, the Court also laid down some ground rules. According to this decision, the monitoring should be proportionate to the employer's legitimate aim and the employer should refrain from unnecessary invasions of the employees' privacy. Such monitoring is a slippery slope that employers should pay utmost attention to, in order to ensure that employee rights are not violated.

[21] https://www.sfo.gov.uk/cases/richard-kingston/

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