ISSN 2147 – 558X

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September / Eylül, Istanbul

Yayın Türü / Type of Publication
Yerel Süreli / Local Periodical

ELİG Gürkaynak Avukatlık Bürosu adına Yayın Sahibi, Sorumlu Müdür / Owner and Liable Manager on behalf of ELIG Gürkaynak Attorneys-at-Law

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Çitlenbik Sokak No: 12,
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Beşiktaş 34349,
ISTANBUL, TURKEY

Basımcı / Publisher
Detay Mat. San. Tic. Ltd. Şti.

ISSN 2147 – 558X

Preface to the September 2019 Issue

The September 2019 issue of Legal Insights Quarterly aims to enlighten the reader with seventeen different articles under thirteen variant legal disciplines, thus providing the reader with the most contemporary legal questions of this quarter.

This issue includes a special section on the Judicial Reform Strategy of Turkey prepared by the Ministry of Justice on May 20, 2019, which incorporates the nine primary objectives discussed during the preparation of the Strategy Document.

This quarter, the Data Protection section discusses the digitalization of healthcare data, a controversial topic throughout the world. The Regulation on Personal Health Data in question is expected to be a crucial instrument and the article addresses the most significant elements of the Regulation such as access of attorneys and access by parents to a minor's information.

A summary of a recent case of the High Court of Appeals' Assembly of Civil Chambers is featured in the Employment Law section which addresses the legislative framework of the dismissal of an absentee employee.

The Corporate Law section provides an oversight with respect to financial aid in the context of joint stock companies.

Finally, the Competition Law section acquaints readers with four significant cases from the past quarter addressing issues such as resale price maintenance and hindering of an on-site inspection.

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

September 2019

Corporate Law

Prohibition of Financial Aid under Turkish Commercial Code

I. Introduction

Unlike the former Turkish Commercial Code, the Turkish Commercial Code numbered 6102 (**"TCC"**) implemented a provision that allows joint stock companies (**"JSC"**) to acquire their own shares within certain limits and conditions set forth therein. This provision was adopted from the Second Council Directive of European Economic Community numbered 77/91 and dated 13/12/1946 (**"Directive"**).

As per the limits and conditions defined under the TCC, JSCs can neither grant third parties the right to acquire its shares on behalf of such party and on the account of the JSC nor grant security. Even though the Article derives from the Directive, the main purpose of implementing such restriction arises from Article 379 of the TCC. According to paragraph 1 of Article 379, a JSC is allowed to acquire and pledge its own shares in return of consideration for an amount that does not exceed or will not exceed as a result of a transaction, one tenth (1/10) of its principal or issued capital. Naturally, JSCs would be inclined to evade the 10% (ten percent) limit, for example by granting advance payments to third parties to perform transactions on behalf of the company. In this case, hiding the fact that a third party is acting on the account of the JSC would be deemed as a fraud against the law because provisions in relation to granting financial aid assume that the shares are acquired on behalf and on account of the third party and the JSC is not involved with the transaction. Thus, with the financial aid prohibition provisions, the TCC intends to prevent JSCs from "getting help" from third parties to acquire their own shares and exceed the acquisition limits granted under Article 379.[1] In the following sections of this article, financial aid prohibition and the consequences of violating this rule will be explained in detail.

II. Financial Aid Prohibition and Exceptions

The general rule under the first paragraph of Article 380 is that when a JSC conducts a legal transaction with other persons and grants an advance payment, loan or security for the purposes of acquiring its shares, such transaction shall become null and void. We should point out that the Article only restricts financing transactions and not the share transfer itself. Furthermore, the prohibited transactions are not listed as *numerus clausus* (limited in number); meaning any other financing transaction with third parties for the purposes of acquiring shares of a JSC which does not fall into the exceptions stated under Article 380 (*e.g.* guaranteeing that the JSC will distribute dividends if the third party acquires the shares or that the JSC will undertake the costs of the acquisition) could also be prohibited. Granting sureties, guarantees, mortgages to third persons for the abovementioned purposes could be given as sample transactions that would become null and void under financial aid prohibition rules.

Furthermore, causing an actual loss or damage to a JSC's assets is not a requirement for a transaction to violate Article 380. Even financing transactions creating advantageous circumstances for the companies could be contrary to the rules if the company provides financial aid to other parties.

Article 380 has granted two exceptions under which the JSCs can procure financial aid without being subject to the prohibition:

[1] Poroy, Tekinalp, Çamoğlu, Ortaklıklar Hukuku I 593, (13th ed. 2014).

(i) If the transaction is within the scope of activity of credit and finance organizations; or

(ii) If the legal transaction is related to granting an advance, a loan or security to the JSC's employees or its group companies for the purposes of acquiring shares of such company.

The definitions of credit and finance institutions are included in the Banking Law numbered 5411. Under Article 3 of the Banking Law, credit institutions are divided into two groups; (i) the deposit banks (operating primarily for the purpose of accepting deposit and granting loan in their own names and for their own accounts) and (ii) participation banks (operating primarily for the purposes of collecting fund through special current accounts and participation accounts and granting loans). Finance institutions are defined as the institutions other than credit institutions, which have been established to perform insurance, individual private pension fund or capital market activities, development and investment banks, and financial holding companies. Thus, in the event a third party obtains credit or surety from a credit or finance institution defined under the Banking Law to acquire the shares of a JSC or if the credit or finance institution grants cash or non-cash credit to others for acquiring its own shares (provided that it does not deliver the guarantee of the credit itself), such transaction will be valid.[2]

Unlike the first exception stated in Article 380, which is applicable only to the transactions within the scope of activity of credit and finance organizations, a second exception is applicable to any transaction regardless of its subject. On the other hand, the TCC does not have a clear definition and scope for the term "*employee*" referred under Article 380. According to Article 3 of Occupational Health and Safety Law numbered 6331, "*employee*" refers to real persons employed in private or public workplaces regardless of their status under special laws. For this reason, some scholars argue that any worker, officer, contract personnel and government official should be included in the definition and the term should be interpreted broadly. However, the same scholars also point out that board members or managing directors of the company should not be within the scope of the definition since there is a high chance that people with management powers could use the assets of the company to gain control.[3]

Nevertheless, under both circumstances, such transactions should not (i) reduce the legal reserves of the JSC which are obliged to allocate as per the law and the articles of association; or (ii) violate the rules stipulated in Article 519 of the TCC, which regulates spending of the reserves; and (iii) should not make it impossible for the JSCs to allocate legal reserves regulated in Article 520 of the TCC. Hence, a transaction will become null and void if it violates any of these three rules, even though such transaction is stated as an exception under the first paragraph of Article 380.

Additionally, as per the second paragraph of Article 380, a transaction between a JSC and a third party shall also become invalid if such transaction grants the right to acquire, on behalf of the JSC, JSC's shares, JSC's affiliates' shares or shares of the companies where the JSC holds the majority shares or creates an obligation for the third party to acquire; and if such transaction would have been declared null and void in the event the JSC acquired such shares contrary to the rules contained in Article 379.

[2] Id. at 594.

[3] Arıcı, Veziroğlu, Kaldıraçlı Devralma ve Anonim Şirketin Finansal Yardım Yasağı 50, (1st ed. 2014).

III. Consequences of the Breach

In case the JSC violates the financial aid restrictions and grants an advance payment, a loan or a security to another party, the financial transaction entered into by the parties will become null and void. According to Article 27 of the Turkish Code of Obligations numbered 6098, a contract is deemed as null and void if it is against the mandatory rules, rules of morality, public order, personal rights or contracts where the subject matter is impossible to perform. In such case, any person who has an interest in the transaction (*i.e.* shareholders, the creditors, JSC itself) can claim the invalidity of the transaction.

Furthermore, Article 385 states that in case the JSC acquires shares contrary to Article 379 or 380, it needs to sell the acquired shares within six (6) months following the acquisition. A special procedure has not been provided under the TCC for the disposal of such shares. However, the preamble of the TCC states that the board of directors of the company is authorized to perform the necessary actions to sell the shares. Thus, it is likely to say that the JSCs which acquire the shares contrary to the financial aid restrictions would be obliged to transfer the acquired shares to others within six (6) months. Otherwise, the JSC has to redeem such shares with capital decrease.[4]

IV. Conclusion

Article 380, along with Article 379, has implemented a broad restriction for joint stock companies in terms of the acquisition of its own shares and only allowed financial aid if it is within the scope of activity of credit and finance organizations and if the employees of the company are acquiring shares. As a result, this restriction has created a struggle for the JSCs to obtain financing without using the company's own assets, resources or to grant security to others. Furthermore, the fact that there are no precedents by the Court of Appeal in this matter to show guidance to JSCs and lack of consensus between scholars have created additional burden for JSCs because it is not possible to fully to get informed about the risks and consequences they might face. However, by taking into account that the TCC has been enacted in 2012, there is no doubt that there will be new precedents and improvements in the doctrine within the next few years to guide JSCs.

Banking and Finance Law

Intercompany Loans under the Capital Movements Circular

I. General Overview

The Central Bank of the Republic of Turkey has adopted the Capital Movements Circular (**"Circular"**), which came into effect on May 2, 2018.

As also explained in other sections of this issue and in previous issues, starting from the last quarter of 2018, Turkish lawmakers concentrated on putting in force new regulations for protecting the value of the Turkish Lira by way of regulating transactions where foreign currency may and may not be used. This Circular also serves the same purpose which is to protect value of the Turkish Lira through monitoring export and import of capital and marketable securities in and out of Turkey and also setting out rules for utilization of foreign currency loans.

Among other matters, the Circular stipulates the rules and principles regarding utilization of foreign exchange cash and non-cash loans as well as utilization of intercompany loans. As a general rule it is allowed by the Circular to utilize intercompany loans, however, there are also certain rules and technical details that should be considered while utilizing such

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[4] Hasan Pulaşlı, Şirketler Hukuku Şerhi 1790, (3rd ed. 2018)

loans. To begin with, an intercompany loan shall not bear the characteristics of renewable/revolving loans. Term and interest rate of an intercompany loan should also be definite.

In this article we will explain utilization of loans between group companies as per the Circular.

