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LEGAL INSIGHTS QUARTERLY

June 2017 – August 2017

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Preface to the June 2017 Issue

In this issue, the litigation law section discusses the decision of the Constitutional Court on the application for the partial annulment of Article 14 of Press Law No. 5187, with regard to the obligation to publish correction and reply texts in certain cases.

On the competition law front, this issue explores the Turkish Competition Board's reasoned decision concerning whether Türk Telekom's refusal to provide access to the infrastructural elements constitutes abusive conduct within the meaning of Article 6 of the Law No. 4054.

The data protection law section sheds light on the implementation of administrative fines under the Law No. 6698 on the Protection of Personal Data by examining the comparative case law among the Member States of the EU. The internet law section delves into a Constitutional Court decision which sets out how the Constitutional Court balances the freedom of press and expression with the access ban decisions imposed on website contents.

Finally, on the white collar irregularities front, this issue tackles internal fraud and misconduct, and gives suggestions on how businesses can implement an effective compliance program in order to protect themselves against such risks.

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

June 2017

Corporate Law

Release of the Members of the Board of Directors

I. General Information

The persons who have the responsibility to manage a company are obliged to explain and account for their managerial activities throughout the year to the general assembly of shareholders at the end of each fiscal year. Such persons are defined as members of the board of directors, executives, and auditors under the Turkish Commercial Code No. 6102 ("TCC"). This article aims to illustrate the rules and procedures regarding the release of the members of the board of directors.

The board of directors is responsible for the preparation of balance sheets and financial reports, as well as their submission to the general assembly of shareholders for approval. The approval of the balance sheet results in the release of the members of board of directors, unless indicated otherwise in the general assembly resolution. However, if the balance sheet is not properly provided to the general assembly or intentionally obscures the company's actual conditions, the approval does not result in a release.

Only the general assembly of shareholders is authorized and responsible for releasing the members of the board of directors and this duty is non-assignable. The general assembly may release the board of directors either wholly (*i.e.*, as a group) or individually. Likewise, the general assembly may release the board of directors for specific points (*e.g.*, such as release for a specific period of time of the accounting period).

By a duly-issued release resolution of the general assembly, all acts and transactions made by the members of the board of directors are approved. Accordingly, the company and the shareholders shall not subsequently claim any further compensation.

Once the release resolution is issued by the general assembly, it shall not be withdrawn by the general assembly. Shareholders who have acquired the shares of the company with full knowledge of the release resolution of the general assembly and who have approved the release, lose the right to initiate a lawsuit against the members of the board of directors before the courts. Other shareholders, who have not approved the release, have the right to initiate a lawsuit before the courts within 6 months as of the date of the release resolution.

II. Revocability of the Release Resolution

The law allows certain claims to be advanced regarding the revocability or invalidity of the release resolutions.

As the release resolution is issued by the general assembly, it shall be subject to the TCC provisions regarding the revocation of the general assembly resolutions. According to the relevant provisions of the TCC, the release resolutions can be revoked on the grounds of contradicting the law, the articles of association and the objective good faith principle. The revocation process must be set in motion by the persons stated under the TCC, by initiating a lawsuit at the commercial court of first instance where the headquarters of the company is located and within 3 months of the date of the general assembly resolution.

III. Invalidity of the Release Resolution

If the release resolution is based on intentionally missing or incorrect information in the balance sheets and financial reports, such resolution shall be deemed as invalid and shall not have any effect. The key element for proving an allegation of invalidity is whether or not the members of the board of directors acted intentionally in providing missing or false information during the preparation of company's balance sheets and financial reports. A lawsuit for the determination of invalidity of the release

resolution may be initiated by anyone without any time limitation. However, it should be noted that not every missing and incorrect piece of information in the balance sheets or financial reports of the company would be sufficient to invalidate the release of the members of the board of directors.

On the other hand, it should be emphasized that there are no explicit provisions on how to prove the intentional acts of the members of the board of directors. The preparation of balance sheets and financial reports is one of the essential duties of the board of directors and the members of the board of directors shall comply with such duties. Otherwise, the contrary situation would cause the liability of the board of directors.

Rights of Minority Shareholders in Joint Stock Companies

The "minority shareholder" is defined under Article 411 of the Turkish Commercial Code No. 6102 ("TCC") as the shareholders represent at least 10% of the share capital in joint stock companies and 5% in public joint stock companies. Rights of the minority shareholders in joint stock companies under the TCC are as follows:

1. The Right to Request the Dismissal of the Auditor and the Appointment of a New Auditor

Pursuant to Article 399 of the TCC, an auditor shall be elected by the general assembly in joint stock companies for each fiscal year and the appointment shall be made before the end of the fiscal year in which the auditor will perform his/her duty. The circumstances that allow for the dismissal of the auditor are set out and prescribed in a limited manner in the said article and the auditor cannot be dismissed for any other reasons. Upon the request of the minority shareholders, the commercial court of first instance that has jurisdiction over the registered address of the joint stock company can appoint another auditor, if a fair cause for dismissal can be established (*e.g.*, especially if doubts arise that the auditor is acting subjectively), after hearing the concerned parties and the elected auditor. In order for the minority shareholders to initiate such a lawsuit, they must have voted against the election of the auditor at the general assembly, have had their opposing votes recorded in the general assembly meeting minutes, and have been shareholders for at least 3 months prior to the date of the general assembly at which the election was made.

2. The Right to Request the Issuance of Share Certificates

There are two types of shares that can be issued by joint stock companies: (1) registered shares and (2) bearer shares. The type of the shares shall be determined in the articles of association. Share certificates representing bearer shares shall be issued and delivered to the shareholders within the first 3 months following the date that shares are fully paid-in. Bearer share certificates cannot be issued for shares that are not paid in full. With regard to share certificates representing registered shares, there is no obligation to issue registered share certificates under the TCC. However, if requested to do so by the minority shareholders, the company is obliged to issue registered share certificates and to deliver those to the shareholders in accordance with Article 486 of the TCC.

3. The Right to Request the Dissolution of the Company

Article 531 of the TCC allows minority shareholders to request the dissolution of the joint stock company for legitimate reasons by initiating a lawsuit before the commercial court of first instance that has jurisdiction over the registered address of the company. Article 531 does not address the question of which circumstances may be deemed as legitimate and justified reasons. The legitimacy of such reasons is evaluated by the courts on a case-by-case basis.

4. The Right of Representation in the Board of Directors

Pursuant to Article 360 of the TCC, provided that it is stated in the articles of association, certain share groups, shareholders comprising a certain group in terms of their qualities and nature, and minority shareholders can be granted the right to be represented in the board of directors. The number of board members who represent these groups cannot exceed half of the total number of board members in public joint stock companies.

5. The Right to Request a Special Auditor

Pursuant to Article 438 of the TCC, minority shareholders have the right to request a specific audit to clarify certain issues whenever necessary, by exercising their shareholders' rights in the general assembly, although such an audit may not be included in the meeting's agenda, and provided that the right to demand information or examination right has already been exercised by the shareholders. If such request is rejected by the general assembly, then the minority shareholders may request the appointment of a special auditor from the commercial court of first instance that has jurisdiction over the registered address of the company, in accordance with Article 439 of the TCC.

6. The Request for the Convention of a General Assembly Meeting and Addition of an Item to the Meeting Agenda

Pursuant to Article 411 of the TCC, minority shareholders may, via notary public and by stating the reason, request that a general assembly be convened, or demand addition of a subject that they wish to be discussed to the agenda of a meeting that has already been announced. In case the request is rejected or not approved by the board of directors within 7 business days, the minority shareholders may apply to the commercial court of first instance that has jurisdiction over the registered address of the company. In the event that the court deems that the convention of the general assembly or the inclusion of an agenda item is necessary, the court shall appoint a trustee responsible for calling the general assembly for a meeting and determining the agenda.

7. The Adjournment of the Deliberations concerning the Financial Tables

Pursuant to Article 420 of the TCC, upon the request of the minority shareholders, deliberations concerning the financial tables and subjects related to the financial tables are automatically adjourned for 1 month.

8. The Rights with Respect to Release

Pursuant to Article 559 of the TCC, members of the board of directors, auditors, and founding shareholders cannot be released from the liabilities with respect to the incorporation and capital increases of the company unless 4 years have passed since the incorporation, or the capital increase in question. Following the lapse of such four-year period, a release may only be certified upon the approval of the general assembly. However, a release cannot be granted if the minority shareholders vote against such release.

9. The Rights against the Dominant Shareholder (or "Controlling Company")

Pursuant to Article 202 of the TCC, a controlling company is not allowed to exercise its control in a way that would cause the controlled company to incur losses. In particular, the controlling company cannot direct the controlled company to carry out legal transactions, such as the transfer of businesses, assets, funds, staff, receivables and debt; to decrease or transfer its profit; to restrict its assets with rights in-rem or personal rights; to undertake liabilities such as providing surety, guarantee, and bill of guarantee; to make payments; to adopt decisions or take

measures that negatively affect its efficiency and business activities without reasonable grounds; to refrain from taking measures that will hinder its development. Such steps might be allowed only if any loss incurred due to such acts or decisions is compensated within that financial year, or a right to claim the "equivalent value" is granted to the controlled company no later than the end of that financial year, with a specific explanation of how and when this loss will be recovered. If compensation has not been made within the activity year, or if a "right of equivalent claim" has not been granted within the due period, each shareholder of the controlled company can claim that the loss incurred by the controlled company be compensated by the controlling company and its board members, who caused the loss.

Shareholders who have cast negative votes against the general assembly resolution and had them recorded in the general assembly minutes in connection with transactions such as mergers, divisions, conversions, terminations, issuance of securities and important amendments to articles of association initiated through application of control and without any clear reasonable grounds concerning the controlled company, or who have objected in writing to the board resolution on the same and similar subjects have the following rights: They can request from the court that (i) their damages be compensated by the controlling company, or (ii) their shares in the controlled company be purchased at stock exchange value, if applicable, or at a value determined in accordance with generally accepted methods.

Banking and Finance Law

Updates on Banking Legislation: The Amending Regulation Regarding Banks' Obtainment of Support Services and the Amending Communiqué on Tools for the Reduction of Credit Risk

The Official Gazettes of 2 and 4 March 2017 (No. 29995 and 29997, respectively) have introduced amendments to a regulation and a communiqué, both of which have been previously published by the Banking Regulation and Supervision Agency ("Agency"). Both amendments have entered into force on the date of their publication. Below is information we deem significant with regard to the content of these amendments.

I. The Amending Regulation on the Regulation Regarding Banks' Obtainment of Support Services

The Agency has published the Amending Regulation on the Regulation Regarding Banks' Obtainment of Support Services ("Amending Regulation") on the Official Gazette No. 29997, dated 4 March 2017. The Amending Regulation contains three amendments made to the original regulation. The first amendment is to the fourth paragraph of Article 4 of the original regulation. While Article 4 sets forth the limitations to the banks' obtainment of support services, subparagraph 4 thereof stipulates that they could obtain support services, such as security services and services regarding the collection, counting, distribution and delivery of any kind of cash, security and similar valuable goods, from companies that fall within scope of the Law No. 5188 on Private Security Services. That part of the subparagraph remains the same. The amendment concerns the addition of the last sentence, which states, in summary, that the services including the collection, counting, distribution and delivery of securities, could also be provided by service providers that are authorized by the Information Technologies and Communications Authority.

The second amendment is to the seventh subparagraph of the same article (*i.e.*, Article 4 of the original regulation). The relevant subparagraph is regarding the marketing of products and services for which banks could obtain marketing services from support services providers. The amendment widens

the scope of such products and services, and includes among them: (i) the products and services that are deemed as retail receivables as per the applicable legislation, (*i.e.*, Article 6(1) (g) of the Regulation on the Assessment and Evaluation of Banks' Capital Adequacy), and (ii) products and services regarding the purchase and sale of any kind of real estate and vehicles.

Lastly, the Amending Regulation eases certain qualifications that it requires with respect to service providers, as per Article 6 of the original regulation. With the Amending Regulation, entering into force as of 4 March 2017, the original regulation will no longer seek such service providers to be equity companies, if the services they offer to the banks can be classified as services related to marketing, the collection of data and information, the provision of execution of agreements and the delivery of such agreements to the banks.

II. Amending Communiqué on the Communiqué Regarding Tools for the Reduction of Credit Risk

The Agency has published the Amending Communiqué on the Communiqué Regarding Tools for the Reduction of Credit Risk ("Amending Communiqué") on the Official Gazette No. 29995, dated 2 March 2017. The Amending Communiqué contains only one amendment, which amends Article 20(7) of the original communiqué. Said Article 20 stipulates the minimum conditions for the eligibility of financial collateral.

For deposits and cash equivalents to be deemed eligible as financial collateral, the original version (prior to the amendment) sought that the following be explicitly stipulated: (i) the term of pledge or assignment, and (ii) the credit for which such deposits and cash equivalents were pledged or assigned in exchange. The original version further specified that such collateral could not be left to the free use of the debtor during the term of the credit. The amending communiqué is wider in scope. Firstly, it adds the following to the matters that must be explicitly addressed in the agreement: The risk amounts in exchange for which such collateral was deemed eligible, and the date of the calculations, which were taken into account when financial collateral were used in the credit risk reduction calculations, should also be recorded. Additionally, all such information should be kept ready for inspection. Lastly, the Amending Communiqué also sets forth a condition for cross-collateralization and the rules regarding when collateral could be let free or reused for the purposes of credit risk reduction.

Capital Markets Law
Real Estate Certificates

I. Introduction

Real estate certificates are regulated under the communiqué of the Capital Markets Board ("CMB"), namely the Communiqué on Real Estate Certificates (VII-128.2) ("Communiqué").

As per the Communiqué, a "real estate certificate" is a kind of capital market instrument issued by issuers,[1] for the financing of real estate projects to be constructed in the future or in the process of being constructed, and that has a nominal value representing independent units or specified area units of such independent units of a real estate project.

The issuance of real estate certificates grants financing facility and resources to the issuers for the completion of the project. Furthermore, real estate certificates enable investors[2] to acquire real estate and/or invest their savings by collecting and trading the relevant certificates in the capital markets.

[1] The term "issuers" refers to the joint stock companies that issue real estate certificates or file applications to CMB for their issuance, as well as the public entities and institutions authorized to issue securities in accordance with their own laws and regulations.

[2] The term "investors" refers to holders of real estate certificates.

II. General Merits of the Real Estate Certificates

Real estate certificates may be issued either domestically or internationally by issuers, through both public offerings and by selling them to qualified investors without public offering.

In order for real estate certificates to be issued and traded on the stock exchange, the issuer shall apply to the CMB and to the relevant exchange, namely Borsa İstanbul A.Ş. ("BIST").

The details and specifications of real estate certificates (*e.g.*, the execution of primary and secondary obligations of the issuer, the completion date of the project) are specified in the publicly available offering circular or in the issuance document of the issuer.

Before the issuance of the real estate certificates, the issuer should duly appoint an independent auditor (known as the "execution auditor") who is authorized to engage in capital market activities. The independent auditor is charged with auditing whether the execution of primary and secondary obligations of the issuer is in compliance with the offering circular or the issuance document. If the primary and secondary obligations have not been duly executed, the issuer would be liable to pay a penalty to the investors.

Investors may purchase real estate certificates in separate pieces and various quantities (without any quantity restrictions) through the authorized banks and brokerage firms.

The independent units that are subject to the issuance of the real estate certificates should not carry or be subject to any kind of encumbrance. Those independent units shall not be pledged, provided as guarantee, seized, transferred to a bankruptcy estate, or be disposed of in any manner, even if the issuer, its management or auditing is transferred to public institutions.

If the relevant provision is set forth in the terms of the offering circular or the issuance document, the issuer may take back the real estate certificates from the investors at a price to be determined by the issuer or by the BIST before the completion of the project, so long as it does not subsequently offer the certificates for sale again in the market.

The Communiqué also enables the Housing Development Administration of Turkey ("TOKİ"), İller Bankası A.Ş., or their group companies and affiliates to issue real estate certificates having certain exemptions as to provisions of the Communiqué.

III. The Redemption of Real Estate Certificates

Real estate certificates are redeemed by the issuer by way of execution of primary and secondary obligations, and payment of the penalty amount as specified in the offering circular or the issuance document, if the relevant circumstances occur.

"Primary obligation" is defined as the transfer of title deed and delivery of the independent units by issuers to the investors, in exchange for the sufficient real estate certificates representing the relevant independent units.

If an investor already possesses sufficient real estate certificates, then it is able to request the execution of the primary obligation. Such requests should be conveyed to the issuer, to the authorized banks or to the brokerage firms within the primary obligation request period, as specified in the offering circular or issuance document. For the investors who request the execution of the primary obligation but do not have sufficient real estate certificates during the request period, the issuer may choose to grant credit facility or allow cash payments in lieu of real estate certificates, if such credit or cash payment arrangements can be made in accordance with the offering circular or issuance document.

If the execution of the primary obligation is requested before the completion of the real estate project, in accordance with the offering circular or issuance document, then the issuer transfers the title deed to the investor or a preliminary agreement (or purchase agreement) is concluded for the independent unit between the issuer and the investor and this agreement is registered with the title deed registry. The purpose of the preliminary agreement and purchase agreement is to guarantee the execution of the primary obligation by the issuer.

"Secondary obligation" refers to the sale of the independent units corresponding to the relevant real estate certificates that are subject to the secondary obligation, and the distribution of the sale price to the investors in proportion to their existing real estate certificates.

If an investor does not request the execution of the primary obligation within the prescribed time period or fails to satisfy the relevant criteria as specified in the offering circular or issuance document, then the investor is deemed to have requested the execution of the secondary obligation.

If there are independent units not sold during the execution of the secondary obligation, average of the weighted average price occurred at the BIST over the last quarter before the maturity date[3] of the real estate certificates is calculated. This calculation is made to facilitate the redemption by the issuer of the real estate certificates corresponding to such independent units. Therefore, if the price cannot be duly calculated, or if the CMB or the BIST determines that the calculation is not proper, a value assessment report is prepared for the unsold independent units. Consequently, the relevant price for the redemption is determined in accordance with the value assessment report.

[3] "Maturity date" refers to the term between the issuance date of the real estate certificates and the expiration date of the relevant obligations as to the real estate certificates.

If it becomes apparent that the primary and secondary obligations cannot be executed on time, this would lead to a delay in the completion of the project. In such a case, the CMB may grant a time extension to the issuer, provided that the extension lasts no longer than 180 days, not including force majeure circumstances. In such a case, the issuer shall pay the penalty amount specified in the offering circular or issuance document to the investors, in addition to the execution of the primary and secondary obligations.

If the issuer cannot execute the primary and secondary obligations in spite of the extension of time, the investors are duly convened and they decide on: (i) the completion of the real estate project, or (ii) the sale of the uncompleted real estate project and the return of the sale price and the available funds obtained during the issuance of the real estate certificates to the investors, in proportion to their existing real estate certificates.

IV. Use of the Fund

The fund to be obtained during the issuance of the real estate certificates are deposited in a special bank account to be opened by the authorized banks or brokerage firms, and invested on behalf of the issuer in government bonds, treasury bills, lease certificates issued by the Undersecretariat of the Treasury, time deposit or participation accounts, or other capital market instruments, as determined by the CMB.

The fund is allocated as follows:

1. 10% of the fund is transferred to the issuer before the commencement of the construction of the real estate project.

2. With regard to the development process of the real estate projects, construction development reports are prepared by the relevant inspection authorities and 80% of the fund is transferred to the issuer depending upon the development progress of the construction, as stated in those reports.

3. The remaining 10% of the fund is transferred to the issuer as of the maturity date.

If it becomes apparent that the real estate project cannot be completed on time, then the relevant part of the fund is not transferred to the issuer.

The fund to be obtained from the issuance of the real estate certificates may only be used for the completion of the real estate project or for the repayment of the financing sources used for the project. Other than these purposes, the fund shall not be pledged, provided as a guarantee, seized, transferred to a bankruptcy estate or disposed of in any manner, even if the issuer, its management or its auditing is transferred to public institutions.

Competition Law / Antitrust Law

The Competition Board Concluded Its Preliminary Investigation Concerning Excessive Pricing Allegations and Did Not Find It Necessary to Initiate a Full-Fledged Investigation Against Soda Sanayii A.Ş.

The Turkish Competition Board ("Board") published its reasoned decision[4] on the preliminary investigation concerning allegations that Soda Sanayii A.Ş. ("Soda") violated (i) Article 6 of the Law on the Protection of Competition ("Law No. 4054") by abusing its dominant position in the basic chromium sulphate market by way of excessive pricing, and (ii) Article 4 of the Law No. 4054 by engaging in vertical restrictive agreements.

Soda, incorporated under the Şişecam Group, is a leading global manufacturer of sodium bichromate and basic chromium sulphate. In determining the relevant product market, the Board held that basic chromium sulphate differs from other chemical substances, as (i) it is used as an ingredient in leather manufacturing, and (ii) the quality of the chemical improves the results of the graining and dressing of leather and affects the quality and value of the product. In this respect, the Board defined a separate relevant product market for basic chromium sulphate.

The Board initially assessed the allegations against Soda from the abuse of dominance perspective. In its assessment, the Board first evaluated whether Soda held a dominant position in the relevant product market, before moving on to its substantive assessment under Article 6 of the Law No. 4054. Considering Soda's market shares for the previous years, the Board found Soda to be a global and European leader in terms of the chromium chemicals industry, which includes basic chromium sulphate. Within this framework, the Board assumed that Soda held a dominant position in the relevant product market and proceeded to analyze whether there had been an abuse of dominant position by way of excessive pricing at Soda's end, based on this assumption.

The Board defined "excessive price" as "the price determined consistently and significantly above the competitive level as a result of the undertaking's market power." The Board also discussed the concept of excessive pricing through conceptual and practical aspects, indicating that —from a conceptual perspective—prohibiting excessive pricing may restrict the ability of undertakings (with a certain level of market power) to determine prices for the purposes of profit maximization. Also, from a practical perspective, it held that competition authorities may be unable to efficiently analyze whether the relevant undertakings' prices are determined consistently and significantly above the competitive level.

The Board then examined the US antitrust practice and the EU competition law approach regarding excessive pricing and found that, in both jurisdictions, competition authorities tend not to interfere with excessive prices in

[4] The Board's reasoned decision numbered 16-14/205-89 and dated 20 April 2016.

cases where the market is expected to recover on its own in the short or medium term. However, the need for interference is expected to rise in several certain markets where there are major barriers to entry and a competitive structure is not expected to be established in the long term. In this regard, the Board concluded that market conditions, such as market shares and concentration levels within the relevant markets, barriers to entry and expansion, and buying power, should also be assessed in order to determine the merit of allegations regarding the abuse of dominant position through excessive pricing.

Furthermore, the Board referred to its previous decisions and indicated that the Board interferes with excessive prices only under limited circumstances, since such interference may have a negative effect on the market's ordinary course of business and that there is a risk of misjudgement with respect to competition authorities' assessment and interference methods.

In excessive pricing cases, echoing the practice of the European Commission, the Board evaluates the relationship between the economic value and the price of a product and applies a two-step test comprising (i) a price/cost comparison, and (ii) a comparison between the undertaking's own prices along with (iii) a comparison with the prices of competitors. Accordingly, the Board conducted a price comparison of Soda's (i) basic chromium sulphate products and those of its competitors, (ii) domestic sales prices and export prices, (iii) domestic sales prices and the consequent profit margin ratios, and (iv) export sales prices and the consequent profit margin ratios.

The Board found that Soda's products generally cost more than those of its competitors, and that Soda generally has a high profit margin with respect to its domestic and export sales. Further, the Board determined that Soda's domestic prices and the consequent profits were higher than its export prices and profits and held that this was due to the fact that (i) Soda focused its sales and marketing strategy mainly on exports, and (ii) the purchase price of the foreign manufacturers would be higher than the purchase price of the domestic manufacturers due to transportation costs and other costs which domestic manufacturers do not have to bear. The Board also stated that, even though there were no barriers to entry to the basic chromium sulphate market, Soda has been maintaining its market power throughout the years.

The Board also evaluated the allegation that Soda had violated Article 4 of the Law No. 4054 by determining its distributors' resale prices. No evidence was found that Soda had engaged in practices that lead to resale price maintenance. On the contrary, several authorized Soda distributors indicated that they were completely independent in determining their own sales terms and conditions.

In sum, the Board concluded that there were no legal grounds to initiate a full-fledged investigation of the allegation that Soda had abused its dominant position by way of excessive pricing, as Soda's prices in question can be related to and sufficiently explained by the quality and indispensability of Soda's products.

As for the Board's reasoning in constructing its decision, due to the fact that its assessment of the framework of excessive pricing is in line with its previous case law, the present decision can be considered to conform to the Board's well-established decisional practice concerning excessive pricing.

The Competition Board Imposed an Administrative Fine on Türk Telekomünikasyon A.Ş. for Abusive Refusal to Deal Practices

The Turkish Competition Board ("Board") published its reasoned decision on the full-

fledged investigation conducted against Türk Telekomünikasyon A.Ş. ("Türk Telekom").[5] The case arose out of the allegations that Türk Telekom had violated Article 6 of the Law No. 4054 on the Protection of Competition ("Law No. 4054") by abusing its dominance through delaying, hindering, and/or preventing facility-sharing request applications made by third parties, as alleged by the complainants Vodafone Net İletişim Hizmetleri A.Ş. ("VodafoneNet"), Superonline İletişim Hizmetleri A.Ş. ("Superonline"), and TurkNet İletişim Hizmetleri A.Ş. ("TurkNet").

Türk Telekom, a privatized company incorporated under the provisions of the Telegraph and Telephone Law No. 406 and private law, offers services related to land phones, mobile phones, data, Internet and value added services in Turkey. Türk Telekom has a legal duty to share the infrastructure that it holds and maintains in Turkey for the provision of electronic communication services with the other operators that are active in Turkey in the same product market.

In its reasoned decision, the Board first assessed its competence within the electronic communications sector and stated that Türk Telekom should conduct itself in accordance with the provisions of the regulations issued by the Information and Communication Technologies Authority ("ICTA") regarding the duration, pricing, and other procedures and principles of facility-sharing services. By also referring to the case law of the Turkish administrative courts, the Board further stated that ICTA's regulations do not prevent the Board from conducting an evaluation of whether Türk Telekom's practices in response to the facility-sharing applications made by the complainants would give rise to a competition law violation under the provisions of the Law No. 4054.

The Board defined the relevant upstream product market as "physical infrastructure elements, such as duct, channel, sub-duct, manhole, pole, tower and unlighted fiber market" and the downstream market as the "physical infrastructure market," which it took into account in its evaluation of the allegation of abuse of dominance through refusal to supply, under Article 6 of the Law No. 4054.

The Board then conducted an evaluation to determine whether Türk Telekom held a dominant position within the relevant product market. The Board stated that, due to the specific characteristics of the sector, the most convenient indicator for the determination of market shares is the actual length of the physical network infrastructures, as it provides an insight regarding the size of the infrastructure that the undertaking is responsible for sharing. To that end, the Board found that, among the market players, Türk Telekom has the most widespread infrastructure, which enables access to nearly all households in the country. The Board also stated that (i) there are various legal and economic barriers for new players who intend to enter the relevant product market, (ii) it does not seem likely that any alternative operator will have the potential to limit or curtail Türk Telekom's market power in the short term, and (iii) countervailing buyer power is relatively low within the relevant product market, since the alternative undertakings need Türk Telekom's widespread infrastructure to reach end-users and there are no such alternatives. Based on these considerations, the Board concluded that Türk Telekom held a dominant position both in the upstream market for "physical infrastructure elements, such as duct, channel, sub-duct, manhole, pole, tower and unlighted fiber" and the downstream market for "physical infrastructure."

The Board then assessed the complainants' allegations within the scope of Article 6 of the Law No. 4054, as well as the Turkish Competition Authority's Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings, and asserted that the refusal to deal constitutes an anti-competitive behavior if it (i) relates to a product or service in the upstream market that

[5] The Board's reasoned decision numbered 16-20/326-146, and dated 9 June 2016.

is indispensable for the activities of undertakings which compete in the downstream market, (ii) is likely to lead to the elimination of effective competition in the downstream market, and (iii) is likely to lead to consumer harm. Based on these conditions, the Board assessed whether Türk Telekom's conduct in question constituted a "refusal to deal" that would qualify as an abuse of dominance under Article 6 of the Law No. 4054. With respect to the first condition, the Board found that Türk Telekom's infrastructure components are indispensable for other operators' ability to build their own physical infrastructures for the provision of the electronic communication services (*i.e.*, the downstream market), and for their ability to compete effectively with Türk Telekom on the downstream market. The Board concluded that the second condition had also been met, considering Türk Telekom's high level of market share compared to its competitors, and due to the fact that Türk Telekom competes with the undertakings that are active in the downstream physical infrastructure market and that need Türk Telekom's upstream products for their activities in the downstream market. Thus, Türk Telekom's refusal to supply is likely to lead to the elimination of effective competition in the downstream market. Finally, as for the third condition, the Board held that Türk Telekom's refusal to supply prevents the fiber optic network from evolving and consequently prevents new undertakings from introducing more innovative products to the market, and that various cost efficiencies would have arisen without such behavior by Türk Telekom. Therefore, the Board concluded that Türk Telekom's conduct was likely to lead to consumer harm. Based on the foregoing, the Board determined that the conditions for establishing a refusal to deal had been met.

After having determined the existence of the refusal to deal by Türk Telekom, the Board further assessed whether Türk Telekom's behavior in question gave rise to de facto or potential market foreclosure, and could thus be considered as a violation of Article 6 of the Law No. 4054. Following a detailed analysis of the complainants' facility-sharing procedures, the Board found that Türk Telekom's refusal to supply had significantly extended the length of the procedure for the relevant operators' facility-sharing applications and had caused several damages to them. Furthermore, in order to determine if the refusal to supply practices in question had given rise to de facto market foreclosure, the Board also examined route lengths in terms of facility sharing and found that the levels of sharing remained highly limited. In light of the foregoing, the Board decided that the facility-sharing procedures had not been efficiently implemented and that Türk Telekom's refusal to deal practices had hindered the competitors' activities and had led to anticompetitive market foreclosure.

As a result of the foregoing examinations, the Board decided that Türk Telekom's refusal to provide access to the infrastructural elements constituted "abusive conduct" within the meaning of Article 6 of the Law No. 4054. Accordingly, the Board unanimously decided to impose an administrative monetary fine of TL 33,983,792.76 (approximately EUR 8.5 million at the prevailing exchange rate), which corresponds to 0.45% of Türk Telekom's turnover generated in its financial year of 2015.

The Board's decision is noteworthy, as it is one of the rare occasions in which a dominant company has been sanctioned for refusal to deal and also due to the Board's detailed assessment and explication of the criteria to be taken into consideration for determining an abusive refusal-to-deal practice.

Turkish Competition Authority's Amendments on the Merger Control Regulation in Turkey

The Turkish Competition Authority ("Authority") has introduced the Communiqué No. 2017/2 Amending Communiqué 2010/4 on Mergers and Acquisitions Requiring the Approval of the Competition Board ("Communiqué No. 2010/4") ("Communiqué No. 2017/2"). The Communiqué No. 2017/2

has been published in the Official Gazette on 24 February 2017, and entered into force on the same day. The amendments introduced to Communiqué No. 2010/4 are as follows:

(I) