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ELİG
GÜRKAYNAK
Attorneys at Law

LEGAL INSIGHTS QUARTERLY

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Av. Gönenç Gürkaynak
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Yıldız Mahallesi
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Preface to the March 2018 Issue

In this issue, the Capital Markets Law section discusses the major changes to the Capital Markets Regulation, which includes certain communiqués adopted by the Capital Markets Board ("***CMB***") regarding the simplification of the issuance procedure for capital market instruments, changes on allocation limits for capital market instruments, data protection rules for right owners, and the recent amendments made in the real estate certificates communiqué.

The Competition Law section discusses, among other topics, the Board's decision regarding the preliminary investigation on the restriction of online sales of BSH Ev Aletleri Sanayi ve Ticaret A.Ş., where the Board found that the distributor's passive sales were being restricted through the agreement and the de facto applications in practice. Further, this section also examines the Board's decision on the preliminary investigation initiated against Maysan Mando, which was later annulled by the Administrative Court which stated that the case required the Board to initiate an extensive investigation, as the existing evidence was found not to be satisfactory or appropriate for this case.

On the Internet Law front, this issue explores the Constitutional Court's decision regarding the freedom of press and expression with respect to the access ban of several articles posted on a news website.

The Real Estate Law section analyzes the New Communiqué on the National Calculation Method of Energy Efficiency in Buildings, regulating the limitation of greenhouse gas emissions in relation to carbon dioxide emissions and the primary energy of buildings.

Finally, on the White-Collar Irregularities front, this issue sheds light on the importance of conducting anti-corruption due diligence in pre- and post-M&A and joint venture transactions.

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 2018

Corporate Law

For Cause Dissolution of Joint-Stock Companies

1. General

Minority shareholders of joint-stock companies (“***JSC***”) are granted various favorable rights under the Turkish Commercial Code No. 6102 (“***TCC***”) in order to protect them against majority shareholders. The right to request postponement of balance sheet discussions (specified in Article 420 of the TCC), the right to appoint an independent auditor (Article 438 of the TCC), the right to request the convention of a general assembly meeting and the addition of items to the meeting agenda (Article 411 of the TCC), the right to request issuance of shares (Article 486 of the TCC), and the right to be represented on the Board of Directors (Article 360 of the TCC) are among the said minority rights. Minority shareholders, who represent at least 10% of share capital in private companies and at least 5% of share capital in publicly held companies, may benefit from such minority rights.

The right to request the dissolution of the JSC (Article 531 of the TCC) is also set forth as a right under the TCC for the minority shareholders, since there is no direct provision in the TCC that would enable the minority shareholders to exit from the JSC.

2. Right to Request the Dissolution of the JSC

As per Article 531 of the TCC, if a just cause exists, shareholders representing at least one tenth of the share capital of the JSC may submit a request to the commercial court of first instance, which has jurisdiction over the geographical area in which the JSC headquarters is located, for the dissolution of the JSC by filing a lawsuit. The court may, instead of ruling in favor of dissolution, decide that the plaintiff shareholders must be compensated for their shares at the actual price of their shares on a date that is close to the date of the court decision, and thereby exclude the plaintiff shareholders from the JSC or find any other appropriate and satisfactory solution.

It is important to note that, in order to meet or exceed the minimum share capital percentage requirement under Article 531 of the TCC, the minority shareholders may act jointly and together initiate a lawsuit which should be filed against the JSC.

Legislators have not defined “just cause” or specified under which circumstances the minority shareholders may request the dissolution of the JSC. It is understood from the reasoning of Article 531 that legislators have intentionally refrained from defining the concept of “just cause,” and have deliberately left that to be decided by the courts and doctrine. However, several grounds are listed under the reasoning of Article 531 of the TCC as examples of “just cause” under Swiss law. For example, the unlawful invitation of the general assembly to the meeting on several occasions, the violation of the minority shareholders’ and individuals’ rights, the obstruction or hindrance of the right to demand information and examination, continuous losses incurred by the JSC, and a constant decline in profit distributions are among possible just causes as per Swiss and Turkish doctrine.

Accordingly, the 11th Civil Chamber of the Court of Appeals ruled for the dissolution of the JSC (with the decision dated July 4, 2017, and numbered 2017/4079) in the case of a dissolution lawsuit, because (i) there were significant disagreements between the shareholders of the defendant company as to the management of the company and other business matters, (ii) the defendant group had not fulfilled its obligations, (iii) the JSC had incurred losses continuously due to the fact that the shareholders did not act collectively in line with the objectives determined and set forth in the articles of association of the JSC,

(iv) the employees' remunerations had not been paid, (v) the defendant group operated an alternative sales office instead of an ordinary sales office, (vi) arguments had arisen when the shareholders convened in order to resolve earlier disputes, (vii) the realization of the common objectives of the JSC were no longer possible, (viii) the plaintiff shareholder did not contribute in any way or cause the events that constituted just causes, and (ix) the conditions for the dissolution of the JSC for just cause were satisfied as per Article 531 of the TCC.

3. Squeeze Out of the Plaintiff Shareholders

In such cases, the court is entitled to determine whether or not the asserted reasons constitute a valid just cause. On the other hand, although the court is empowered to decide that the asserted reasons constitute just cause, it is not therefore obliged to order the dissolution of the JSC.

The continuation of the JSC is essential as per the general principles of Turkish laws and therefore, the termination of the JSC should be perceived and treated by courts as the last resort for resolving such disputes. If the court is convinced that the continuation of the JSC is more appropriate or beneficial in terms of the economic and business prospects of the company than its termination, it may choose to resolve the matter by ordering the minority shareholders who requested the dissolution of the JSC to be forced out of the JSC in return for the payment of the actual price of their shares on the date nearest to the court decision, or by ruling for any other solution or resolution that is appropriate and satisfactory. Such other solutions and resolutions should be determined by the courts. For example, the court may decide and order the distribution of profits if the dispute arises from undistributed profits. In any case, as per the views in the doctrine and court of appeal decisions, the decision of the court should aim to balance the interests of the plaintiff minority shareholders and the JSC, while satisfying the demands of the plaintiff minority shareholders.

Accordingly, the 11th Civil Chamber of the Court of Appeals ruled in favor of the "squeezing out" of the plaintiff shareholders with the decision dated March 3, 2016, and numbered 2016/2352, as to a lawsuit in which it considered either the dissolution of the JSC or the squeezing out of the minority shareholders from the JSC, due to the following reasoning: (i) the continuation of the JSC is often essential for its business operations and the court should first consider other solutions instead of the dissolution of the JSC, which has an economic value, as per the relevant legislation, (ii) the JSC could continue to perform its operations with its assets and it may realize its objectives under its articles of association, even though it was inactive as of 2006 and had disposed part of its assets, (iii) the objectives of the JSC could be realized by amending the articles of association following the exit of the plaintiff shareholders, and (iv) the plaintiff shareholders also claimed to wish to leave the partnership; however, the shareholders had been unable to agree on the sale price for their shares.

The courts and doctrine should also determine who will pay the actual price of the shares held by the minority shareholders requesting the dissolution of the JSC, how this payment is to be made, and whether such shares will temporarily be acquired by the JSC.

Banking and Finance Law

Derivative Transactions: Intermediary Issues

The Republic of Turkey Prime Ministry Undersecretariat of the Treasury has introduced amendments to both the Decree on the Protection of the Value of Turkish Currency No. 32 ("***Decree***") and the communiqué regarding the same (the communiqué No. 2008-32/34) ("***Communiqué***"), which were published in the Official Gazette of January 25, 2018. The amendment, which we aim to discuss hereby, is one of the amendments made to the Communiqué, namely the addition of a second paragraph into the text of Article 9 thereof.

As per the newly added second paragraph of Article 9 of the Communiqué, persons residing in Turkey shall freely engage in leveraged transactions and purchase and sale of derivatives, which are classified as being subject to the same provisions as the leveraged transactions. Such purchase and sale transactions shall only be made through intermediaries that are accredited by the Capital Markets Board of Turkey ("***CMB***"). Readers who are familiar with this subject will undoubtedly notice that the effect of this provision is similar to that of Article 6(8) of the Decree. That article also stipulates that the purchase and sale of all types of derivatives from/to parties abroad shall be made through intermediaries that are accredited by the CMB. The introduction of a new provision within the Communiqué only raised more questions among practitioners regarding the stance of the Decree and the relevant legislation with respect to the regulations of the CMB.

Article 26 of the CMB's Communiqué on the Principles Regarding Investment Services and Activities and Ancillary Services, published in the Official Gazette of July 11, 2013, stipulates certain conditions that must be fulfilled in order for activities to be excluded from the scope of the rules concerning derivative transactions. Accordingly, the purchase and sale of derivatives by and between real and/or legal persons without an intermediary, which cannot be deemed as a commercial or professional activity, shall fall out of the scope of derivative transactions. The coexistence of the aforementioned provisions raises vexing questions, especially with respect to the activities of group companies, which engage in inter-company transactions, whose subjects can include derivatives. Consider a scenario in which neither of the group companies is a financial entity, and where engaging in such transactions does not constitute the main line of business for either company. In this case, engaging in the transactions mentioned above shall, in principle, be deemed to fall out of the scope of the Decree, and thus shall not, in principle, require an intermediary due to the CMB's relevant regulation, as per which such transactions can be interpreted as having been exempted from the rules concerning derivatives transactions. Accordingly, the activities of intergroup companies, which engage in such transactions solely to mitigate their risk exposures, and not as one of their main lines of business, shall be deemed to fall out of the scope of derivative transactions. Thus, we conclude that such transactions would not necessarily have to be carried out through intermediaries that are accredited by the CMB.

Capital Markets Law

Major Changes in Capital Markets Regulations in the Last Quarter of 2017

In the last quarter of 2017, the Capital Markets Board ("***CMB***") has adopted certain communiqués amending the Communiqué on the Sale of Capital Market Instruments, the Communiqué on the Procedure of Keeping Records as to Dematerialized Capital Market Instruments, and the Communiqué on Real Estate Certificates. We will summarize some of these changes below.

1. Simplification of the Issuance Procedure of Capital Market Instruments

In accordance with the recent amendment made to the Communiqué on the Sale of Capital Market Instruments (II-5.2), companies are now allowed to revise their public offering price, price range, discount or interest rates in order to have lower figures just before launching their sale and/or book building, without being required to revise the accompanying offering circular ("izahname"). In such a case, a simple public disclosure will be sufficient, instead of the previous rule requiring the revision of the offering circular. As per the amendment, the launching of the public offering is also allowed on the second day as of the public disclosure at the earliest. However, if the public offering price, price

range, discount or interest rates are revised lower during the sale and/or book building process, then the public offering date will be delayed by at least 2 (two) days.

2. Changes on the Allocation Limits of Capital Market Instruments

As per the recent amendment made to the Communiqué on the Sale of Capital Market Instruments (II-5.2), the allocation limits of capital market instruments have been changed. While companies were previously required to allocate 20% of the nominal value of capital market instruments to local institutional investors, this amount has now been decreased to 10%. Additionally, the CMB has been granted the authority to decrease minimum allocation limits to 0 or to increase these limits up to onefold by taking into consideration the value of the capital market instruments, market conditions, the request of issuers, and/or other applicable reasons, according to the circumstances.

For public offerings that involve foreign institutional investors who are subject to Regulation S or Rule 144A, this amendment is of vital importance. With this change, the allocation ratio may be increased significantly in favor of the foreign institutional investors.

3. Data Protection Rules for Right Owners

In the Communiqué on the Procedure of Keeping Records as to Dematerialized Capital Market Instruments (II-13.1), it has been regulated that data relating to right owners may be obtained in accordance with the procedures to be determined and set forth by the Central Registry Agency (“Merkezi Kayıt Kuruluşu”). In this respect, the issuers have become responsible and liable for keeping said information confidential. In addition to the foregoing, it has also been regulated that right owners’ information shall not be disclosed to any party other than the officers of the issuer who have administrative responsibility and shall only be used for its stated and lawful purposes. In accordance with the foregoing developments, it is aimed that the right owners’ positions will be strengthened and that their information will be kept confidential to the greatest extent possible.

4. Recent Amendments Made to the Communiqué on Real Estate Certificates (VII - 128.2)

Some of the recent amendments made to the Communiqué on Real Estate Certificates (VII - 128.2) are as follows:

As a new requirement, independent sections of real estate projects that are subject to real estate certificates shall meet the same quality standards as other independent sections of the real estate project that are not subject to real estate certificates.

The cancellation of real estate certificates and the performance of primary obligations shall be conducted in accordance with the procedures to be determined by the Central Registry Agency and approved by the CMB. In accordance with the foregoing amendment, it is expected that further secondary legislation will be published on this matter.

During the public offerings, price stabilizing transactions may be executed if they have been put forth in the offering circular. It should be noted that this opportunity did not previously exist.

Special procedures that are deemed appropriate and suitable by the CMB in terms of the rights and benefits of the investors may be implemented, if they have been declared in the offering circular. The CMB did not previously possess such an authority.

As a new exemption, the CMB has been granted the power to exempt companies—which are at least 51% owned, directly or indirectly, by public institutions—from the requirements concerning the issuance of real estate certificates.

The issuer has obtained the right to receive the entire amount of the funds raised from the issuance of real estate certificates, provided that the redemption amount and the potential penalty amount have been either guaranteed by a bank or duly insured. Previously, the fund would be allocated to investors by partly taking the progress of the construction project into account.

Crowdfunding Legislation Introduced in Turkey

I - Introduction

On December 5th, 2017, with the Omnibus Bill No. 7061 published in the Official Gazette, the Capital Markets Law No. 6362 ("***Law***") was amended to pave the way for the introduction of the financing tool known as "crowdfunding" in Turkey. In its simplest form, crowdfunding is the practice of funding a project or venture by raising many small amounts of money from a large number of people, typically via the Internet.[1] As per the changes introduced under Articles 3, 4, 16, 35/A and 99 of the Law, Turkey is now one of the few countries that governs and regulates crowdfunding in its domestic legislation. The Turkish Capital Markets Board ("***Board***") is now authorized to regulate crowdfunding activities and license crowdfunding platforms in accordance with the new legislation. The Board is also authorized and empowered to enact secondary legislation for crowdfunding.

The motivation behind the amendment is to encourage additional investments in startups by way of building a bridge between small-scale funders/investors and startup companies through online crowdfunding platforms. Our article hereby summarizes how crowdfunding works and sheds light on the underlying principles of the Law.

II - What is Crowdfunding?

Crowdfunding, as explained by the European Commission,[2] is a way of raising money to finance projects and businesses. It enables fundraisers to collect money from a large number of investors (which can include companies, non-profit organizations, and individuals) via online platforms.

In Turkey, Article 3 of the Law describes crowdfunding as "fundraising through funding platforms in an attempt to provide a project or entrepreneurs with the required funding according to the principles set forth by the Board, without being subject to the provisions of the Law relating to investor compensation."

There are more than 600 crowdfunding platforms around the world, with the total amount of fundraising reaching billions of dollars annually, according to the research firm Massolution.[3] According to a Commission Report published in 2015, amongst 510 crowdfunding platforms operating in the EU during the period under observation, the UK had the largest number of platforms (143), which also accounted for the majority of the €2.0 billion raised by the participating platforms in total. In terms of the popularity of crowdfunding platforms in the EU, the UK was followed by France (77 platforms), Germany (65 platforms), the Netherlands (58 platforms) and Italy (42 platforms).[4]

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[1] *See at* https://en.wikipedia.org/wiki/Crowdfunding

[2] *See at* https://ec.europa.eu/growth/tools-databases/crowdfunding-guide/what-is/explained_es

[3] *See at* https://www.entrepreneur.com/article/228125

[4] *See at* http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595882/EPRS_BRI(2017)595882_EN.pdf

III - How Does Crowdfunding Work?
Crowdfunding, also known as the "social media version of fundraising," is a relatively new sector and is still developing and changing rapidly. According to the European Commission, fundraisers are usually charged a fee by crowdfunding platforms if their fundraising campaigns reach their goals (*i.e.*, if their campaign has been successful). In return, crowdfunding platforms are expected to provide a secure and easy-to-use service to both fundraisers and small-scale investors.

While the advantages of crowdfunding are mounting due to network effects (from reaching out to a global audience/customer base to actualizing a business idea almost without incurring any upfront costs), there is, as always, the flip side of the coin. Many crowdfunding platforms require entrepreneurs to meet their stated fundraising goals fully in order to receive any of the funds that have been pledged to their idea or business proposition. This means that, if entrepreneurs fail to reach their predetermined funding goal (*i.e.*, target amount) after working long hours and putting in a considerable amount of time and effort into their project, the donations that have already been pledged to them can be returned to the funders.

IV - Legislative Criteria in Turkey
Below is the outline of the new crowdfunding principles introduced with the amendment of the Law in Turkey:

- The Board will regulate crowdfunding activities within the boundaries of the Law and enact the necessary secondary legislation accordingly.

- Online/electronically operated crowdfunding platforms will be required to obtain a license from the Board. Crowdfunding platforms that carry out crowdfunding activities without first obtaining a license from the Board will face the risk of an access ban of their website(s), with the decision to be made by the Information and Communication Technologies Authority.

- Crowdfunding will not be deemed or treated as a public offering of shares, and thus will not be subject to the legislation relating to public offerings, such as the requirement of issuing an offering circular.

- The Board will determine the rules and procedures applicable to the establishment of these platforms, as well as to their shareholders, share transfers, employees, and maximum funding limits, and the rules and procedures applicable to the fund collection for a particular project/company. Hence, the Board will be authorized to monitor and audit crowdfunding activities to ensure their compliance with these standards.

- According to Article 35/A of the Law, crowdfunding platforms and the relationship between investors and entrepreneurs will be subject to the general provisions of Turkish laws (*e.g.*, to the generally applicable rules under the Turkish Commercial Code and the Turkish Code of Obligations).

Competition Law / Antitrust Law

The Turkish Competition Board's Reasoned Decision Regarding Trakya Cam's Request to Access the Case File Is Published

Turkish Competition Board's ("***Board***") reasoned decision (dated 13.07.2017 and numbered 17-22/352-157) regarding the request to access the case file submitted by Trakya Cam Sanayii A.Ş. ("***Trakya Cam***") has been published on the official website of the Turkish Competition Authority ("***Authority***").

The decision concerns the investigation initiated against Trakya Cam through the Board's decision for the purpose of determining whether Trakya Cam had violated Articles 4 and 6 of the Law No. 4054 on the Protection of Competition ("***Law No. 4054***") through the de facto implementation of its dealership system, which had not been granted with an individual exemption in a previous decision of the Board (dated 02.12.2015 and numbered 15-42/704-258).

Following the official service of the investigation report on May 26, 2017, ("***Investigation Report***"), Trakya Cam requested access to the case file, pursuant to the Communiqué No. 2010/3 on the Regulation of the Right of Access to the File and the Protection of Trade Secrets ("***Communiqué No. 2010/3***"). Trakya Cam claimed in its application that, in line with the Law No. 4045 and the Communiqué No. 2010/3, and in order to acquire a full understanding of the claims brought against it so that it could effectively prepare and submit its responses to the findings in the Investigation Report, it needed to gain access to the case file, and thus requested the documents and evidence listed in its application to be delivered via electronic data storage devices.

The first group of documents listed in Trakya Cam's request comprised the following: (i) the application and complaint petitions that had been submitted along with a request for confidentiality, and (ii) the minutes of the telephone conversation conducted with the complainant regarding the relevant applications. In response to this request, the Board emphasized that Article 6 of the Communiqué No. 2010/3 provides that the parties may access any documents or evidence issued by the Authority and which, additionally, concern them directly. Nonetheless, as the applications in question had been issued by parties outside the Authority (*i.e.*, the Authority was not the author of the relevant documents), the Board determined that they did not constitute "in-house" documents. Furthermore, the Board noted that, although the application and complaint petitions formed the basis of the Authority's inspection, they were not utilized as evidence for substantiating any allegations or establishing the guilt or culpability of the investigated undertaking (*i.e.*, Trakya Cam).

In this respect, the Board determined that the relevant documents did not qualify and would not be classified as evidence pertaining to the undertaking in question, and therefore, the application and the complaint documents were found to be outside the scope of Article 6 of the Communiqué No. 2010/3.

Nonetheless, the Board also made reference to its previous precedents (16-12/188-83, 30.03.2016 and 16-17/290-133, 18.05.2016) and stated that access to the application and complaint petitions had previously been granted to the parties in prior cases by way of redacting commercial secrets and confidential information. However, the Board declared that the relevant complaint petitions in those precedent cases did not include requests for confidentiality, contrary to the case at hand. Therefore, the Board ultimately concluded that, while petitions that did not involve confidentiality requests could be revealed to the applicants, Trakya Cam's request for access to the first group of documents should be denied in this case, due to the fact that: (i) all of the complaints submitted in the case at hand included confidentiality requests, and (ii) there were no additional claims or allegations put forth during the telephone conversation in question.

The second group of documents subject to Trakya Cam's request for access to the case file comprised the reports resulting from the on-site inspection conducted at the premises of Trakya Cam's dealers. The Board stated that the unredacted portions of these documents concerning the violation allegations had already been conveyed to Trakya Cam, either as annexes to the investigation notice or as annexes to the Investigation Report itself. Thus, the Board noted that Trakya Cam had been provided with all the means necessary to effectively utilize its right of defense. Furthermore, the Board concluded that the remaining parts of these documents, which (i) were not related to Trakya Cam, (ii) did not include information exonerating or incriminating Trakya Cam, and (iii) included commercial secrets to a significant degree, could not be revealed to Trakya Cam within

the scope of the Communiqué No. 2010/3, due to the fact that they were related to the internal communications and operations of the undertakings concerned.

The third group of documents in this case consisted of information and documents submitted by Trakya Cam's dealers, the customers of its dealers, and its former dealers. The Board herein stated that, pursuant to Article 7 of the Communiqué No. 2010/3, the correspondence between the Authority and natural persons or legal entities in the private sector that is undertaken for the purpose of collecting information constitutes the internal correspondence of the Authority, and therefore, the documents requested also constituted the internal correspondence of the Authority.

In this regard, the Board determined and declared that the third group of documents comprised information about the dealership system that Trakya Cam was accused /suspected of using, the undertakings that supplied glass and the amount supplied by each of them, together with data about the regional distribution of sheet glass sales. The Board noted that, within the framework of Article 12 of the Communiqué No. 2010/3, the identities of the undertakings that supplied glass and the amount and regional distribution of sheet glass sales were deemed as commercial secrets. In addition, Article 10 of the Communiqué No. 2010/3 provides that the internal correspondence of the Authority which contains information that could exonerate or incriminate the investigated undertaking may be examined physically at the premises of the Authority. Based on these provisions, the Board ultimately ruled that access to these files—limited to the explanations of the undertakings, by way of redacting commercial secrets and confidential information—could be granted at the premises of the Authority's headquarters, and that the undertaking would not be allowed to make any records or copies of such documents.

The Board's Decision on BSH Ev Aletleri Sanayi ve Ticaret A.Ş. Regarding the Preliminary Investigation on the Restriction of Online Sales

The Authority published the Board's reasoned decision (dated 22.08.2017 and numbered 17-27/454-195) on the preliminary investigation launched against BSH Ev Aletleri Sanayi ve Ticaret A.Ş. ("***BSH***"), a subsidiary of BSH Hausgeräte GmbH operating in the market for durable consumer goods in Turkey with its master brands of Bosch and Siemens, in order to determine whether it had violated Article 4 of the Law No. 4054 by imposing restrictions on its distributors' online sales through: (i) a restrictive provision within BSH's standard distribution agreements, (ii) automatic re-routing of the customers to the BSH's website, and (iii) sending warning letters to the distributors who made online sales in order to prevent them from doing so. The decision sets a landmark precedent strengthening the Board's and the European Union's ("***EU***") stance that the online sales of distributors cannot be restricted, unless such restriction is objectively justified.

Within its decision, the Board conducted an in-depth analysis of the Turkish and EU legislation on this issue, as well as examining the relevant EU precedents. The Board initially determined that the online sales of products in Turkey are generally considered as "*passive sales*," pursuant to paragraph 24 of the Guidelines on Vertical Agreements ("***Vertical Guidelines***"). Therefore, the Board concluded that a supplier restricting its distributors from performing online sales, as was the case within the preliminary investigation at hand, would, by its own nature, constitute a restriction regarding the passive sales of the distributor, which is explicitly deemed as a restriction under Article 4(c) of the Block Exemption Communiqué No. 2002/2 on Vertical Agreements ("***Communiqué No. 2002/2***") and under the Vertical Guidelines. Furthermore, the Board evaluated the European Commission's Vertical Agreements Block

Exemption Regulation, the European Commission's Guidelines on Vertical Restraints, as well as several precedents of EU courts and competition authorities (*e.g., Pierre Fabre, Scout Satchels, Bang & Olufsen, Bosch Siemens*)[5] and indicated that the main perspective and established precedent of the EU case law regarding distribution agreements is that distributors (who are parties to a vertical agreement) should not be restrained from performing online sales.

Following its analysis, the Board primarily evaluated the "active vs. passive sales" issue. The Board first noted that, prior to 2015, BSH's standard distribution agreements had restricted both active and passive online sales altogether, and that, after a revision was made to these agreements in 2015, only 'active' online sales were restricted. Moreover, the Board asserted that, as per Article 4(c) of the Communiqué No. 2002/2, the restriction of passive sales through the distribution agreement eliminates the economic/technical developments and advantages that the vertical agreements are expected to stimulate, and should be prohibited unless such restrictions are otherwise objectively justified. In addition, the Board considered that passive sales were not only restricted through the distribution agreement itself, but also through *de facto* applications in practice. In light of the foregoing considerations, the Board finally determined that, even though passive sales had not been restricted by BSH after 2015 within or through the distribution agreement itself, the fact that BSH was sending warning letters to its distributors performing online sales as well as the automatic re-routing of the customers to BSH's website, were deemed to constitute *de facto* restrictions of passive sales.

[5] *See* Autorité de la concurrence *Pierre Fabre Dermo-Cosmétique SAS* decision No. C-439/09, dated 13.10.2011; Kammergericht, the Court of Appeals of Berlin, *Scout Satchels* decision No: Case 2 U 8/09 Kart, dated 19.09.2013; Autorité de la concurrence, *Bang et Olufsen* decision No: 12-D-23, dated 12.12.2012; Bundeskartellamt, *Bosch Siemens* decision No: B7-11/13, dated 23.12.2013.

Considering the provision within BSH's standard distribution agreements restricting active sales, along with the *de facto* applications and practices of BSH, the Board concluded that the distribution agreements, which had previously been granted a block exemption, did not satisfy the conditions laid down by Article 5(a) of the Law No. 4054, as it did not offer any economic/technological developments or improvements for the distribution of goods and provision of services. As such, the Board did not consider BSH's defenses to amount to an objective justification for the restriction. Accordingly, the Board decided that: (i) the block exemption previously granted to BSH pursuant to the Communiqué No. 2002/2 with its decision dated 06.10.2015 and numbered 15-37/573-195 should be revoked, and (ii) the exclusive distribution agreement should be amended to comply with the block exemption regulation above. At the conclusion of the preliminary investigation, the Board unanimously decided that there was no need to launch a full-fledged investigation against BSH at this stage, by determining that: (i) BSH had significant competitors with high market powers, and (ii) BSH had not imposed any specific, concrete sanctions on its distributors regarding online sales.

The Administrative Court Annulled the Board's Decision Not to Initiate an Investigation against Maysan Mando in Terms of Its Alleged Refusal to Supply

The 15th Administrative Court of Ankara ("***Court***") has recently rendered a decision[6] in which it annulled the Board's decision[7] not to initiate an investigation regarding the allegations that Maysan Mando Otomotiv Parçaları San. ve Tic. A.Ş. ("***Maysan Mando***") had distorted competition by way of (i) refusing to supply, and (ii) colluding with the

[6] Ankara 15th Administrative Court (2016/3742 E., 2017/2794 K.)

[7] The Board's decision dated 18.02.2016 and numbered 16-05/107-48.

competitors of Tok Oto Market ("***Tok Oto***") in order to exclude Tok Oto from the downstream market.

As background information, we note that Maysan Mando is a supplier of shock absorbers for a wide range of products, including passenger cars, light commercial vehicles, buses and heavy trucks, along with the railways and certain products with military applications. Tok Oto, a dealer of Maysan Mando, lodged a complaint before the Authority alleging the following: (i) Maysan Mando had the highest market share in the relevant market in Turkey, (ii) Maysan Mando had refused to supply its products to Tok Oto as a result of the pressure from Tok Oto's competitors, and therefore (iii) Maysan Mando had excluded Tok Oto from the downstream market.

In its assessment of the complaint, the Board started out by defining the relevant product market as "the market for sales of shock absorbers" and the relevant geographic market as "Turkey." The Board then proceeded with its evaluation of the allegations put forth in the case file, and indicated that the relevant allegations should be assessed within thescope of Articles 4 and 6 of the Law No. 4054.

In this regard, the Board first analyzed whether there were any agreements between Maysan Mando and its dealers that restricted competition under Article 4 of the Law No. 4054. The Board declared that the case handlers had not discovered or unearthed any documents or evidence during their on-site inspection supporting the allegation that Tok Oto's competitors had put pressure on Maysan Mando to refuse to supply its products to Tok Oto. Additionally, based on its review of the two e-mail correspondences between Maysan Mando and other dealers, the Board noted that not only Tok Oto but other Maysan Mando dealers had also made similar complaints regarding the delays in product supply. According to the Board's findings, the delays in Maysan Mando's product supply were closely linked with the change in its marketing strategy: In 2015, there was a record-high increase in the supply and demand of automobiles, which was closely followed by a significant increase in the original equipment manufacturers' ("***OEM***") demand for shock absorbers. According to the Board, given that Maysan Mando's production and supply capacity was not ready to meet such a significant increase in demand, Maysan Mando had prioritized supplying the OEMs and had used its limited capacity to meet the OEMs' demand, as this was deemed to be a more profitable strategy.

The Board then evaluated whether the delays in supply and the non-delivery of shock absorbers to Tok Oto had the object or effect of excluding Tok Oto from the market under Article 6 of the Law No. 4054. The Board indicated that the refusal to supply constitutes an anti-competitive behavior if it: (i) relates to a product or service that is indispensable for competing in the downstream market, (ii) is likely to lead to the elimination of effective competition in the downstream market, and (iii) is likely to lead to consumer harm. Based on these conditions, the Board found that the shock absorbers supplied by Maysan Mando were not indispensable for Tok Oto to effectively compete in the market for automotive spare parts. Accordingly, the Board concluded that Maysan Mando's refusal to supply was not likely to exclude Tok Oto from the relevant market and that it would not lead to the elimination of effective competition in the market. Therefore, the Board found that Maysan Mando's refusal to supply Tok Oto did not constitute an abuse of dominant position under the Law No. 4054. In conclusion, the Board decided not to launch a full-fledged investigation against Maysan Mando.

Tok Oto subsequently appealed the Board's decision before the Court on the grounds that (i) the Board's decision was unlawful and contrary to the law, (ii) Maysan Mando was

in a dominant position in the relevant market, (iii) Maysan Mando had excluded Tok Oto from the relevant market, and (iv) the Authority had failed to investigate Tok Oto's complaints and allegations thoroughly.

In its review of the case, the Court stated that the Board must initiate a full-fledged investigation in cases where the evidence is not satisfactory or suitable to reach the conclusion that the behavior of the investigated undertaking that was the subject matter of the preliminary investigation did not constitute an anti-competitive act, decision or agreement. Accordingly, the Court found that: (i) Maysan Mando had ceased to supply shock absorbers to Tok Oto before the termination of their dealership agreement, (ii) the Board had taken into account the e-mail correspondence of Maysan Mando with other dealers, which indicated that there were short delays in its supply chain that were not permanent, (iii) since Tok Oto was a wholesaler, if Maysan Mando refused to supply its product to Tok Oto, then its customers might cancel their purchase orders from Tok Oto, and competition in the downstream market might therefore be diminished. Hence, according to the Court, this chain of events might eventually lead to price increases in the relevant market and subsequently cause consumer harm. The Court also found that the Board had decided not to initiate a full-fledged investigation and thus had failed to carry out a sufficient investigation and examination; whereas, according to the Court, it should have launched an extensive investigation in order to comprehensively evaluate the evidence and documents gathered during its preliminary investigation and to address and resolve every complaint put forth by Tok Oto, without leaving any doubts or lingering questions as to their merits.

In light of this analysis, the Court finally declared that the decision of the Board was not in accordance with the law and annulled the Board's decision. The Court's annulment decision also included the dissenting opinion of the Chief Justice of the Court, which stated that Maysan Mando had not been in a dominant position in the relevant market, given that: (i) there were two competitors of Maysan Mando in the market, (ii) the share of Maysan Mando products in the total turnover of Tok Oto was significantly low, and (iii) Maysan Mando had put its product deliveries on hold (for rational and justifiable reasons) for the same period of time to other dealers as well.

Following the judgment of the Court, the Board announced on its website that it had initiated a full-fledged investigation against Maysan Mando.[8]

The Board Imposed an Administrative Monetary Fine to Çekok Gıda for Hindering the On-Site Inspection within the Scope of the Preliminary Investigation Initiated against Various Undertakings That Are Active in the Wholesale Fresh Fruits and Vegetables Market

The Authority has recently published the Board's reasoned decision in the *Çekok Gıda* case (dated 03.07.2017, and numbered 17-20/318-140) regarding its *ex-officio* preliminary investigation based on the allegations that eight undertakings[9] had violated Articles 4 and 6 of the Law No. 4054 by (i) concluding agreements between the relevant undertakings and abusing their dominant positions by imposing prices to consumers that were above the market prices, and (ii) sharing retailers and geographic areas among major suppliers (*i.e.*, market allocation) in the wholesale market for fresh fruits and vegetables.

[8] The Board's decision numbered 17-39/630-M, announced on the Authority's website on December 19, 2017.

[9] Çekok Gıda, Uçak Kardeşler Gıda, Menas, Sultan Gıda, Uzmanlar Gıda, Kalyoncu, Gamze Tarım Ürünleri and the Association of Merchants and Artisans of Antalya.

For the purposes of its evaluation of the case, the Board made use of the Turkish Central Bank's report of May 2017, which analyzed the competitive conditions in view of the market structure in the processed food supply market. The Board also carefully examined the wholesale market for fresh fruits and vegetables in terms of its structure and its operation throughout Turkey and the European Union. The Board determined that the distribution of fresh fruits and vegetables were carried out through three channels, namely the wholesale market halls, large distribution places, and associations of producers in the EU. On the other hand, customers reach the products through several intermediary actors, including collectors, brokers, commissioners, and merchants in the Turkish market for fresh fruits and vegetables, which has various upstream and downstream levels, from production to retail sale/producers to consumers in Turkey.

In light of the foregoing considerations, the Board preferred to base its examination on the wholesale market for fresh fruits and vegetables. However, the Board proceeded with its investigation without defining any relevant product market pursuant to paragraph 20 of the Guidelines on the Definition of Relevant Market, which provides that the market definition can be left open/undetermined in cases that do not give rise to competition law concerns regardless of how the market is defined.

The Board pointed out that fierce competition takes place in the wholesale market for fresh fruits and vegetables in which the final price is determined through vigorous bargaining, and that wastages in fruits and vegetables cause losses in profit, based on the information collected through its on-site inspections and meetings. The Board further found that transportation costs, wastages and climate conditions could be considered as the most substantial factors in determining the prices of fresh fruits and vegetables.

The Board then proceeded with its analysis under Article 6 of the Law No. 4054. To that end, the Board first demonstrated that there are various players in the upstream and downstream markets, including wholesalers, commissioners and retailers, who each take part and play a distinct role in the process of providing the products to the end consumers. The Board further determined that the relevant undertakings active in these markets are not able to influence the market conditions, and therefore, not able to achieve a dominant position in the market. Thus, the Board concluded that the probability of a violation under Article 6 of the Law No. 4054 could be deemed as low.

Subsequently, the Board conducted an assessment under Article 4 of the Law No. 4054, and observed that (i) anti-competitive coordination is unlikely to occur in the relevant market since there are a lot of undertakings operating at different levels of the market, (ii) the undertakings would be unable to increase the price by reducing supply since weather conditions are a crucial/unpredictable factor for the supply of fresh fruits and vegetables, (iii) the risk of rotting for the products lead the undertakings active in the market to sell out their products on a daily basis regardless of the market conditions, and finally (iv) the investigated undertakings have no ability to increase the price in the overall market by adjusting their supply amount, since more than half of the products are sold through channels other than the wholesale market halls. Accordingly, for the relevant market, the Board concluded that there were no grounds or factors that would facilitate a violation of Article 4 of the Law No. 4054.

The Board also evaluated the allegations regarding market allocation and indicated that there was no need to take an enforcement action due to the lack of evidence supporting the claim at hand and due to the ability of retailers to purchase their products from different sources.

In light of the foregoing analysis, the Board concluded that there was no legal ground to initiate a full-fledged investigation against the relevant undertakings operating in the wholesale market for fresh fruits and vegetables based on the Law No. 4054.

Finally, the Board decided to impose an administrative fine on one of the investigated undertakings, namely Çekok, amounting to 3,120,136.61 Turkish Liras (which corresponded to 0.5% of its gross income for the 2016 financial year) under Article 16 of the Law No. 4054. The Board took this enforcement action on the grounds that Çekok had hindered the Authority's on-site inspection by delaying it for one-and-a-half hours.

The Board's decision in this case is important, as it provides instructive explanations and analyses regarding the wholesale market for fresh fruits and vegetables from a competition law perspective by also taking into account the market structure in the EU. The Board's decision is also interesting and noteworthy from another perspective, as it provides a rare illustration of the imposition of an administrative monetary fine for delaying, and thus impeding, the Authority's on-site inspection.

Labor Law

The Court of Appeals Changed its Precedents on the Issue of 6-Months' Seniority for Job Security

In principle, the termination of an employment agreement is considered to be a last resort in labor relations in Turkey, where employers are obliged to make a sincere effort not to terminate the employment agreements of their long-term employees. This rule is called the "*ultima ratio*" (literally, "final argument" or "last resort") principle and governs the entirety of Turkish labor law. Therefore, the termination of an employment agreement has become an issue that is widely regulated and strictly controlled by the legislator under the Labor Law No. 4857 ("***Labor Law***"). Article 18 and et seq. encompass the job security provisions of the Labor Law, regulating the fundamental rules for a valid termination, and thus are at the forefront of securing the employee-protective approach adopted under the Labor Law. The job security provisions provide legal protection to employees from arbitrary termination that is unilaterally initiated and executed by employers. As to the job security provisions, employers are required to strictly follow the termination procedures set forth under the said articles, and if they fail to do so, employees will be entitled to bring such termination actions to the courts for judicial review, and they will be allowed to petition the court for the invalidation/annulment of the termination decision and their reinstatement to their job positions as well. However, not all employees are entitled to benefit from these expansive job security provisions. Only employees whose specific qualifications are included and stipulated under the Labor Law enjoy the protection of the job security provisions. To that end, only those employers who employ at least thirty (30) employees are obliged to provide a valid reason/basis for terminating an employee who has worked for the employer under an indefinite-term employment contract for at least six (6) months. The prerequisite of a minimum tenure of six months before the "valid reason" clause for termination kicks in has recently become a hotly debated topic, as employers have started to terminate the employment contracts of their employees one day before the date on which the employee would have reached six months of seniority, for the obvious purpose of avoiding the job security provisions of the Labor Law.

The Court of Appeals has long adopted a skeptical approach to this type of behavior on the part of employers and has displayed an antagonistic attitude against employers on this matter. The Court of Appeals has stated in numerous decisions that this specific method of termination with such particular (not to

say, exquisite) timing is contrary to the fundamental principle of good faith, and that an employee who is fired in this manner should be deemed to have attained six months of seniority, which would therefore make him/her a beneficiary of the job security provisions, and allow him/her to take advantage of those provisions, by operation of law. (See, for example, the 9th Chamber of the Court of Appeals decision dated 01.04.2013 and numbered 2013/35856 E. and 2013/10606 K.; 9th Chamber of the Court of Appeals, decision dated 14.02.2011 and numbered 2011/474 E. and 2011/2785 K.)

The Court of Appeals explained in its *ratio decidendi* that it is of utmost importance to ensure the safeguarding of employees from malicious and bad-faith termination methods, even if they are not necessarily used for the purpose of circumventing the law, that may be utilized or implemented by the employers.

However, the 9th Chamber of the Court of Appeals, in its more recent decision of November 09, 2017 (2016/28920 E. and 2017/17860 K.), seems to have modified its prior decisions, which may therefore lead to an overturning of its precedents on this controversial issue. In this recent case, the court did not presume in advance that the employer who terminated its employee's employment contract one day before the day on which the employee would have completed six months on the job had violated the principle of good faith. On the contrary, the court appeared to demand to see some probative evidence, submitted by the employee, demonstrating that the employer had, in fact, maliciously terminated the employment contract, in order to rule in favor of the employee.

Unless this case was a singular decision or one-off exception, one may argue that, in light of this decision, not all terminations occurring just before the date on which employees would have attained six months of tenure on the job will be deemed as malicious. Rather, this decision seems to indicate that the rationale behind each dismissal should be closely scrutinized, in order to ensure that an employer's actual objective is not to avoid being subject to the job security provisions of the Labor Law. If the court is satisfied that the termination of the employment contract was carried out in good faith and not for the purpose of sidestepping the applicability of the job security provisions, this decision implies that the employer should be allowed to terminate the employment contracts of its employees, without being subject to the strict procedures set forth under the Labor Law.

Consequently, the 9th Chamber of the Court of Appeal's decision in the above-mentioned case may lead to an increasingly tolerant judicial perspective in favor of employers in termination cases, such that employers may rightfully and legally terminate their employees' employment contracts, even if the termination date is only one or two days before the date on which the dismissed employee would have reached six months of seniority on the job.

Litigation

Strict Conditions Regarding the Use of the 'Organic Link Theory' Reiterated by the Court of Appeals: Extending Liability to Affiliates

"Organic link theory" applies to legal entities and is relied upon by such entities to extend the liability of one legal entity to another when there is an "organic link" between the two that could render both entities as one in terms of exposure to legal liability. Organic link theory has no positive stipulation or declaration under existing Turkish legislation; however, the courts have adopted and applied this theory in their decisions. Resorting to organic link theory has turned into a favored go-to move for extending or spreading liability to more convenient targets in Turkish litigation practice

in recent years. For instance, this is a preferred move that is frequently observed in cases that concern foreign companies that have subsidiaries in Turkey, both of which are separate legal entities.

In such cases, the claimants direct their claims to the Turkish subsidiaries of foreign companies, despite the fact that the goods or services subject to their claims were provided to them directly by independent and completely separate foreign companies, or vice versa. This method is often utilized simply because of logistical/administrative expediency or opportunism; for instance, Turkish subsidiaries of foreign companies are usually easier to target, both in terms of the service of official papers and the enforcement of court decisions. In the reverse scenario, claims may be directed against foreign companies, even though it is actually the Turkish subsidiary that is the liable/responsible party for the goods or services that are subject to the claims. Once again, this "defendant shopping" technique might be used simply because suing the foreign entity could be more convenient and advantageous in terms of the enforceability of any final judgments (*i.e.*, collectability of any compensation) due to the superior financial health or resources of the foreign entity. In both instances, the claimants rely on the organic link theory and argue that there is an organic link between the foreign company and its Turkish subsidiary, as a result of which both entities must be deemed a single entity and be held legally liable. The Court of Appeals has handled disputes related to the applicability of the organic link theory in numerous cases.

The 15th Civil Chamber of the Court of Appeals[10] has acknowledged that there must be some sort of close relationship between two separate legal entities, such as an economic or commercial dependence of one on the other, or sharing a common fate, or acting together, for the organic link theory to be applicable. For instance, although it does not provide sufficient proof of an organic link on its own, the fact that two separate companies have the same shareholders could be an indication of an organic link. The General Civil Assembly of the Court of Appeals[11] has ruled that mere similarities between the companies or merely sharing a location or operating at the same address do not provide conclusive proof of an organic link. In another case, however, it was ruled[12] that the fact that two separate companies belonged to the same company group that was managed by a holding company may be considered as evidence of the existence of an organic link between these two companies.

That being said, the precedents clearly illustrate that the organic link theory is based on the prohibition of the abuse of rights and the principle of good faith, which translates to the abuse of the legal protections that separate corporate identities provide in such cases. For instance, in various cases, the Court of Appeals[13] had sought evidence of an intention on the defendant's part to harm the claimant, before agreeing to apply the organic link theory or acknowledging that the legal entity that is not a part of the commercial relationship that is subject to the dispute could

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[10] 15th Civil Chamber of the Court of Appeals, September 18, 1996, 1996/4034 E., 1996/4502 K.,

[11] General Civil Assembly of the Court of Appeals, April 16, 2003, 2003/9-279 E., 2003/292 K.

[12] 9th Civil Chamber of the Court of Appeals, November 25, 2002, 2002/7086 E., 2002/22210 K.; 19th Civil Chamber of the Court of Appeals, April 7, 2005, 2005/448 E., 2005/3753 K.

[13] 17th Civil Chamber of the Court of Appeals, March 30, 2009, 2009/6139 E., 2009/1827 K.; 17th Civil Chamber of the Court of Appeals, March 24, 2009, 2009/4597 E., 2009/1709 K.; 17th Civil Chamber of the Court of Appeals, November 12, 2009, 2009/5758 E., 2009/7495 K.; 17th Civil Chamber of the Court of Appeals, March 26, 2012, 2012/10906 E., 2012/3592 K.; 17th Civil Chamber of the Court of Appeals, February 3, 2011, 2010/5439E., 2011/685 K.

also be held legally liable for claims borne of that relationship. Such an intention can manifest itself in, for example, the total transfer of assets to another company, in order to turn the liable company into a hollow shell and make it virtually impossible for the creditor (*i.e.*, claimant) to collect any judgments from that company. Thus, the Court of Appeals requires very strict conditions for the application of the organic link theory and does not allow this concept to be put forward so easily, whenever a claimant wishes to drag yet a third party into a dispute, often merely because it may be more convenient or advantageous for the claimant.

In a recent case, the Court of Appeals reiterated that the organic link theory can only be applied under very strict conditions, which is significant due to the precise wording used in the verdict with respect to this issue. In this case, the plaintiff, a company established in Turkey, brought a lawsuit against the Turkish subsidiary of a multinational company ("***TS***") and the multinational company ("***MNC***") itself due to unfair competition claims, and requested monetary compensation from the defendants. Although the commercial relationship was established solely between the plaintiff and the TS, the plaintiff tried to drag the MNC into the litigation by claiming that there was an organic link between these two companies, and that the MNC must therefore be held liable for the anti-competitive acts of the TS. The MNC argued that the case should be dismissed due to lack of standing, as there was no direct or indirect legal relationship between the plaintiff and the MNC. The local court ruled[14] that the legal relationship existed only between the plaintiff and the TS; therefore, it was not possible to hold the MNC responsible by relying on the organic link theory.

[14] Istanbul Anadolu 3rd Commercial Court of First Instance, May 12, 2015, 2010/718 E., 2015/369 K.

The court's reasoning underlying this decision was that there was no evidence proving that the MNC had acted contrary to the principle of good faith by hiding its assets or resorting to similar evasive actions. The plaintiff appealed the decision, but the 11th Civil Chamber of the Court of Appeals upheld[15] the lower court's decision. Thus, by this decision, it has been conclusively established, by virtue of the clear and unambiguous language of the court in its reasoning for relieving the MSN of legal liability, that proof of an intention to harm the claimant's chances of collecting a judgment or executing its rights is a prerequisite for the application of the organic link theory.

Data Protection Law

Article 29 Working Party's Updated Opinion on Consent under the General Data Protection Regulation

The Working Party on the Protection of Individuals with regard to the Processing of Personal Data ("***Working Party***") updated their opinion on consent under the General Data Protection Regulation ("***GDPR***"), which developed the concept of consent by providing further clarification and specification regarding the requirements and obligations for obtaining and demonstrating valid consent.

The GDPR, which will be effective as of May 28, 2018, defines consent as "any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her."[16]

The Working Party, in their opinion, stated that consent will not be considered as "free"

[15] 11th Civil Chamber of the Court of Appeals, December 12, 2017, 2016/8831 E., 2017/7161 K.
[16] *See* Article 4(11) of the GDPR. *See at* http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679&qid=1490179745294&from=en

if the data subject is unable to refuse his or her consent, and also mentioned that the power imbalance between the data subject and the data controller is also taken into consideration by the GDPR.

According to Article 7(4) of the GDPR, when assessing whether or not consent is freely given, “utmost account shall be taken of whether, *inter alia*, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contract.” By regulating this provision, the GDPR aims to narrow the scope of the term “the performance of a contract.” According to the Working party, there needs to be a direct and objective link between the processing of the data and the purpose of the execution of the contract.

The Working Party mentions the term “granularity” while determining the existence of freely given consent. This means that, if personal data is processed for more than one purpose, the data subject should be free to choose which purpose he/she accepts, rather than having to consent to a bundle of processing purposes. Therefore, the data controller may have to obtain several consents for each purpose. In other words, when the data processing has multiple purposes, free consent should be sought and given for all of these purposes.

The GDPR also states that the data controller needs to demonstrate that the data subject is free to refuse or withdraw consent without detriment (*i.e.*, that withdrawing consent does not lead to any costs), and it should also prove that the data subject has a free choice with regard to giving consent.

According to the Working Party, the data controller must apply the following rules to comply with the element of “specific,” which is included in the definition of “consent” under the GDPR:

(i) The data controller needs to obtain a new and separate consent from the data subject for the new processing purpose.

(ii) The data controller should provide a separate opt-in for each purpose, in order to allow users to give specific consent for specific purposes.

(iii) The data controller should provide specific information regarding each separate consent request about the data in order to inform the data subjects and make them aware of the impact of the different choices that they have.

The Working Party also listed the minimum information required to be provided to data subjects for obtaining valid informed consent in terms of the GDPR. These are as follows:

(i) the identity of the data controller,
(ii) the purpose of each of the processing operations for which consent is sought,
(iii) the type of data that will be collected and used by the data controller,
(iv) the existence of the right to withdraw consent,
(v) information about the use of the data for decisions based solely on automated processing, including profiling,
(vi) if the consent relates to data transfers, information about the possible risks of data transfers to third countries in the absence of an adequacy decision and appropriate safeguards, where applicable.

It is important to note that the existence of the right to withdraw consent is a new criterion brought by the GDPR. This requirement was not included in the earlier EU Directive.

Even though the GDPR does not require this information to be conveyed to the data subjects in a specific form or shape, it brings higher standards with respect to the clarity and accessibility of the information. Accordingly, the Working Party stated that the information must be concise and easily accessible, and that the data controller should use clear and plain language which can be easily understood by an average person.

According to the Working Party, when consent is requested as part of a contract, the request for consent for data processing activities should be clearly distinguishable and separated from information about other matters. Furthermore, if consent is requested by electronic means, the consent request has to be separate and distinct from other material imparted by the same electronic communication. If the consent request for data processing is indistinguishable from information about other matters and incorporated into an agreement along with many other provisions, then the data subject cannot give consent freely and separately, since he or she is compelled to sign the agreement as a whole.

The EU Directive described consent as an "indication of wishes by which the data subject signifies his agreement to personal data relating to him being processed."[17] The GDPR expands this definition, by clarifying that valid consent requires an unambiguous indication by means of a statement or by a clear affirmative action, which means that the data subject must have taken a deliberate action to consent to the particular data processing. Furthermore, in the Working Party's opinion, unambiguous means that it must be "obvious" that individuals have consented to the processing.

The GDPR also sets forth various new requirements for data controllers regarding the explicit consent they obtain from data subjects. For instance, according to Article 7 of the GDPR, the data controller is obliged to be able to demonstrate that the data subject has consented to the processing of his or her data. The same provision also states that the data controller must ensure that consent can be withdrawn by the data subject as easily as it can be given and that it can be withdrawn at any time.

The Working Party's updated opinion for the GDPR might also be considered as a guide for Turkish businesses in terms of structuring their data processing processes. For instance, according to the GDPR, the data controller must demonstrate that valid consent was obtained from the data subject and the data controller must also provide information on how to withdraw consent. The Law No. 6698 also imposes similar obligations on data controllers.

Although the Law No. 6698 is a separate and independent local regulation that is not directly subject to the GDPR, it is likely that the Turkish Data Protection Board, which is the main national authority on data-protection-related matters, would take the opinion of the Working Party into account when evaluating the validity of consent, as the Law No. 6698 is mainly based on the EU legislation and the implementation in the EU is currently the primary source of guidance. According to the Turkish Data Protection Board, umbrella consents (to a bundle of data processing purposes or as part of an overall agreement involving other matters) will be deemed invalid, which is in parallel with the "specific consent" principle and the granularity requirement in the EU. We expect that the opinion of the Turkish Data Protection Board will also take into account the implementation in the EU and will be shaped and developed further in time, as new cases arise. Data controllers may also benefit from the Working Party's updated opinion for clarity on the requirements of explicit consent and assess whether their current workflow for seeking and obtaining informed consent needs to be updated.

[17] Article 2(h) of the EU Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. *See at* http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046&from=en.

Internet Law

The Constitutional Court's Decision on the Freedom of Press and Expression Regarding the Contents Posted on a News Website

The owner and chief director of the website "www.airporthaber.com" ("***Applicant***") applied to the Constitutional Court to invalidate and overturn the decision of the Ankara 14th Criminal Court of First Instance ("***Court***"), which had approved the Ankara 5th Criminal Judgeship of Peace's decision on access banning four URL addresses, including the articles regarding the Turkish Air Association that had been written by the Applicant. In his individual application petition, the Applicant stated that access banning these contents violated the principles of the freedom of press and expression.

To provide a brief background of the case, the Applicant had written several articles on the website in question, which criticized the Turkish Air Association, and the head of the Turkish Air Association ("***Complainant***") subsequently applied to the Ankara 5th Criminal Judgeship of Peace and obtained a court order to access ban the relevant articles. One of these articles stated that the Turkish Air Association was in debt, and another article declared that the Complainant had derived an improper personal benefit by exploiting his position as the head of the Turkish Air Association. According to the Constitutional Court's decision, one of these articles had even asserted that the complainant engaged in nepotism and provided employment opportunities to his relatives.

Following the order of the Ankara 5th Criminal Judgeship of Peace, the Applicant applied to the Ankara 14th Criminal Court of First Instance for the removal of this order, but his appeal was rejected. After losing his appeal at the Ankara 14th Criminal Court of First Instance, the Applicant then appealed the rejection decision to the Constitutional Court.

In its decision, the Constitutional Court first mentioned Article 9 of the Law on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts ("***Law No. 5651***"), titled "Removal of Content from Broadcast and Access Ban." The Constitutional Court also indicated the relevant provisions of the European Convention of Human Rights ("***Convention***") in its judgment. The Constitutional Court emphasized the importance of protecting the freedom of expression in a democratic society by providing the relevant decisions of the European Court of Human Rights ("***ECHR***"), and explained the complicated relationship between the freedom of expression and the right to request the protection of one's dignity and reputation (*i.e.*, by not being subjected to libelous statements).

The decision also discussed another decision of the ECHR (*Castells v. Spain*, Application No. 11798/85) and stated that, according to this decision, not allowing a journalist to prove the veracity of his/her claims should be considered as a violation of Article 10 of the Convention.

The Constitutional Court in its decision also stated that the following factors should be taken into consideration while evaluating whether or not the intervention against the applicant's freedom of expression and press constituted a violation of his rights: (i) legality, (ii) legitimate purpose, (iii) compatibility with the norms and requirements of a democratic society, and (iv) proportionality.

The Constitutional Court further stated that, although the Ankara 5th Criminal Judgeship of Peace had indicated that the accusations directed at the Complainant had not been proven (and therefore should not have been broadcast), it would not be fair or reasonable to expect journalists to prove every statement that they make, as also indicated in the precedent decisions. The decision further

asserted that the Turkish Air Association is a well-known institution in Turkey, and should therefore tolerate being written about in the news and endure the harsh criticisms directed against it.

According to the Constitutional Court's decision, access banning contents from the internet must be seen and used only as a last resort, and it should be avoided if access banning the content would cause more damage than the legal benefits brought about by the access ban; otherwise, the freedom of expression and press would be violated. Additionally, the Constitutional Court asserted that the access ban procedure under Turkish law makes it difficult to maintain a balance between conflicting rights (*e.g.*, between the right to freedom of expression of the defendant and the right of the complainant to protect his/her dignity and reputation), as the judges grant access ban decisions solely on the basis of the information and documents presented by the complainants, without independently collecting any further evidence or receiving or evaluating a defense from the other party.

The Constitutional Court finally determined that access banning content indefinitely without an adequate legal basis or rationale would not be proportionate, and emphasized that, in a democratic society, measures taken cannot be so disproportionate as to prevent freedoms from being exercised, regardless of the purpose of such measures. Consequently, the Constitutional Court decided that the contents in this case fell under and were covered by the freedom of press and expression, and that access banning the contents in question would be in violation of the freedom of expression and press, which is protected under Articles 26 and 28 of the Turkish Constitution.

Telecommunications Law

Draft Principles and Procedures on the Resolution of Consumer and User Complaints by Operators and Service Providers

The Information and Communication Technologies Authority ("***Authority***") published the Draft Principles and Procedures on the Resolution of Consumer and User Complaints by Operators and Service Providers ("***Draft***") on its official website on November 13, 2017, in order to obtain opinions and comment from the public and other stakeholders. The Draft aims to determine the responsibilities of the service providers and operators regarding complaints received from consumers and users. The Draft applies to the resolution of complaints between (i) operators, who provide electronic communication services, and their subscribers, and (ii) service providers, who provide post services, and their users.

According to the Draft, operators and service providers will be obliged to provide a complaint system through a website, where complaints can be sent by the consumers/users and received and responded to by the operators/services providers. The purpose of this obligation is to ensure that the consumers and users are able to reach fast, seamless, easy and effective solutions for their complaints and to enable operators and service providers to take preventive measures. Moreover, the Draft indicates that the liability of operators/service providers is not limited to their own services. Their responsibility also covers services provided by third parties, who are not operators.

The Draft sets down a time frame for complaints to be resolved. Consumer/user complaints sent through the complaint systems should be resolved within 15 (fifteen) days as of the date of the complaint by the operators or service providers, without prejudice to the provisions of other regulations. This legal

period applies to all complaints, including the initial complaint and ensuing complaints about a particular issue. If complaints cannot be resolved within 15 days for reasons that are not related to (or in the control of) the operator/service provider, the consumer/user should be notified to this effect without delay. This notification should include, at a minimum, the reasons for the delay, the expected date of resolution, and other alternative measures that could be taken to provide the user/consumer with the requested benefit or desired outcome. The complaints and the responses to these complaints and other documents related to the complaint resolution process should be recorded and kept for a minimum of 2 (two) years by the operators/service providers.

Operators and service providers are required to consider certain factors and conditions when establishing their complaint systems. In particular, the Draft regulates that the complaint system needs to comply with the conditions set forth in Annex 1 of the Draft. According to Annex 1: (i) a consumer/user complaints section should be placed on the homepage of the operator/service provider's website, (ii) the system must be easy-to-use and free of charge, (iii) the protection of personal data must be ensured, (iv) consumers and users must be able to receive feedback through the complaint system, and (v) consumers and users must be able to easily follow up on their complaints.

The Draft goes even further and indicates that complaints must first be sorted according to certain headings, which will be determined by the Authority. The headings are not limited to those already specified in the Draft, but these minimum requirements can be subject to change from time to time and can be modified by the Authority. The purpose of sorting out the complaints according to such headings pursuant to the Draft is to prevent repetitive/duplicate complaints, so that the reporting stage can be easily completed by the Authority.

The manner in which the complaint system will be carried out in practice is also regulated by the Draft. Operators who have more than 200,000 (two hundred thousand) users and service providers that are authorized to provide service on a national level, are obliged to convey all complaints and responses to the Authority through a secure network, as of reiteration of a complaint. Complaints that are made through the complaint systems may be repeated 3 (three) times after the initial complaint has been recorded. The maximum period of time for the same consumer/user to repeat his or her complaint, under the same heading and for the same service, is limited to 3 (three) months. Without prejudice to other regulations, if a consumer/user complaint sent through the complaint system is not responded to by the operators/service providers even after the allotted period of 15 days has passed, then the complaint can be repeated/resubmitted by the consumer or user. Necessary and appropriate measures should be taken by the operator/service provider to ensure that the same consumer/user does not file a new complaint under the same heading for the same service number.

Other operators/service providers who are not covered by the foregoing criteria (*i.e.*, operators with fewer than 200,000 users or local service providers) are obliged to report the complaints they receive in accordance with Annex 2 of the Draft and transmit these reports to the Authority when requested.

Furthermore, operators/service providers are required to determine the areas in which they receive elevated numbers of complaints and are obliged to take preventive measures in these particular critical areas and to implement the necessary changes and improvements. Operators and service providers are also responsible for taking the necessary and appropriate measures for consumers and users who have not submitted complaints, and are also required to inform the Board when necessary.

The Draft does not explicitly state the consequences of failing to comply with the principles and procedures laid down in the document, but instead refers to the Information and Communication Technologies Authority Administrative Sanctions Regulation and the Regulation on Administrative Sanctions in the Postal Sector, and states that the provisions therein will be applicable in terms of the implementation of the Draft. If the Draft is issued in its current form, it will enter into force on the date of its publication in the Official Gazette.

Real Estate Law

New Communiqué on National Calculation Method of Energy Efficiency in Buildings

The new Communiqué on National Calculation Method of Energy Efficiency in Buildings ("***Communiqué***") was published in the Official Gazette of November 1, 2017, and entered into force on the same day. The Communiqué is based on the Regulation on Energy Performance of Buildings ("***Regulation***"), which regulates the limitation of greenhouse gas emissions in relation to carbon-dioxide emissions and the primary energy of buildings. The EU Directive No. 2002/91/EC entitled "Directive on the Energy Performance of Buildings" was taken as the basis for drafting the Regulation.

Generally speaking, energy efficiency legislation in Turkey aims at increasing the efficient use of energy, preventing wastage of energy, mitigating the negative effects of energy costs on the economy, and enhancing energy efficiency in order to protect the environment. As per Article 7 of the Law No. 5627 on Energy Efficiency ("***Law***"), the work to be done and the steps that need to be taken in order to increase energy efficiency include the following:

- Norms, standards, minimum performance criteria, information collection and control procedures regarding architectural design, heating, cooling, heat isolation, hot water, electricity installation and illumination to be used in residential buildings whose total construction area is determined by regulations, as well as in commercial buildings and in service buildings, are to be determined and governed by a regulation. In case of non-compliance with the applicable regulation, the administration may not allow the use of the building.

- An energy identity certificate must be prepared and designated for the building projects in accordance with the rules set forth in the regulation. The energy identity certificate must include and specify, at a minimum, the following: (i) the energy needs/consumption of the building, (ii) its isolation systems and features, (iii) the efficiency of its heating and cooling systems, and (iv) the energy consumption classification of the building. The additional issues and information that must be included and stipulated in the energy identity certificate are to be determined by regulations. It is not required to prepare an energy identity certificate for buildings whose total construction area is less than 1,000 square meters and which are not part of the neighboring areas.

As stipulated above in the Law, the Regulation sets out the details with regard to the requirements of the energy identity certificate. Accordingly, an energy identity certificate: (i) will be valid for 10 years from the date of its preparation, (ii) must be prepared in the format set out in the corresponding communiqué, (iii) must be provided by an authorized institution, (iv) must be provided to the relevant administrative authorities during the procurement of the building-use permit. Furthermore, no building-use permit will be provided to buildings that do not have an energy identity certificate, and, in case there is a project that will necessitate changing the

annual primary energy needs of the building, the energy identity certificate must be renewed within 1 year.

Article 25 of the Regulation sets out that the real person who actually prepares the energy identity certificate and the owner and the manager of the legal person who issues the energy identity certificate shall be jointly liable if the certificate is found not to be in compliance with the applicable regulations. The article further regulates that the calculations in the energy identity certificate should be made in accordance with the rules set out in the corresponding Communiqué.

According to Annex 1 of the Communiqué, which sets out and describes the calculation method, the method in question has been developed to evaluate and take into account all parameters that affect the building's energy consumption, and to thereby determine its energy performance classification. This method can be utilized to compare the energy performances of various building design alternatives, to determine the energy performance of existing buildings, or to uncover potential energy efficiency measures that could be implemented in existing buildings.

The following criteria are used when evaluating the energy performance of a building:

- The calculation of the amount of net energy that the building needs for heating and cooling,

- The determination of the total heating/cooling energy consumption of the building by taking into consideration the energy losses and gains from the installed systems, which will provide the net energy,

- The computation of energy consumption for ventilation,

- The calculation of energy needs and consumption for illumination in areas where daylight is not effective or sufficient, and for periods when the daylight cannot be used, taking into consideration the effects of daylight on the building, and

- The calculation of the energy consumption needed for the use of hot water for sanitary purposes.

The main inputs for the net energy calculation of heating and cooling activities are as follows:

- Climate data,

- Building geometry,

- Building's ventilation and thermal properties,

- Building's properties with respect to internal gains and solar energy gains,

- Building materials and building components,

- Internal comfort measures based on the building's function (*i.e.*, heating and moisture regulation statistics, amount of ventilation, etc.),

- Zoning methods based on the building's classification and zoning information.

Anti-Dumping Law

Update on Anti-Dumping Cases in Turkey in the Last Quarter of 2017

In Turkey, the authority to initiate dumping or subsidy examinations, upon complaint or, where necessary, *ex officio*, is granted to the Ministry of Economy ("***Ministry***"). Within the scope of this authority, the Ministry announces its decisions with the communiqués published in the Official Gazette.

During the last quarter of 2017, the Ministry has initiated a significant number of new investigations and announced its decisions upon concluding many of its ongoing investigations.

Below is a bullet-point summary of the status of the anti-dumping cases initiated or revised during the last quarter of 2017:

- *Communiqué No. 2017/21 dated October 20, 2017, concerning knuckles/fixed hangers, hat hangers, bends/drawer rails originating from Spain, Italy, Thailand, and Greece*: Within the scope of the investigation regarding the neutralization of the effect of current dumping measures with respect to the imports of “knuckles/fixed hangers, hat hangers, bends/drawer rails” by way of deviation of origin through Spain, Italy, Thailand and Greece, the Ministry has decided to apply the same measures that had been previously applied against the People’s Republic of China, Spain, Italy, Thailand, and Greece.

- *Communiqué No. 2017/22 dated October 20, 2017, concerning quilted hosiery originating from the People’s Republic of China:* The Ministry announced its decision upon the completion of the anti-dumping investigation regarding “quilted hosiery” originating from the People’s Republic of China. In this respect, the Ministry has decided to impose an anti-dumping duty at the rate of 17.29% on imports of quilted hosiery with CN Code 5811.00 originating from the People's Republic of China.

- *Communiqué No. 2017/23 dated October 20, 2017, concerning dioctyl-phthalate originating from South Korea:* The Ministry announced its decision upon the completion of the anti-dumping investigation regarding “dioctyl-phthalates” with CN Code 2917.32.00.00.00 originating from South Korea. In this case, the Ministry has decided to apply an anti-dumping duty on imports of dioctyl-phthalate originating from South Korea, at rates ranging from 7.99% to 12.57%.

- *Communiqué No. 2017/24 dated October 20, 2017, concerning dioctyl terephthalates originating from South Korea:* The Ministry announced its decision upon the completion of the anti-dumping investigation regarding “dioctyl terephthalates” with CN Code 2917.39.95.90.13 originating from South Korea. In this respect, the Ministry has decided to impose an anti-dumping duty on imports of dioctyl terephthalates originating from South Korea, at rates ranging from 7.99% to 12.57%.

- *Communiqué No. 2017/25 dated October 17, 2017, concerning thin and thick pipes made out of refined copper originating from Greece:* The Ministry announced its decision upon the completion of the anti-dumping investigation on “thin and thick pipes made out of refined copper” originating from Greece, with CN Codes 7411.10.10.00.00 and 7411.10.90.00.00. In this case, the Ministry has decided to apply an anti-dumping duty on imports of thin and thick pipes made out of refined copper originating from Greece, at rates ranging from 5% to 9%.

- *Communiqué No. 2017/26 dated November 2, 2017, concerning yarn and ropes made out of vulcanized rubber (latex yarn) with CN Code 4007.00, originating from the Kingdom of Thailand:* The Ministry initiated a final review investigation against the current dumping measures with regard to imports of “yarn and ropes made out of vulcanized rubber (latex yarn)” originating from the Kingdom of Thailand.

- *Communiqué No. 2017/27 dated November 23, 2017, concerning textured yarn made out of polyesters originating from the Republic of India and Chinese Taipei:* The Ministry initiated a final review investigation against the current dumping measures regarding imports of “textured yarn out of polyesters, with CN Code 5402.33” originating from the Republic of India and Chinese Taipei.

- *Communiqué No. 2017/28 dated December 8, 2017, concerning granite originating from Iran:* The Ministry initiated an investigation against the termination of current dumping

measures with respect to imports of "granite" originating from Iran.

- *Communiqué No. 2017/29 dated December 15, 2017, concerning granite originating from Vietnam:* The Ministry initiated a new exporter review investigation on imports of "granite" with CN Codes 6802.23 and 6802.93, originating from Vietnam.

- *Communiqué No. 2017/30 dated November 28, 2017, concerning polycarboxylate originating from South Korea:* The Ministry announced that it has initiated an anti-dumping investigation on the imports of polycarboxylate originating from South Korea.

- *Communiqué No. 2017/31 dated November 30, 2017, concerning lighters (used as a gas oven and cooker component) with CN Code 9613.80.00.00.11, originating from the People's Republic of China:* The Ministry announced that it has initiated an anti-dumping investigation regarding the imports of lighters (that are used in ovens and cookers as a firing system) originating from the People's Republic of China.

- *Communiqué No. 2017/32 dated November 29, 2017, concerning hot rolled flat steel not in a roll form (thick plate) originating from the People's Republic of China:* The Ministry announced its decision upon the completion of the anti-dumping investigation on "hot rolled flat steel not in a roll form (thick plate)" originating from the People's Republic of China. In this respect, the Ministry has decided to impose an anti-dumping duty on imports of hot rolled flat steel not in a roll form (thick plate) originating from the People's Republic of China, at rates ranging from 16.89% to 22.55%.

- *Communiqué No. 2017/33 dated December 2, 2017, concerning tires of heavy vehicles, agricultural vehicles and engineering vehicles (new tires made out of rubber) originating from the People's Republic of China:* The Ministry announced its decision upon the completion of the final review investigation on "tires of heavy vehicles, agricultural vehicles and engineering vehicles (new tires made out of rubber)" originating from the People's Republic of China. In this respect, the Ministry has decided to maintain the current measures as is, at 60%.

- *Communiqué No. 2017/34 dated November 28, 2017, concerning thin and thick pipes made out of refined copper originating from the United Arab Emirates and the Republic of India:* The Ministry announced that, upon withdrawal of the complaint during the investigation period, the dumping investigation has been terminated without the implementation of any measures.

- *Communiqué No. 2017/35 dated December 23, 2017, concerning uncolored flat glass originating from the Russian Federation:* The Ministry announced its decision upon the completion of the anti-dumping investigation regarding "uncolored flat glass" originating from the Russian Federation. In this respect, the Ministry has decided to apply an anti-dumping duty on imports of uncolored flat glass originating from the Russian Federation, at rates ranging from 8% to 10%.

- *Communiqué No. 2017/36 dated December 29, 2017, concerning wires - copper wires (copper-wire rod) originating from the Russian Federation and Ukraine:* The Ministry announced its decision upon the completion of the final review investigation on "wires - copper wires (copper-wire rod)" originating from the Russian Federation and Ukraine. In this case, the Ministry has decided to terminate the current dumping measures against the Russian Federation and Ukraine.

- *Communiqué No. 2017/37 dated December 29, 2017, concerning yarns made out of synthetic and artificial irregular fiber originating from Nepal and Bangladesh:* The Ministry initiated an investigation with respect to neutralizing the effect of current dumping

measures on imports of "yarns made out of synthetic and artificial irregular fiber" originating from Nepal and Bangladesh.

White Collar Irregularities

Fundamentals of an M&A/Joint Venture Due Diligence Checklist - Understanding the Anti-Corruption Risks

Gaining substantial momentum in the last couple of years, anti-corruption compliance has become a significant part of the day-to-day business of many multi-national and local companies. Those who do not set up effective procedures to prevent, detect and deter wrongdoings—*i.e.*, those who do not establish compliance programs—risk towering fines, reputational damage, and loss of trust from commercial partners, stakeholders, the public, and even possible debarment and exclusion from projects that are funded by international financial institutions. Hence, the establishment of compliance programs is vitally important for companies of all sizes and varying business interests. However, one specific element of anti-corruption compliance programs is especially important for those companies who wish to expand their operations to different jurisdictions by acquiring (or merging with) other companies, namely anti-corruption due diligence.

There are several advantages to conducting anti-corruption due diligence before acquiring or merging with a company. The acquiring company will pay a significantly lower amount for the transaction, if it becomes aware through due diligence that the target company is involved in corrupt activities. As a result of its assessment and ensuing awareness of the corrupt practices of the target company, the acquiring company may even choose to walk away from the deal, or disclose the past corrupt acts of the target to the relevant authorities and hopefully obtain a non-declination decision. Once the acquiring company has become aware of the corruption risks associated with the target company, it will be able to set up a compliance program specifically tailored to deal with those particular risks. Thus, this process of pre-transaction due diligence and post-transaction integration will mitigate the transaction-related anti-corruption risks of the acquiring company.

According to "A Resource Guide to the FPCA," a sample merger and acquisition due diligence would include: (i) reviewing the target company's customer agreements, sales and third-party agreements (*e.g.*, the distributor and consultant agreements), (ii) performing a risk-based analysis of the target company's customers, (iii) performing audits on selected transactions, and (iv) speaking with essential personnel of the target company, such as the general counsel, sales managers and other key managers of the company, regarding the company's potential corruption soft spots. When reviewing the agreements, the acquiring company should check to see if these agreements include anti-corruption clauses. Here, the third-party agreements and the congruence between the payment terms stipulated in writing and the actual payments made will be of particular significance. The absence of such congruence/harmony will be a significant red flag suggesting past corrupt actions and crucially useful for determining whether to continue to work with the supplier in question. The interviews with the key company personnel should be focused on understanding the business processes of the target company and getting a sufficient grasp on the potential incompliance infractions that the employees may have committed.

There is one exception to the potential anti-corruption liability inherited through a merger or acquisition: There would not be any FCPA successor liability if the target company was not subject to the jurisdiction of the FCPA before the transaction. Needless to say, this does not completely rule out anti-corruption liabilities that a company may face following the transaction for those that are not subject to the FCPA regulations. However, it does mean that, in case the acquiring company is not a U.S. company, does not have any

subsidiaries in the U.S., is not considered as an issuer under the FCPA, the act is not perpetrated in the U.S. and the perpetrating employees are not U.S. subjects, then liability may not be triggered at all. With that said, each case should be thoroughly reviewed in accordance with the applicable laws and in light of its own specific circumstances in order to determine whether the target company was subject to FCPA jurisdiction.

Case Examples: In January 2017, Mondelez International, Inc. ("***Mondelez***"), a U.S.-based food beverage and snack manufacturer, along with its subsidiary, Cadbury Limited ("***Cadbury***"), agreed to pay a $13 million civil penalty to settle charges with regard to its violation of the FCPA. Mondelez had acquired Cadbury and its subsidiaries, including Cadbury India Limited ("***Cadbury India***"), in February 2010. Subsequently, Cadbury India hired an agent in order to obtain licenses and approvals for a factory in India. However, it failed to conduct appropriate due diligence or to sufficiently monitor the agent. After receiving payments from Cadbury India Limited, the agent withdrew most of the money (a total of $90,666) from the account in cash. According to the Securities and Exchange Commission, Cadbury India failed to keep accurate books and records with regards to the agent's purported services, and Cadbury also failed to implement adequate controls regarding its subsidiary, Cadbury India. This case highlights the importance of post-transaction integration of the target company with the acquiring company's existing compliance program.

In June 2017, the Department of Justice ("***DOJ***") closed its investigation with regard to Linde North America, Inc., and Linde Gas North America, LLC (collectively known as "***Linde***"). According to the DOJ, Spectra Gases, Inc. ("***Spectra***"), a company that Linde had acquired in 2006, bribed foreign public officials in the Republic of Georgia between 2006 and 2009, in relation to Spectra's transactions with the National High Technology Center ("***NHTC***"), a state-owned and state-controlled entity in Georgia. The DOJ records indicate that three high-level executives of Spectra entered into an arrangement with NHTC officials and a third-party intermediary, whereby the parties would share the profits of income-producing products sold by NHTC to Spectra. Throughout the course of this scheme, Spectra entered into an agreement with a company established by NHTC officials, which allegedly provided consultancy services to Spectra, and in return, received a certain amount of profit from the transaction in question.

After Linde learned of the corrupt arrangement, it withheld the $10 million payment due to the Spectra executives, and refused to make any further payments that were due to the companies controlled by the NHTC officials. Consequently, the DOJ declined to prosecute Linde due to its newly acquired subsidiary's corrupt activities. The decision was based on Linde's withholding of payments (which was viewed as a remediation step), Linde's timely and voluntary disclosure, full cooperation, and its termination of the employees and business partners who had taken part in the corrupt arrangement, as well as the fact that it had agreed to disgorge any profits it had received due to the corrupt arrangement, among others.

The above cases stress and illustrate the significance of not only anti-corruption due diligence before the acquiring company engages in a corporate transaction, but also of post-transaction integration. If proper due diligence is not exercised, this could result in negative consequences for the acquiring company, such as fines, reputational damage, loss of trust of commercial partners, stakeholders and the public, or debarment and exclusion from projects that are funded by international financial institutions. Not engaging in due diligence could also be a problem in the integration phase, as the

acquiring company may not be able to tailor its compliance program to the specific risks posed by the target company. Exercising pre-transaction due diligence, on the other hand, not only enables the company to enter into a successful integration phase, but also gives the acquiring company the chance to disclose the wrongdoing to the relevant authorities and hopefully obtain a declination decision.

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For further information, please visit www.elig.com.

Çitlenbik Sokak No: 12 Yıldız Mah. Beşiktaş 34349, Istanbul / TURKEY
Tel: +90 212 327 17 24 • Fax: +90 212 327 17 25
www.elig.com