II. Definition of Group and a Group Company

The Circular does not provide a definition of a "*group*" or a "*group company*". Therefore, the definition should be determined according to the TCC and its secondary legislation. As per the TCC, in order to state that there is a "group of companies" there needs to be a "*dominance relationship*" between at least 2 (two) companies.

A "*dominance relationship*" can be established in case a company (dominant company) controls another company (dependent company) through:

- directly or indirectly holding the majority of voting rights in the dependent company, or

- holding the right to appoint the members to the management body of a dependent company under the articles of association in a number that constitutes the majority to make decisions, or

- having the majority of the voting rights of the dependent company alone or together with other shareholders or partners based on an agreement, or

- keeping the dependent company under its control in accordance with an agreement or through other means.

In the event that a company controls the other company, these 2 (two) companies are deemed to be "*group companies*" within the meaning of the TCC.

III. Obtaining Intercompany Loans

The Circular obliges legal entities residing in Turkey to have foreign currency revenue in order to obtain a foreign currency loan. However, the Circular also introduces a number of exceptions to this general requirement to have foreign currency revenue to receive foreign currency loans.

One of these exceptions is that companies residing in Turkey which are fully owned by foreign companies may obtain foreign currency loans from their foreign group companies residing abroad, although they do not have foreign currency revenue.

Even if the Circular grants a certain level of freedom with the aforesaid exception, Turkish companies that fall within the scope of this exception should, in any case, comply with various requirements to receive foreign currency loans from their foreign group companies. In this respect, the Circular stipulates certain documentation requirements for Turkish companies to utilize foreign currency loans from their foreign group companies. Accordingly, the Turkish resident company must provide the intermediary bank with (i) loan agreement, (ii) repayment plan, and (iii) trade registry gazettes and letters issued by the relevant authorities and confirming its shareholding structure, in case it obtains foreign exchange intercompany loan from:

(a) The creditor company residing abroad which fully owns the borrower; or

(b) The creditor company residing abroad is a direct or indirect fully-owned subsidiary of a company residing abroad and indirectly owns 100% of the borrower.

In the latter case, the Turkish resident company (borrower) must also submit documents showing the shareholding structure of the creditor company to the intermediary bank.

IV. Providing Intercompany Loans

According to the Circular, Turkish residents may provide foreign currency or Turkish Lira denominated loans to partnerships in which they are shareholders, parent companies and group companies residing abroad.

Similar to obtaining foreign exchange intercompany loans, the Circular stipulates certain requirements for Turkish resident companies to provide foreign currency or Turkish Lira loans to the abovementioned companies residing abroad.

In this respect, such loans must be transferred abroad via banks. In other way of saying, Turkish resident companies cannot provide intercompany loans without making a bank transfer. The Circular also stipulates certain documentation requirements for Turkish resident companies providing intercompany loan.

Accordingly, Turkish resident companies are required to submit the following documents to the intermediary bank: (i) loan agreement and (ii) trade registry records showing the dominance relationship between the Turkish resident company and the company residing abroad.

Finally, it is also important to state that such loans may be transferred directly to the beneficiary's account abroad or in Turkey, in Turkish Lira or foreign exchange currency.

V. Conclusion

On the one hand, the Circular aims to introduce certain rules for utilization of foreign currency loans and to establish a flow of information for credit activities of the companies in order to observe the import and export of Turkish Lira and credit activities of the companies in foreign currency. On the other hand, the Circular exempts group companies from certain rules and specifically addresses intercompany loans, which are commonly, used financing instruments both in Turkey and globally thereby ensuring that group companies do not suffer because of the general rules stipulated in the Circular.

The documentation requirements for group companies to obtain and provide foreign currency loans that are introduced by the Circular may also be motivating for group companies to comply with tax laws since there are a number of tax matters that the group companies must take into consideration and evaluate in detail when utilizing intercompany loans.

Capital Markets Law

How to Process the Forward Looking Statements as per the Communiqué on Material Events?

The Communiqué on Material Events (II-15.1) (**"Communiqué"**) introduced by the Capital Markets Board of Turkey and entered in to force on January 23, 2014 (**"CMB"**) sets out certain procedures and principles for companies which fall under the scope of the said Communiqué as issuer of the capital markets instruments (*i.e.* "issuers").

The Communiqué mainly regulates disclosure of material information, events and developments which may affect the value of their capital market instruments or investment decisions of the investors, and the Communiqué aims to provide a reliable, transparent, efficient, fair and competitive capital market to investors. For the same purpose the Communiqué regulates specific rules with regards to the forward looking statements of the issuers.

This article is focused on how the forward looking statements should be processed by issuers as per the Communiqué.

I. What is a "Forward Looking Statement"?
Article 4/1(d) of the Communiqué describes "forward looking statements" as statements, including future plans and projections that are in the nature of insider information or assessments that provide an idea to investors with regard to the future activities, financial position and performance of the issuer.

In addition to the Communiqué, the Material Events Guideline (**"Guideline"**) published by the CMB shows the way for the issuers and provides detailed information on specific procedures and principles with regard to the forward looking statements.

In a nutshell, as per the Guideline, a forward looking statement may have the characteristics of evaluations, projections, predictions, assumptions, plans, expectations, intentions, targets and/or strategies. The foregoing is not provided in numerus clausus (*limited in number*) basis.

In terms of the Guideline, the forward looking statements should also comply with the three principles listed below:

- Forward looking statements should be prepared by taking into account the economic, financial and legal position of the issuer.

- If a forward looking statement includes numerical data, its calculation method should be explained.

- Explanations regarding general and ordinary advertisement and marketing activities are not considered as forward looking statements. Therefore, an issuer should not make any forward looking statement related to its ordinary advertisement and marketing activities.

II. How to Process Forward Looking Statements?
The Communiqué obliges issuers to set forth a method to handle and disclose a forward looking statement under its information policy that is also publicly announced.

The Communiqué stipulates that the issuers are not required to disclose forward looking statements and that it is optional. Nevertheless, if an issuer intentionally decides to disclose a forward looking statement to the public, it will be subject to five principles as listed below:

- A forward looking statement may be disclosed to the public provided that there is a board of directors' resolution or written approval of any other individual authorized by the board of directors on this matter.

- An issuer may disclose forward looking statements four (4) times within a year at most. Such statements can be made in the form of material event disclosure, through the activity reports of the company or by a presentation to investors.

- In the event that any material change occurs with regard to a forward looking statement previously disclosed, the relevant forward looking statement should be updated accordingly and the updated version should be duly disclosed to the public in each case.

- If there are major differences between the forward looking statements, formerly disclosed matters and the realized events, the reasons behind such differences should also be disclosed to the public.

- If an issuer prefers to disclose any forward looking statement through a press release, other communication tools or in any public meeting, it is also liable to make a disclosure on the matter via the Public Disclosure Platform (**"KAP"**).

III. Conclusion

It could be said that the CMB has granted flexibility to the issuers in terms of disclosure of the forward looking evaluations, predictions, assumptions, plans, and targets etc., collectively the forward looking statements. In this regard, an issuer may opt to keep such information confidential rather than making it publicly available. However, if the issuer wishes to disclose forward looking statements, then it must comply with the relevant rules of the Communiqué and the Guideline.

As per the records of KAP, there were only 67 forward looking statements made by public companies during the year of 2018. Given that there are approximately 515 public companies whose shares are traded in Borsa Istanbul, it could be also concluded that public companies usually and intentionally do not make forward looking statements since such statements are optional and the Communiqué imposes further rules and requirements if the statement is made even once.

Competition Law / Antitrust Law

An Analysis of a Recent Board Decision Assessing the Circumstances of Access to Personal E-mail Account Contents

The Turkish Competition Authority (**"Authority"**) published the Turkish Competition Board's (**"Board"**) reasoned decision[5] imposing an administrative fine on Ege Gübre Sanayii A.Ş. (**"Ege Gübre"**) as per Article 16(d) of the Law No. 4054 on the Protection of Competition (**"Law No. 4054"**) based on the finding that Ege Gübre hindered on-site inspection by refraining the case handlers' evaluation of a personal e-mail correspondence which is found to be directly related to a competitive behaviour within the scope of the preliminary investigation initiated to assess the price increases in the fertilizer sector.[6]

Before providing its interim decision, the Board examined the allegations of the case handlers and the statements of Ege Gübre provided within the on-site inspection report. Within the said report, the case handlers initially stated that the Ege Gübre's general manager used a personal e-mail account with a superonline.com extension that is directed to its business e-mail account. Moreover, the case handlers underlined that after being informed that the general manager's business e-mail account also included its personal correspondences, the business account was made available within the scope of the preliminary investigation. That being said, further to a search by using the name of another undertaking under investigation namely, "Toros", the case handlers have identified an e-mail message indicating that an undertaking (İgsaş) stated that it will revise its prices. The English convenience version of the exact quote from the decision is as follows "*İgsaş said it was changing prices*". Upon discovering this e-mail message, the case handlers printed out the relevant correspondence. The company officials indicated that the relevant message was among the personal correspondences, abstained from handing over the relevant message and thus, prevented the access of the case handlers to the relevant document. Thereafter, although the company officials allowed the case handlers to continue their review after separating the personal and the business e-mail accounts, the case handlers informed the company officials that the said conduct would be deemed as hindering of on-site inspection.

On the other hand, the Board reiterated the statements of Ege Gübre, indicating that the

[5] The Board's decision dated February 7, 2019, and numbered 19-06/51-18.

[6] The Board's preliminary investigation decision dated October 11, 2018, and numbered 18-38/619-M.

case handlers requested access to a personal e-mail correspondence which was mistakenly located within the general manager's business account and thus, without any legal basis or court decision, the relevant request would constitute an infringement of constitutional rights mainly of the violation of privacy and freedom of communication.

In this regard, the Competition Authority conducted a second on-site inspection at the premises of Ege Gübre the next day by obtaining an injunction decision from the Criminal Judgeship of Peace[7], which allowed the case handlers to examine the books, written documents, obtain necessary copies of oral and written statements, and to examine any assets belonging to the company. Within the second on-site inspection, the case handlers have detected an e-mail message with respect to Igsaş's prospective prices communicating that "*The current prices are listed on the 19.11 Page. Last week Igsaş has told Gemlikçiler that it will make a price increase of 2200 TRY/ton for urea fertilizer on Tuesday (which is tomorrow). Accordingly, Gemlik made a price increase last week. They told us that if Igsaş fails to do so, the prices for urea fertilizer may be loosen*".

Accordingly, Ege Gübre submitted a statement to the Authority on January 29, 2019, stating that the case handlers continued their inspection without any difficulty or intervention and that the company officials provided the case handlers with easy access, opened up all of its offices and provided the documents requested. That being said, Ege Gübre underlined even though the scope of the injunction decision was limited with the documentations and belongings of the company, the case handlers collected the copies of personal e-mail correspondences and identified documents for their review at the presence of law enforcement.

In light of the statements provided above, the Board indicated the e-mail message with respect to Igsaş's prospective prices, is found to be directly related to a competitive behaviour. In consequence, the Board, without providing any explanation on its assessment, unanimously found that Ege Gübre's relevant conduct would be deemed as hindering on-site inspection and thus, decided to impose an administrative monetary fine in the amount of 0.5% of its gross income for the 2017 financial year under Article 16 (d) of the Law No. 4054.

Although, the decision does not include any explanations on the Board's assessment of the relevant conduct or does not answer to the questions on whether the said correspondence (i) would be considered as a personal communication, (ii) would be used as an appropriately collected evidence by the Authority or (iii) would be deemed within the scope of the injunction decision, the decision is important as it sheds some light to exceptional circumstances of obtaining a personal communication which is directly associated to a competitive behaviour that is found to be related with the preliminary investigation at hand. It is yet to be seen how the Board's future assessments on hindering on-site inspection would be affected by this decision.

The Board Fines BFIT for Imposing No-Poaching Obligations upon Gyms Post-Termination of Franchise Agreements

The Board has published its decision[8] on the preliminary investigation against Bfit Sağlık ve Spor Yatırım ve Tic. A.Ş. ("**BFIT**") following a complaint by a franchisee based on the allegations that BFIT's franchising

[7] Decision of the Aliağa Criminal Judgeship of Peace dated 17.01.2019 and numbered 2019/76 D.

[8] The Board's decision dated February 7, 2019, and numbered 19-06/64-27.

agreements included non-compete and no-poaching clauses and violated the Law No. 4054 and the Block Exemption Communiqué on Vertical Agreements (“**Communiqué No. 2002/2**”).

BFIT granted franchisees the right to use its trademark in its franchising agreements in order to open gyms. In these agreements, BFIT imposed a non-compete obligation on its franchisees and their employees during the agreement term, *i.e.*, five (5) years. These agreements also included a non-compete obligation for the period following the termination of the agreement for two (2) years in BFIT’s Type 1 agreements and one (1) year in Type 2 agreements.

In addition to non-compete agreements, the franchising agreements included no-poaching clauses stating that “*the franchisee cannot employ anyone who has worked or is currently working in BFIT or as a franchisee of BFIT or another competitor without written consent of BFIT*”. BFIT included these provisions to its franchising agreements in order to be notified in case personnel committed an infamous crime or there is a lawsuit between personnel and franchisee. However, BFIT added that personnel can be transferred between BFIT’s centres and they can be employed by competitors if they provide equal or better conditions in spite of no-poaching clauses.

In its reasoned decision, the Board referred to the US Department of Justice’s approach to no-poaching agreements. From US competition law perspective, no-poaching agreements deprive the employees of the opportunity to negotiate for better job opportunities and restrict competition in labour markets, which have similar effects with wage-fixing agreements. Wage-fixing agreements between competitors result in the repression of wage increases over the time by restricting employees' ability to find jobs with higher wages and no-poaching agreements indirectly have the same result.

In line with the US approach, the Board found that no-poaching clauses may have indirect effect in labour market, since they result in wage fixing, therefore they should be evaluated under Article 4 of the Law No. 4054.[9] However, the Board stated that if know-how and innovation are essential in the relevant sectors and the duration of the clauses is reasonable, these agreements may benefit from exemption. Accordingly, the Board concluded that the franchising agreements would be assessed within the scope of block exemption under Communiqué No. 2002/2, since BFIT’s market share was below the 40% threshold.

Under Communiqué No. 2002/2, a non-compete obligation may be imposed on the purchaser with regard to the period following the termination of the agreement provided that it does not exceed one year as of the termination of the agreement, with the conditions that (i) the prohibition relates to goods and services in competition with the goods or services which are the subject of the agreement, (ii) it is limited to the facility or land where the purchaser operates during the agreement, and (iii) it is necessary for protecting the know-how transferred by the provider to the purchaser.

The Board stated that non-compete obligations regarding agreement term for five (5) years complied with Communiqué No. 2002/2. However, the non-compete obligations with regard to the period following the termination of agreements do not meet the conditions in Communiqué No. 2002/2, since they are not

[9] The Board’s Actors decision dated July 28, 2005 and numbered 05-49/710-195 and the Board’s Private schools decision dated March 3, 2011 and numbered 11-12/226-76.

limited to the facility or land where the purchaser operates during the agreement and Type 1 agreements do not meet the conditions in terms of duration. Therefore, the Board concluded that they cannot benefit from block exemption. In the same vein, the Board stated that no-poaching clauses cannot benefit from the block exemption either.

The Board further conducted an individual exemption analysis for the non-compete and no-poaching clauses. In this analysis, the Board found that franchising agreements restricted competition more than necessary, and thus did not grant individual exemption, since (i) non-compete obligation with regard to the period following the termination of the agreement did not meet the condition in terms of duration and geographic area, and (ii) the scope of the consent of BFIT was unclear.

In addition, the Board evaluated resale price maintenance ("**RPM**") allegations. It is claimed that BFIT determines the gym services' prices, the franchisees are obliged to obtain written consent from the franchiser for the fees. The Board concluded that BFIT's RPM practices have limited effects in the market, since BFIT started RPM practices very recently and gym services market is competitive with many players.

The Board ultimately decided not to launch an in-depth investigation and instead ordered BFIT to terminate the infringement under Article 9/3 of the Law No. 4054. The Board stated that BFIT has to revise its non-compete and no-poaching clauses in franchising agreements to comply with the Law No. 4054 and Communiqué No. 2002/2 in terms of the duration, geographic area and the scope of written consent. Against this background, The Board stated that BFIT has to remove the non-compete obligation for franchisees' employees for both during the agreement term and with regard to the period following the termination of agreement, and revise the non-compete obligation with regard to the period following termination of an agreement for franchisees in order to be limited to the facility or land, where the franchisee operates during the agreement, and limited to goods or services, which compete with the goods or services subject to the agreement. In addition, the Board indicated that BFIT has to determine the scope of its written consent in the no-poaching clauses and the duration of no-poaching clauses should be limited to the agreement term, and the non-compete obligation with regard to the period following the termination of agreement should be limited to one (1) year in Type 1 agreements. Lastly, the Board stated that the clauses enabling RPM should be amended.

The Board Fines Turkcell for RPM after the Council of State Annulled its Previous Decision on not Finding an Article 4 Infringement

The Board has recently published its reasoned decision regarding its additional investigation on whether Turkcell İletişim Hizmetleri A.Ş. ("**Turkcell**") violated the Law No. 4054 through RPM.[10] This additional investigation was opened to implement the decision of the 13th Chamber of the Council of State[11] (the "**Court**") which annulled partially the Board's decision on June 6, 2011 ("**Turkcell I**").[12]

In *Turkcell I*, the Board investigated allegations against Turkcell concerning RPM regarding prepaid cards under Article 4 of the Law No. 4054 and de facto exclusivity obligation upon sub-dealers under Article 6.

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[10] The Board's decision dated January 10, 2019 and numbered 19-03/23-10.

[11] The 13th Chamber of Council of State's decision dated October 16, 2017 and numbered 2011/4560 E., 2017/2573 K.

[12] The Board's Turkcell I decision dated June 6, 2011 and numbered 11-34/742-230.

The Board ultimately dismissed the RPM allegation and decided against an Article 4 infringement. The Board however found Turkcell dominant in the markets for "*GSM services" and "the wholesale and retail sale of sim cards, credit vouchers cards and digital credit vouchers, activation and other user services*". The Board also decided that Turkcell abused its dominance and imposed an administrative monetary fine on the grounds that Turkcell indeed imposed *de facto* exclusivity on its sub-dealers by interfering with their signboard choices, decoration and other sale practices and preventing competitors to be included in the sub-dealer channel.

One of Turkcell's sub-dealers, Doğan Dağıtım Satış Pazarlama ve Matbaacılık Ödeme Aracılık ve Tahsilat Sistemleri A.Ş, brought a legal action against the decision before the Court. The Court annulled the Board's *Turkcell I* decision regarding the finding that Turkcell had not violated Article 4 of the Law No. 4054 through RPM. The Court held that there was ample evidence proving that Turkcell had set the retail price of credit vouchers sold by distributors, dealers and sub-dealers.

In order to comply with the Court's decision, the Board initiated an additional investigation against Turkcell. The Board did not analyse whether the evidence indeed indicated an Article 4 infringement but simply referred to the Court's assessment on this evidence, such as tables prepared by Turkcell to set the profit margins for all levels of the supply chain. Accordingly, the Board unanimously decided that Turkcell had infringed Article 4 of the Law No. 4054 through RPM practices.

With regard to the fine calculation, the Board first considered recidivism as an aggravating factor since the Board had fined Turkcell for RPM also in 2005.[13] The Board also held that while the law did not provide an explicit time limit for recidivism, the general statute of limitation for competition law infringements under the Law No. 5326 on Misdemeanor, *i.e.*, eight (8) years, should also apply to increase the fine for repeating offences. As *Turkcell I* was based on documents from the period between 2006 and 2008, *i.e.*, dated after the previous RPM decision, the Board held that recidivism was applicable and increased Turkcell's base fine. The Board further increased the fine due to the duration of the infringement, which was between 1-5 years. In terms of the turnover to be taken into consideration for calculating the base fine, the Board compared Turkcell's turnover for 2010 –the amount that would have been considered if the Board had decided on a fine in *Turkcell I*– against its turnover for 2017. The Board decided to proceed with the fine calculation based on Turkcell's turnover for 2010, which was in Turkcell's favor.

While the Board unanimously found an Article 4 violation in this second decision, two Board members had a dissenting opinion on the fine. These Board members argued that both types of violations (*i.e.*, RPM and exclusivity practices) committed by Turkcell serve the same purpose, namely keeping the dealers under control. Accordingly, even if these two conducts were analysed under two different provisions of the Law No. 4054, namely, Articles 4 and 6, the acts pursuing the same goal cannot be deemed separate infringements. The dissenting opinion therefore found that since the Board had already fined Turkcell in the Board's *Turkcell I* decision for abuse of dominance, this second fine for RPM would not comply with the law.

A Safeguard to Guard Rails: The Competition Board Held That Members of the Guard Rails and Road Safety Systems Association Have Not Violated Article 4 of the Law No. 4054

The Authority published the Board's reasoned

[13] The Board's decision dated December 29, 2005 and numbered 05-88/1221-353.

decision[14] on the investigation initiated upon a complaint against the members of the Association of Steel Guard Rails and Road Safety Systems ("**Association**"), namely Alka San. İnş. ve Tic. A.Ş, Antakya Galvaniz Metal San. Tic. Ltd. Şti., - Çepaş Galvaniz Demir Çelik Madencilik İnşaat Nakliye Tic. ve San. A.Ş., Kıraç Galvaniz Telekominikasyon Metal Makine İnşaat Elektrik San. ve Tic. A.Ş., Kisan İnşaat Mühendislik San. ve Tic. A.Ş., Şa-Ra Enerji İnşaat Tic. ve San. A.Ş., Yimtaş Mühendislik İnşaat Taah. Turz. Metal San. ve Tic. A.Ş. (collectively the "**Members**") based on the allegations that the Members violated Article 4 of the Law No. 4054 through bid-rigging and price fixing in tenders.

The Board defined the relevant product market as "*production and sale of steel guard rails*", while defining the relevant geographic market as "*Turkey*". As regards its substantial assessment, the Board initially evaluated the allegations on collusion in tenders, noting that the most common strategies in such collusions would be cover bidding, bid suppression, bid rotation and market allocation; as well as exchange of competitively sensitive information. According to the evidence submitted to the case file, the Board observed that the Members held frequent meetings to organize trainings and provide sector players with insights on the new standards for guard rails. The Board further established that the Members often discussed creating a mutual product which was a project led by the General Directorate of Highways ("**Directorate**") in the first place. In this regard, the Board did not find any evidences on exchange of strategic information. Additionally, economic analysis conducted within the scope of the case did not indicate collusive tendering by the Members. Therefore, the Board concluded that the Members did not violate Article 4 of the Law No. 4054 via bid rigging.

[14] The Board's decision dated November 22, 2018 and numbered 18-44/702-344.

In the second part of its assessment, the Board focused on the activities of the Association, and found no evidence indicating that the Association had an object or effect to restrict the competition in the sector by way of facilitating collusion or enabling competitively sensitive information exchange among its Members. To that end, the Board also held that there was no concrete evidence demonstrating that the meetings of the Association had infringed competition law.

Accordingly, the Board particularly scrutinized whether the Association's role as a joint product development platform for its Members results in any competition law violations. To that end, the Board observed that the Members signed the Commitment Agreement to enable an efficient joint product development process and reduce their costs. In its analysis, the Board stated that taking into account that the Commitment Agreement was merely confined to joint research and development activities, in the absence of any solid evidences such activity in and of itself could not be deemed as having object of restricting competition. On whether there was an object to exclude any actual or potential competitors, the Board emphasized that such Commitment Agreement was yet to be implemented and it was explicitly set forth within the Commitment Agreement that any other players could partake to the Commitment Agreement provided that they comply with the contractual requirements.

Furthermore, the Board stated that the Commitment Agreement did not include any vertical restraints, exclusivity or contractual obligations that would limit the independent decision-making process of the Members significantly. Moreover, the Board indicated that the contemplated activities within the scope of the Commitment Agreement cannot be realized on an individual basis (*i.e.* such joint activities on this front have an objective necessity) and they would not limit the competition more than what is compulsory

for achieving these goals. Accordingly, the Board indicated that the Commitment Agreement did not have the actual effect or potential effect of restricting the competition either.

That being said, the Board resolved that the horizontal cooperation agreements executed among the Members fell within the scope of Article 4 of the Law No. 4054 due to the coordination risks, given that (i) the parties had significant market power, (ii) the market solely constituted of tenders and there is high-level of cooperation due to joint participations to the tenders in the form of joint ventures/business partnerships, and (iii) the cooperation was among competitors. To that end, the Board resolved that these agreements could not benefit from the protective cloak of the block exemption provided within the scope of the Block Exemption Communique No. 2016/5 on Research and Development Agreements due to the scope of these agreements as well as the parties' market shares.

Accordingly, the Board analysed whether the agreements could qualify for an individual exemption in light of the following conditions: (a) the agreements should contribute to improving the production or distribution of goods or to promoting technical or economic progress, (b) the agreements should allow consumers a fair share of the resulting benefit, (c) the agreements should not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question, and (d) the agreements should not restrict the competition beyond what is strictly necessary to get the aforementioned positive effects (the proportionality and balancing principles).

In its assessment of these conditions, the Board considered that condition (a) of the individual exemption was met given that cooperation on R&D would facilitate emergence of new products and it would give access to know-how which was not previously available to the parties. Condition (b) was also satisfied, given that the cost reduction would be passed on to consumers and that the R&D project would positively affect traffic safety and development of lighter guard rails of a higher quality. As for condition (c), the Board noted that characteristics of the market should be taken into account and accordingly evaluated the importance of the CE marking requirement for public tenders. As of 2011, a requirement on crash tests which were carried out by foreign undertakings was introduced in relation to CE marking that was a prerequisite for guard rail tenders. The Board noted that even if the agreements could pose a constraint in tenders, this would not fall within the scope of the Law No. 4054, as the Directorate introduced the requirement in crash tests for its tenders. Accordingly, the Board held that the agreements would not enable the parties to eliminate competition in respect of a substantial part of the products. In relation to condition (d), the Board stressed that the possibility of restriction of competition was unlikely in cases where a new product or service was launched which, realistically, could not be produced only with the endeavors of a sole party to the agreement. In line with this, the Board held that condition (d) was also satisfied, given that the agreements enabled the Members to have these crash tests done, as there was no Turkish company technically capable to carry out these tests. In light of the foregoing, the Board granted these agreements an individual exemption.

Taking all of the above into consideration, the Board decided not to impose a fine in a majority decision. However, three members of the Board cast dissenting votes and argued that the Association and its Members had violated Article 4 of the Law No. 4054. Their arguments mainly included that the Association became a coordination platform by deviating from its purpose to produce

mutual products given that the Members using mutual products and crash tests were in a dominant position in a very transparent oligopoly and their frequent meetings paved the way for exchange of sensitive information.

Employment Law

Precedent Confirming Legitimacy of Absentee Employee's Immediate Dismissal without Defense

Before terminating an employment agreement made for an indefinite term, a notice to the other party must be served by the terminating party and in accordance to Article 17 of the Turkish Labor Law No. 4857 (“**Labor Law**”). To that end, the notice periods are as follows:

(i) Two (2) weeks for employees with a seniority less than six (6) months,
(ii) Four (4) weeks for employees with a seniority between six (6) months and one and a half years ,
(iii) Six (6) weeks for employees with a seniority between one and a half years and three (3) years,
(iv) Eight (8) weeks for employees with a seniority more than three (3) years.

These are minimum periods and may be increased by agreements between the parties.

In addition to these notice periods, according to Article 18 of the Labor Law, in case the employment agreement is made for an indefinite term, thirty or more employees are employed in the establishment work place and if the employee meets a minimum seniority of six months, the employer should depend on a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the establishment or service.

According to Article 19 of the Labor Law, the notice of termination shall be given by the employer in written form explicitly stating the reason for termination.

However, as per Article 25 of the Labor Law the employer is entitled to terminate the employment agreement immediately and without giving a notice, whether for a definite or indefinite term employment agreement, before its expiry or without having to comply with the prescribed notice periods in certain circumstances stated in the Labor Law. Those circumstances are listed in subsections of Article 25 as; reasons of health (25/I), immoral, dishonorable or malicious conduct or other similar behavior (25/II), force majeure (25/III), and due to the employee being taken into custody or due to his/her arrest, or if his/her absence from work exceeds the notice period indicated in Article 17 (25/IV).

Article 25/II of the Labor Law also states that in cases of illness or accident which is not attributable to the employee’s fault, the employer is entitled to terminate the agreement if recovery from illness or injury continues for more than six (6) weeks beyond the notice periods set forth in Article 17.

As per Article 19 of the Labor Law, an indefinite term employment agreement shall not be terminated for reasons related to the employee’s conduct without taking the employee’s written defense. The employer’s right to terminate the employment agreement in accordance with Article 25/II of the Labor Law (for serious misconduct or malicious or immoral behavior of the employee) is, however, reserved. Therefore, in case the employment agreement is terminated by the employer, the employee shall be entitled to submit his written defense except the agreement is terminated pursuant to Article 25/II.

According to Article 25 of the Labor Law where immediate termination of the

employment agreement is set forth, an employee is entitled to initiate a lawsuit according to Articles 18, 20 and 21 by claiming that the termination was not in accordance with the subsections cited above. Article 19 of the Labor Law is not included in the scope of Article 25. Therefore, according to the explicit wording of the article, employees do not have the right to file a lawsuit on the grounds that he/she has not been provided with the opportunity to defend himself/herself in case termination of his agreement on the ground of any and all reasons listed on subsections.

However, as cited above, Article 19 only allows employers to terminate the employment agreement without providing opportunity to defend himself in case termination of the agreement is based upon 25/II of the Labor Law (for serious misconduct or malicious or immoral behavior of the employee). Therefore, there is a clear contradiction between Article 19 and 25 of the Labor Law. As a consequence of this conflict between these two articles, some judicial authorities are of the opinion that providing a right to the employee to a defense is compulsory, with only the exception of termination with the reason on Article 25/II, some are of the opinion Article 25 abolish the obligation to grant the right to defend for all the causes listed on Article 25, has given variety of inconsistent and contradictory decisions. Therefore, with the purpose of securing uniformity, High Court of Appeals' Assembly of Civil Chambers has decided on its decision[15] that employers could terminate the employment agreement immediately without providing an employee the opportunity to defend himself/herself on the grounds of Article 25/II of Labor Law. The High Court of Appeal based grounded its decision on the basis that granting the employee to a right to defense prior to termination of an employment agreement is acknowledgement of the termination by the employee so there may be an opportunity to change the employer's opinion, and convince him/her not to terminate the agreement. In other words, granting such right as it is beyond a formality to be followed, ensures the employee is given an opportunity to abolish the misconduct claimed and rectify the concern which caused the employer to terminate the agreement. However, in such circumstances regulated under Article 25/II, for example, the termination is a result of absenteeism which is not attributable to the employee's fault, therefore, not related to an employee's direct conduct, granting such right to defend himself/herself would not convince an employer to change his/her mind as it will only be in place as a formality to be followed.

[15] High Court of Appeals' Assembly of Civil Chambers' decision dated 19.10.2018 numbered 2017/9 E. and 2018/10 K.

Litigation

In Online Marketplace Sales, Courts Rule with an Eye towards the Parties of Sales Transactions

As the online marketplace business develops and becomes a bigger sector, the conflicts emanating from online marketplaces and arising in connection with online sale transactions are also increasing. The law is clear about the legal rule that hosting providers are not obliged to conduct a legality review on the content uploaded onto their platforms, but there are numerous circumstances wherein this assessment of liability might not be made with such a clear-cut distinction. Below we delved into a few of the most recent court decisions in the assessment of liability of a provider of an online marketplace in online sale transactions made by the online marketplace. These decisions show that the first and the most essential benchmark in such assessment is determination of the party (*i.e.* seller) of the online transaction in question.

The first decision is a case addressed to a well-known online marketplace about a product put on sale by a third party in that marketplace. The facts of the case are that the seller (third party) cancelled the customer's purchase one (1) day after the sale due to the product being out of stock. Later, the customer was informed that the reason of the cancellation was that the sale price presented in the online market place was erroneously lower than its actual price. The consumer therefore applied to a consumer arbitration committee for delivery of the product and the application was accepted. Following this, the online marketplace objected to the decision before the Consumer Court with the defense that the product was not sold by the online marketplace itself and that the seller is a third party and the online marketplace cannot be held liable. The Court upheld the objection as the sale was not made by the marketplace but by a third party.

In another case in the same vein, websites mostly popular for cars sales were sued alongside many other defendants, including a few various online marketplaces, based on the claim that the defendants engage in the sale of unlicensed cars, constituting unfair competition as per the Turkish Commercial Code. The common defense of online marketplaces was based on the fact that the cars listed on the marketplace are not owned and thus sold by the marketplace, as the websites are mere hosting providers. The First Instance Court ruled that since the online marketplaces are not directly selling the cars and only provide an online platform for people to sell cars, and this makes them host providers, they cannot be held liable for unfair competition. The decision was appealed but the High Court of Appeals rejected the appeal.[16]

[16] 11th Chamber of Courts of Appeals, Decision numbered 2016/9802 E. 2018/2939 K.

In a case involving another well-known online marketplace, the First Instance Court ruled that the marketplace cannot be held liable for alleged trademark infringement for products put on sale. The trademark owner requested an access ban on the website due to infringement of the products and compensation of damages, but the court held that the website cannot be responsible given it acts as a medium bringing sellers and buyers together and does not own and sell the infringing products.

Given the precedents outlined above, it is evident that the courts' approach to the issue of liability of online marketplaces for sales transactions or for sold goods is becoming more consistent and the focus is on the actual parties to the transaction. A closer look on the sales transaction suffices to see the line between the marketplace and the seller, which is crucial in determination of liability.

Judicial Reform Strategy Introduced in Turkey

The Ministry of Justice ("**Ministry**") prepared the judicial reform strategy document ("**Strategy Document**") on May 30, 2019. The Strategy Document introduces comprehensive changes and improvements to the Turkish judicial system. The President of Turkey announced and presented the new reforms brought by the Strategy Document to the attendees of a conference on judicial reform strategy held on May 30, 2019.

The Strategy Document is not legally binding and may only be considered a road map for the government which merely serves to set the general framework and objectives of new legal reforms, which are expected to come into effect in the coming years. The timeline of implementation of these reforms is not yet determined and it is likely to become clearer when the action plan is published.

The Strategy Document primarily touches upon the following issues: strengthening the rule of law and the independence of the judiciary and improving impartiality, protecting and promoting rights and freedoms more effectively, increasing the transparency of the legal system, simplifying judicial processes, facilitating access to justice, strengthening the right of defense and efficiently protecting the right to trial in a reasonable time.

The Strategy Document focuses on nine (9) aims which have been broken down to 63 objectives and 256 activities.

The Action Plan will cover the budget allocated for the identified objectives and targets, the competent or relevant institutions to be involved, and the calendar to be adhered to within the framework of the relevant objectives. In order to monitor the implementation of the Strategy Document, the Ministry will issue annual Monitoring Reports. These reports will be prepared in both English and Turkish and they will be made available to public.

The Ministry will also be establishing an organizational structure, the Judicial Reform Strategy Monitoring and Evaluation Board (“**Board**”), with the participation of relevant institutions and organizations to resolve any problems that may arise with implementation of the Strategy Document and to monitor the implementation process transparently. The Board is to be established within a maximum of three months as of the publication of the Strategy Document. The Board is expected to organize periodic meetings and prepare monitoring and evaluation reports, which will be available for public access.

The objectives of the Strategy Document are listed as follows:

(i) Protection and Improvement of Rights and Freedoms,
(ii) Improving Independence, Impartiality and Transparency of the Judiciary,
(iii) Increasing the Quality and Quantity of Human Resources,
(iv) Enhancement of Performance and Productivity,
(v) Ensuring Efficient Use of the Right to Self-Defense,
(vi) Ensuring Access to Justice and Enhancing Satisfaction from Service,
(vii) Enhancing the Efficiency of the Criminal Justice System,
(viii) Simplification and Enhancement of the Efficiency of Civil and Administrative Trials,
(ix) Expansion of Alternative Dispute Resolution Methods.

Real Estate Law

Amendment to the Regulations on Rent Increase Rates

Remarkable changes have been introduced to Turkish lease regulations with The Law No. 7161 on Amendment to Tax Law and Certain Other Laws and Decree Laws (“**Omnibus Law**”) published on the Official Gazette of January 18, 2019. The Omnibus Law altered the cap on rent increase rates regarding housing and workplaces. The Regulation amended the maximum increase rate regulated in Article 344 of the Turkish Code of Obligations No. 6098 (“**TCO**”) by restricting the rent increase rate to “change in averages of the consumer price index in twelve months” (“**CPI**”). With this amendment, “increases to the producer price index” (“**PPI**”), which was the previous upper limit, has been removed so that lessees could have better protection, given the CPI tends to be more stable than the PPI.

Article 56 of the Omnibus Law further amended Article 344 of the TCO and provided that the rate of increase in rent will be determined pursuant to the average of the previous year's CPI. However, should the

parties agree on a lower increase rate in the relevant lease agreement, the rent increase rate will be applied based on the determined rate. In the event that parties do not reach to an understanding on the increase rate, the rent will be decided by a judge, taking into account the circumstances and market price relating to the leased property and in accordance with the limit of twelve months average of CPI. Notwithstanding the parties' consensus on increase rate with respect to rent, rent for the lease agreements which are longer than five years or which will be renewed at the conclusion of the fifth year, will be determined by a judge every fifth year, taking into account the circumstances and market price relating to the leased property and in accordance with the limit of twelve months average of CPI.

Furthermore, Article 59 of the Omnibus Law amended Article 344 of the TCO for the implementation of the amendment in terms of the workplace rents wherein the lessees are merchants. Earlier, the implementation of the Article 344 of the TCO was postponed until July 1, 2020 regarding agreements where the lessees (tenants) are merchants. Pursuant to Article 59 of the Omnibus Law No. 7161, the obligation to determine the CPI for a twelve month average is now applicable for all kinds of lease agreements (*including the one the lessees are merchants*). The provision entered into force retroactively, is effective from January 1, 2019.

The Omnibus Law also amended paragraph 3 of Article 344 of the TCO. The article previously indicated that the lease agreements' rent determined in foreign currency for housing and workplaces may not be increased until five years had passed. Amendment on the third paragraph of Article 344 refers to the Law No. 1567 on the Protection of the Value of Turkish Currency and its secondary legislations. Article 59 of The Omnibus Law has been drafted in accordance with Communiqué No. 32 on the Protection of the Value of the Turkish Currency and 32 of the Decree on the Presidential Organization, which was published in the Official Gazette on September 12, 2018 ("**Decree**"). The Decree regulates restrictive principles regarding the determination of the value of Turkish currency against foreign currencies. In the last paragraph of Article 344, it is stated that "*if amount subject to the lease agreement is determined as foreign currency in the agreement, without prejudice to the provisions of the Law on Protection of Value of Turkish Lira Law No 1567, the rent cannot be changed unless five years period has passed*". Value of an agreement and any other payment obligation arising from the specific agreements such as lease agreements cannot be determined in foreign currencies or indexed to foreign currencies according to the Decree. Therefore, the amendment reaffirms the application of the Decree by making a reference to it.

Lastly, if there is no agreement on the rent increases to be made during 2019 for housing and workplaces or with public agreements or in case that a lower rate of increase is not determined by the parties, the rate of increase should be the CPI of 2018 as a maximum. In this regard, if the increase rate is unlawful, where the lease agreement lasts more than five years, in accordance with the foregoing amendments, the lessor will be entitled to request from the court the determination of the new rent price rate.

In conclusion, the amendments particularly concern rent increases and are apparently made in an effort to protect consumers from the volatility in the market, by changing the maximum limit of the increase rate from PPI to CPI and clarification of calculation of this benchmark through indicating the period that needs to be taken into account as twelve months.

Data Protection Law

Digitalization of Healthcare Records in Turkey

As many healthcare institutions start maintaining electronic medical records, healthcare data security becomes one of the most important aspects of data protection. The rapid growth in adoption of technology across medicine has brought along and introduced some gaps and legal concerns with health data protection, and thus paved the way for regulatory rules and guidance in this field.

Regulation on Processing and Privacy of Personal Health Data[17] (**"Previous Regulation"**) was the first action taken by the Turkish authorities to regulate privacy of personal health data. This regulation was published in the Official Gazette of October 20, 2016. However, the Council of State ceased the execution of with its decision numbered 2016/10500 E. the Previous Regulation Even though an amendment to the Previous Regulation was published in the Official Gazette of November 24, 2017, the Council of State explicitly stated that a new regulation would need to be drafted in order to ensure full compliance with the laws, rather than making amendments to an annulled legislation and stopped the execution of this amendment as well.

To address this, Regulation on Personal Health Data[18] was enacted by the Ministry of Health (**"Ministry"**) by taking into account of the applicable laws and procedures (such as the Law No. 6698 on Protection of Personal Data (**"DPL"**), secondary legislation, the Data Protection Board's decisions and guidelines) along with the Council of State's decisions and has come into effect on June 21, 2019.

[17] The Official Gazette dated October 20, 2016 http://www.resmigazete.gov.tr/eskiler/2016/10/20161020-1.htm (Last Access Date July 12, 2019).
[18] The Official Gazette dated June 21, 2019 http://www.resmigazete.gov.tr/eskiler/2019/06/20190621-3.htm (Last Access Date July 12, 2019).

The main purpose of the Regulation on Personal Health Data is to control and regulate the activities of real persons and legal entities that process personal health data related to the processes and applications carried out by the Ministry of Health (such as hospitals, health institutions etc.). Unlike the Previous Regulation, Regulation on Personal Health Data has a narrower scope and it covers the activities of real persons and legal entities under private law and legal entities under public law that process personal health data related to the processes and practices carried out by Ministry of Health.

Regulation on Personal Health Data has introduced new definitions such as open data, open health data, e-Pulse, KamuNET (public network for all public institutions), de-identification, personal data, destruction, erasure and demolishing of personal data, authority and masking. Besides these new definitions, Regulation on Personal Health Data removed "data processor" from the definitions and introduced the term "relevant user" which refers to the person who processes personal data within the organization of data controller or in accordance with the authorization and instructions received from the data controller, except for the person or unit responsible for the technical storage, protection and back-up of the data.

Accessing Personal Health Data

In order to prevent unlawful access to personal data, Regulation on Personal Health Data limits access to data to only required and authorized healthcare personnel. Pursuant to Article 6 of the Regulation on Personal Health Data, authorized personnel may access personal data, provided that the relevant access is within the scope of the health services offered to patient. As for patients who are signed up for the e-Pulse system (a system established by the Ministry of Health in accordance with the e-government practices, providing access to the health data of data

subjects, physicians or third parties authorized by data subjects), since they determine the privacy rules to be applied to their personal data on their own, they are deemed to assume full responsibility for any loss or damages caused due to any breakdowns or malfunctions in the e-Pulse system.

Subparagraph (2) of the Article 7 of Regulation on Personal Health Data provides that de-identified data sent to central health data information system may only be utilized by the users authorized by General Directorate (Health Data Information Systems Directorate) upon the request of the head of the unit in accordance with personal data protection legislation. This use may solely be for the purposes of planning, management, financing and auditing healthcare services.

Access to Minor's Health Data

Under most jurisdictions, for a minor to obtain health care services, his/her parent or legal guardian must consent to such services. This is likely to be interpreted as parents are automatically entitled to disclose health care information regarding children. As per Article 8 of the Regulation on Personal Health Data, parents can access their children's health data through the e-Pulse system without consent. However Minors with discernment capacity may subject their parents' access to consent through the e-Pulse system, if they like to.

Access by Attorneys

Attorneys cannot access their client's personal data by enforcing a general Power of Attorney designated to provide them with broad authority. Regulation on Personal Health Data, requires that data subjects include a clear language in their powers of attorney specifically indicating that the attorney was granted power to access, process and obtain personal health data.

Concealing, Correction, Destruction and Transfer of Personal Health Data

Regulation on Personal Health Data requires a warrant issued by the judicial authorities in order to conceal the data regarding persons who were granted a protective order of confidentiality. Provincial health directorate is in charge of all technical and administrative measures to protect confidentiality of the persons and to make sure that the data is only available to the persons who are entitled to that information due to their duties.

Provincial health directorates are also regulated as the point of authority with respect to applications made for health data corrections. Data subjects who believe that an erroneous entry has been made regarding their health data are able to apply to provincial directorates for correction of such data. In case the health directorate finds that the error was made inadvertently, it sends an official request letter to General Directorate asking for correction of the health data generated.

As for the destruction of data, Regulation on Personal Health Data refers to principles set forth in Article 7 of the Regulation on the Erasure, Destruction or Anonymization of Personal Data ("**Erasure Regulation**") published in the Official Gazette of October 28, 2017.[19]

With respect to transfer of personal health data within the country and abroad, Regulation on Personal Health Data adopts the transfer rules listed under Articles 8/2/b and 28 of the Data Protection Law ("**DPL**"). In addition, Regulation on Personal Health Data requires a protocol indicating the data to be transferred within the scope of general principles and data security provisions of personal data

[19] The Official Gazette dated October 28th, 2017 http://www.resmigazete.gov.tr/eskiler/2017/10/20171028-10.htm (Last Access Date July 12, 2019).

protection legislation to public institutions and organizations. As per subparagraph (2) of Article 15, transfer of data is processed through KamuNET[20] when the technical infrastructure is available.

Processing for Scientific Purposes and Open Health Data

Regulation on Personal Health Data allows scientific studies on health data. For personal data to be utilized in such studies, data should be anonymized with official statistics for the purposes of research, planning or statistical operations. Moreover, Health Data Regulation authorizes use of personal health data for artistic, historical, literary or scientific purposes or within the scope of freedom of speech; provided that national defense, national security, public safety, public order, economical safety, privacy of private life or personal rights are not violated and the processing of data does not constitute a crime.

Data Security and Sanctions

Sections 6 and 7 of the Regulation on Personal Health Data refer to obligations and sanctions concerning data security regulated under DPL. Health Data Regulation requires that Personal Data Security Guideline prepared by Data Protection Board be taken into consideration while taking technical and administrative measures.

Article 21 of the Regulation on Personal Health Data imposes disciplinary measures on public officials who fail to comply with Health Data Regulation. Accordingly, public officials who are in violation of Regulation on Personal Health Data will be notified to the disciplinary authority to which they are associated with, and their license, if any, will be cancelled. Also, Articles 17 of 18 of DPL will be applicable for the crimes and minor offences committed against data protected under Health Data Regulation.

Health service providers who fail to send data to the central health data system in accordance with the procedures and principles determined by the Ministry of Health will be subject to disciplinary sanctions in accordance with the third paragraph of Article 11 of the Main Law No. 3359 on Health Services.

Overall, given the sensitive nature of healthcare data and cyber threats in the area of digital privacy, Health Data Regulation is a crucial instrument leveraging healthcare privacy and providing support for progressive universalization of data management.

Internet Law

European Union's Regulation on Online Intermediation Services and Search Engines

European Union's ("**EU**") regulation on online intermediation services and search engines ("**Regulation**")[21] was published on the Official Journal of the European Union on July 11, 2019 and applies from July 12, 2020.

The purpose of the Regulation is set out to contribute to the proper functioning of the internal market by laying down rules to ensure that business users of online intermediation services and corporate website users in relation to online search engines are granted appropriate transparency, fairness and effective redress possibilities.

[20] A project developed by the Ministry of Transport and Infrastructure for the purposes of ensuring data communication between public institutions and organizations, conducting such communication on a virtual network closed to the internet, more secure against physical and cyber-attacks, minimizing cyber security risks, providing standards for the existing and to be installed secure closed circuit solutions and establishing suitable infrastructure for common applications.

[21] https://data.consilium.europa.eu/doc/document/PE-56-2019-INIT/en/pdf (Last access date: August 2, 2019).

The Regulation defines online intermediation services under Article 2/2 of the Regulation as "*information society services which allow business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded and which are provided to business users on the basis of contractual relationships between the provider of those services and business users which offer goods or services to consumers*".

Online search engine is defined under Article 2/5 of the Regulation as "*a digital service that allows users to input queries in order to perform searches of, in principle, all websites, or all websites in a particular language, on the basis of a query on any subject in the form of a keyword, voice request, phrase or other input, and returns results in any format in which information related to the requested content can be found*".

The Regulation applies to providers of online intermediation and online search engine services regardless of whether they are established in a Member State or outside the EU, provided that these two cumulative conditions are met: (i) the business users or corporate website users should be established in the EU and (ii) the business users or corporate website users should, through the provision of those services, offer their goods or services to consumers located in the EU at least for part of the transaction. As per the Recital, in order to determine whether business users or corporate website users are offering goods or services to consumers located in the EU, it would be necessary to confirm whether it is apparent that the business users or corporate website users *direct their activities* to consumers located in EU.

Under Article 1/2 of the Regulation, the Regulation shall not apply to online payment services, to online advertising tools or online advertising exchanges, which are not provided with the aim of the facilitating the initiation of direct transactions and which do not involve a contractual relationship with consumers.

It is provided under Paragraph 11 of the Recital that the Regulation also does not apply to peer-to-peer online intermediation services without the presence of business users, pure business-to-business online intermediation services which are not offered to consumers.

The preamble of the Regulation indicates that it is without prejudice to EU law, in particular EU law applicable in the areas of judicial cooperation in civil matters, competition, data protection, trade secrets protection, consumer protection, electronic commerce and financial service.

The Regulation imposes a number of obligations for online intermediation services and online search engines. Below are the obligations set out by the Regulation under two separate headings for (i) online intermediation services and (ii) online search engines.

1. Online Intermediation Services

To ensure that the general terms and conditions enable business users to determine the commercial conditions for use, termination and suspension of online intermediation services, and to achieve predictability regarding their business relationship, providers of online intermediation services ("**Intermediaries**") should draft terms and conditions in plain and intelligible language. Terms and conditions will not be considered to have been drafted in plain and intelligible language where they are vague, unspecific or lack detail on important commercial issues and thus fail to give business users a reasonable

degree of predictability on the most important aspects of the contractual relationship pursuant to Article 3 of the Regulation.

Under Article 3/1(d) of the Regulation, Intermediaries should ensure transparency of any additional distribution channels and potential affiliate programs that they might use to market those goods or services for their business users.

Intermediaries should within their terms and conditions include general, or more detailed, information if they so wish, regarding the overall effects, if any, of those terms and conditions on the ownership and control of intellectual property rights of the business user. Such information could, inter alia, include information such as the general usage of logos, trademarks or brand names (Article 3/1(e) of the Regulation).

Intermediaries should also ensure that the terms and conditions are easily available at all stages of the commercial relationship, including to prospective business users at the pre-contractual phase, and that any changes to those terms are notified on a durable medium to business users concerned. Notification shall be made within a set notice period which is reasonable and proportionate in light of the specific circumstances and which is at least 15 days (Article 3/2 of the Regulation). That notice period should not apply where, and to the extent that, it is waived in an unambiguous manner by the business user concerned or where, and to the extent that, the need to implement the change without respecting the notice period stems from a legal or regulatory obligation incumbent on the service provider under EU or national law. However, proposed editorial changes should not be covered by the term 'change' in as far as they do not alter the content or meaning of terms and conditions.

Intermediaries shall ensure that the identity of the business user providing the goods or services on the online intermediation services is clearly visible (Article 3/5 of the Regulation). However, this provision should not be understood as a right for business users to unilaterally determine the presentation of their offering or presence on the relevant online intermediation services (Paragraph 21 of the Recital).

Intermediaries should provide, prior to or at the time of the restriction or suspension taking effect, with a statement of reasons for that decision on a durable medium. Intermediaries should also allow an opportunity for business users to clarify the facts that led to that decision in the framework of the internal complaint-handling process, which will help the business user, where this is possible, to re-establish compliance.

In addition, where the Intermediary revokes the decision to restrict, suspend or terminate, for example because the decision was made in error or the infringement of terms and conditions that led to this decision was not committed in bad faith and has been remedied in a satisfactory manner, the Intermediary should reinstate the business user concerned without undue delay, including providing the business user with any access to personal or other data, or both, available prior to the decision (Article 4 of the Regulation).

Termination of the entire online intermediation services and the related deletion of data provided for the use of, or generated through, the provision of online intermediation services represent a loss of essential information which could have a significant impact on business users and could also impair their ability to properly exercise other rights granted to them by this Regulation. Therefore, the Intermediary should provide the business user concerned with a statement of reasons on a durable medium, at least 30 days before the

termination of the provision of the whole of its online intermediation services enters into effect (Article 4/2 of the Regulation).

In order to ensure proportionality, Intermediaries should, where reasonable and technically feasible, delist only individual goods or services of a business user. Termination of the whole of the online intermediation services constitutes the most severe measure (Paragraph 23 of the Recital).

Business users should be offered clarity as to the conditions under which their contractual relationship with Intermediaries can be terminated. Intermediaries should ensure that the conditions for termination are always proportionate and can be exercised without undue difficulty.

Business users should be fully informed of any access that Intermediaries maintain, after the expiry of the contract, to the information that business users provide or generate in the context of their use of online intermediation services (Paragraph 32 of the Recital).

Intermediaries should outline the main parameters determining ranking, in order to improve predictability for business users, to allow them to better understand the functioning of the ranking mechanism and to enable them to compare the ranking practices of various providers (Article 5/1 of the Regulation). Intermediaries should not be required to disclose the detailed functioning of their ranking mechanisms, including algorithms (Article 5/6 of the Regulation).

Intermediaries offering goods or services to consumers that are ancillary to a good or service sold by a business user, using their online intermediation services, should set out in their terms and conditions a description of the type of ancillary goods and services being offered (Article 6 of the Regulation).

Intermediaries should provide business users with a clear description of the scope, nature and conditions of their access to and use of certain categories of data. The description should be proportionate and might refer to general access conditions, rather than an exhaustive identification of actual data, or categories of data.

Intermediaries should provide an internal complaint-handling system which is easily accessible and free of charge for business users. Internal complaint-handling system should be based on principles of transparency and equal treatment applied to equivalent situations (Article 11/1 of the Regulation).

2. Online Search Engines

As per Article 5 of the Regulation, search engines should provide description regarding the main parameters which individually or collectively determine the ranking of all indexed websites, the relative importance of those main parameters, and keep such description in plain language.

These descriptions should take into account (i) characteristics of the goods and services provided; (ii) relevance of those characteristics for the consumers; and (iii) design characteristics of the website used by corporate website users. However, search engines are not obliged to disclose algorithms or any information manipulating search results within this scope.

Search engines should set out a description of any differentiated treatment in relation to goods or services offered to consumers through the relevant search engines, or a corporate website user which they control. This description should contain information regarding any differentiated treatment applied whether through legal, commercial or technical means in respect of goods or services offered (Article 7 of the Regulation).

In conclusion, the Regulation imposes significant new obligations on Intermediaries and search engine operators, particularly for their B2B transactions.

Telecommunications Law

The 2018 Activity Report of the Information and Communication Technologies Authority is Published

The Information and Communication Technologies Authority (**"ICTA"**) published its 2018 Activity Report[22] (**"Report"**) which provides information on the activities carried out by ICTA during 2018.

According to the Report, ICTA determined nine (9) objectives within the scope of its 2019-2023 Strategic Plan[23]:

(i) generalization of high capacity stable, mobile and wireless wideband networks and services and development of fiber infrastructure, (ii) encouraging transition to local and national 5G and Beyond new generation communication technologies and local production, (iii) encouraging innovative digital technologies and services such as communication between machines (**"M2M"**) and internet of things (**"IoT"**), (iv) increasing cyber security and ensuring user assurance on electronic media, (v) encouraging sectoral development and investment, and ensuring effective and sustainable competition environment, (vi) protection of consumers and users rights and interests, (vii) generalization of conscious, safe and effective use of internet, (viii) ensuring development of local and national satellite communication technologies and infrastructure, (ix) development of administrative and corporate capacity.

The Report includes the economic, administrative, regulative, supervisory and international activities carried out during 2018 by ICTA. The Report provides that as of the end of 2018, 444 operators are active in the Turkish market and authorizations given to these operators in 2018 include, but are not limited to, authorizations for in-vehicle emergency call system (E-Call), shared use of transmission lines and tools and embedded universal integrated circuit card (eUICC and eSIM) for M2M and IoT technologies.

As per the Report, following significant regulative and administrative activities have been carried out in 2018:

- Draft Regulation on Radio, Television and On-Demand Broadcasting Provided through the Internet Platform has been issued.
- Regulation on Electronic Communication Devices Security Certificates has been published on the Official Gazette.
- Communiqué on Procedures and Principles on the Obtaining Electromagnetic Area Measurement Certificate has been published on the Official Gazette.
- Draft Procedures and Principles on Institutional Encryption and Electronic Stamp Used for Document Sharing between Public Institutions and Organizations has been issued.
- The Procedures and Principles Applicable to the Refunds to be made to Subscribers has been updated.
- The practice of fair usage quota (AKN) has been banned as of December 31, 2018 with the decision of ICTA dated December 27, 2016.[24]

[22] https://www.btk.gov.tr/uploads/announcements/bilgi-teknolojileri-ve-iletisim-kurumu-2018-faaliyet-raporu-yayimladi/faaliyet-raporu-2018.pdf (Last Access Date July 12, 2019).

[23] https://www.btk.gov.tr/uploads/pages/yayinlar-stratejik-planlar/btk-2019-2023-stratejik-plani.pdf (Last Access Date July 12, 2019).

[24] https://www.btk.gov.tr/uploads/boarddecisions/adil-kullanim-noktasi-akn.pdf (Last Access Date July 12, 2019).

- The Procedures and Principles Regarding the Resolution of Consumer and User Complaints by Operators and Service Providers were enacted.

The rates of administrative measures taken in 2018 within the scope of Article 8 of the Law No. 5651 on the Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts for the online contents based on catalogue crimes are declared as the following:

Obscenity	61.62%
Provision of Medium and Opportunity for Gambling	10.66%
Sexual Abuse of Children	1.89%
Provision of Dangerous Material for Health	0.10%
Prostitution	25.59%
Facilitating Use of Drug and Cordial	0.06%
Crimes against Ataturk	0.05%
Encouraging Suicide	0.03%

The numbers of applications received through Information Notification Center in 2018 regarding online contents are declared as the following:

Obscenity	74,026
Provision of Medium and Opportunity for Gambling	37,831
Sexual Abuse of Children	10,774
Provision of Dangerous Material for Health	2,427
Prostitution	53,991
Facilitating Use of Drug and Cordial	849
Crimes against Ataturk	4,279
Encouraging Suicide	6,830

Other significant activities carried out by the ICTA in 2018 are as explained in the Report as the following:

- Operations regarding game contents and creation of the website of www.guvenlioyna.org.tr in which the contents of the games are analyzed.
- Analyzed and categorized approximately three million web sites within the scope of the activities carried out for secure internet services.
- ICompleted the project of Technical Assistance for Achieving the Harmony with EU Regarding the Implementation of Account Separation, Cost Accounting and Weighted Average Cost of Capital (WACC).
- Provided the Turkish Competition Authority with its opinions for 15 applications made for electronic communication sector.
- Extend the transition period until April 12, 2019 for the deregulation of the market related to access to mobile network and call origination following the analysis of competition concerns.
- Attended meetings and executed a protocol with Middle East Technical University regarding the transfer of the management of domain names in Turkey.
- Published the “White Book” which provides Turkey’s priorities, strategies and road map regarding 5G and Beyond.

Center of Intervention to National Cyber Incidents (USOM) identified and controlled 32,495 harmful addresses including URL addresses, IP addresses and domains and access to such addresses were blocked.

Anti-Dumping Law

European Union Initiates Dispute Complaint Against Turkey’s Measures on Imports of Pharmaceutical Products

On April 10, 2019, the European Union (“**EU**”) circulated its request for dispute

consultations with Turkey to World Trade Organization ("**WTO**") members, in relation to the measures imposed by Turkey on pharmaceutical products with regard to production, import and approval for reimbursement, pricing and licensing.

In brief, the EU claims that Turkey's localization regulations and practices are inconsistent with Turkey's obligations arising out of several agreements, such as the provisions of General Agreement on Tariffs and Trade ("**GATT**"), Agreement on Trade Related Investment Measures, Agreement on Trade-Related Aspects of Intellectual Property Rights, or Agreement on Subsidies and Countervailing Measures.

According to document conveyed by the EU, Turkish authorities are in a localization process with regard to pharmaceutical products consumed in Turkey, where foreign producers are required to commit to localize their production of pharmaceutical products in Turkey. The reason EU has requested a dispute consultation is that the related pharmaceutical products are excluded from the reimbursement scheme, if these foreign producers fail to engage in the localization process. Since the Turkish social security system manages and operates the pharmaceutical products sold by pharmacies to patients and covers the expenses relating to the pharmaceuticals involved in the reimbursement scheme, for a producer to be excluded from the scheme has great impact on their sales and marketing in Turkey.

There are certain measures adopted by Turkish authorities which ensure the operation of this localization process. The EU claims that the process is not sufficiently transparent. The technology transfer requirement, which concerns the transfer of new technology from the originator to a secondary user, imposes the obligation on the producers to transfer technology rights to a producer established in Turkey. Another argument is that, producers cannot import their pharmaceutical product into Turkey, once that product has been localized in Turkey. Lastly, the EU expresses that, the Turkish authorities give priority to the applications for inclusion of domestic pharmaceutical products in the reimbursement scheme in cases where imported products are not excluded from the reimbursement scheme as a result of the localization requirement, which is also administered in a non-transparent manner. These measures are implemented through a variety of legal instruments, such as government programs, development plans, presidency decisions and laws and regulations.

To provide an example, the EU argues that, the abovementioned treatment of producers with pharmaceutical products imported to Turkey is inconsistent with Article III:4 of GATT, which rules that the imported products from the territory of any contracting party into the territory of any other contracting party, shall treated no less favorable than that of the national origin, since localization requirement results in unfavorable treatment of imported products, thus affecting their sales in Turkey. Another argument is that the non-transparency in establishing of certain procedures such as the technology transfer requirement, which varies from producer to producer, is inconsistent with Article X:1 of GATT, indicating that laws, regulations, judicial decisions and administrative rulings put in place by a contracting party should be published promptly, in order to enable traders to become acquainted with them. It can be seen that many of the arguments revolve around the "*less favorable treatment*" argument, while others include inconsistencies with obligations relating to patent rights and transfer of undisclosed information arising out of related agreements.

Accordingly with the procedure of consultations, a dispute will be initiated in the WTO and parties will discuss the related matters to find an amicable solution without proceeding with litigation. If the EU and Turkey fail to resolve the issues after 60 days, a panel will be established upon EU's request from the Dispute Settlement Body.

White Collar Irregularities

The DOJ Issues Additional Guidelines for Evaluation of Compliance Programs

The U.S. Department of Justice's Criminal Division ("**DOJ**") issued a new and comprehensive guidance named "*The Evaluation of Corporate Compliance Programs*"[25] for prosecutors to help shaping their analysis of compliance programs on April 30, 2019. This updates previous guidance issued in February 2017 and provides more detailed and concrete factors in the assessment of compliance program effectiveness, for the purposes of determining the appropriate form of resolution or prosecution, penalty and compliance obligations, if any.

These factors stem from the following three essential questions federal prosecutors are expected ask to assess whether the program actually works, is thoroughly implemented throughout the company and has preventative consequences in terms of corporate misconducts:

(i) if the compliance program is well designed,
(ii) if the compliance program is effectively implemented, and
(iii) if the compliance program actually works in practice.

[25] The guide can be accessed through https://www.justice.gov/criminal-fraud/page/file/937501/download (Last Access Date August 2, 2019).

(i) Design of the compliance program
The DOJ has put forward a structure for the assessment of adequacy and coverage of the program's design in each company. The first step is a risk assessment. The program is required to be appropriately designed, to have the methodology to detect the types of misconduct that could occur in the company's line of commercial and regulatory environment, and should be frequently updated in this regard. The second topic is the company's policies and procedures. The company must establish an adequate set of accessible and enforced policies which address the related laws and which serve in reducing the risks identified as part of the company's risk assessment process. The DOJ is also to look into the persons involved in the creation of the policies and procedures, in terms of seniority and relevant business units. As an extension of this, the company is required to ensure that these policies and procedures has been implemented and are in effect through periodic risk-based trainings and communication, in other words, the company should raise the awareness of its employees with regard to its position on misconduct. Similarly, the guidance indicates that the company should have a confidential reporting structure and investigation process to enable employees to report misconducts anonymously and confidentially.

The guidance specifically focuses on third-party management and acquisition targets also. The prosecutors are required to evaluate the company's due diligence processes, controls regarding third parties, and the company's oversight on third-party partners based on their business field, region and relationships and reputation. It is significant to note that there should be a comprehensive due diligence process and well-developed programs for acquisition targets in order to identify the target's corrupt practices or misconduct, or any potential compliance issues.

(ii) Effectiveness in implementation of the compliance program
The guidance indicates simply a tone at the top is not sufficient. Effective implementation of a compliance program requires commitment by both senior and middle management in order to establish a culture of compliance. Prosecutors should consider whether the program has sufficient autonomy and resources to investigate and enforce the program, as well as incentives and disciplinary measures are being applied.

(iii) Compliance program in practice
The prosecutors are required to evaluate whether the program minimizes the risk of misconduct by investigating if it is operating effectively, improves continuously, and undergoes periodic testing, review, analysis and remediation of underlying misconducts are being made. This can be made through the observation of how and if the company was able to identify misconducts and nature of remediation, which are regarded as a strong indicator that the program is working effectively.

Healthcare Law

Turkish Medicines and Medical Devices Agency Announces Draft Regulation on Sales, Advertising and Promotion of Medical Devices

The Turkish Medicines and Medical Devices Agency ("**Agency**") announced[26] the Draft Regulation on Sales, Advertising and Promotion of Medical Devices ("**Draft Regulation**") on May 9, 2019. The Draft Regulation will replace the Regulation on Sales, Advertising and Promotion of Medical Devices ("**Regulation**") currently in force.

Through the announcement, the Agency expressed that the Regulation requires an amendment as a result of practical matters presented during the implementation of the Regulation and the current needs of the sector. The Agency invited suggestions and comments from concerned parties until close of business on June 9, 2019, by post or through the Agency's official e-mail address.

One of the amendments the Draft Regulation introduces relates to a slight change in the procedure in the application for obtaining the authorization certificate and work permit for medical device sales centers. Both the Regulation and the Draft Regulation provide that the applicant will be notified in writing if the application documentation is incomplete. However, the Draft Regulation foresees the application will be rejected, in the event the applicant does not confirm completion of the documentation within forty-five (45) days as of the notification, or if the second examination conducted by the local health authority following the applicant's confirmation demonstrates that the documentation is still incomplete.

Throughout the following provisions, there are several amendments relating to the physical and legal requirements of the infrastructure and personnel of medical device sales centers. For instance, sales centers are now required to be at least twenty-five (25) square meters in size. Sales centers are now also able to provide sponsorship to scientific meetings, training activities, cadaver trainings, simulation trainings and online meetings which are scientifically or technically declared to be in relation with medical devices. Moreover, sales centers are not required to notify the Agency for researcher meetings of multi-centered domestic and international clinical researches that they are sponsoring. The audit intervals of sales centers have also been increased to at least once a year within

[26] "The full text of the announcement can be accessed through" https://www.titck.gov.tr/duyuru/tibbi-cihaz-satis-reklam-tanitim-yonetmelik-taslagi-09052019093043 (Last Access Date July 12, 2019).

the Draft Regulation, which is currently "every other year" as per the Regulation. Lastly, the Draft Regulation introduces a new standard where the authorization certificates of sales centers will be terminated indefinitely, as a result of their change of location.

One of the most critical amendments within the Draft Regulation could be the significant developments regarding advertising and promotion regulations. Both activities now include highly similar and even some identical provisions with the rules and principles laid out in Consumer Protection Law No. 6502 and Commercial Advertising and Unfair Commercial Practices Regulation ("**Advertising Regulation**"). The Draft Regulation introduces the most fundamental principles of the legislation with regard to advertising of medical devices, prohibiting commercial advertising by way of "*misleading consumers or taking advantage of their lack of knowledge, risking their security, promoting violence or crime, deranging public health, taking advantage of children and the disabled*" and "*using inaccurate, misleading, exaggerated or uncorroborated information*". On top of this, in line with the Advertising Regulation, the Draft Regulation now includes the definition of surreptitious advertising, as well as the prohibition of surreptitious advertising of medical devices. The related provision is identical to that of the Advertising Regulation, which goes along the lines, "*including or promoting trade names or company names within articles, news, broadcasts or programs for the purposes of advertising, by way of using names, trademarks, logos or other distinctive shapes or expressions pertaining to the products or services, without explicitly disclosing or clearly expressing that it is an advertisement*".

Provisions relating to free samples appear to have been removed from the Draft Regulation and have been incorporated into the provisions under "*donations*". It may be expected that the Agency will provide the details and additional rules relating to free samples through secondary guidelines.

The Draft Regulation also significantly extends the provisions regarding administrative penalties and provides a more detailed list of potential violations.

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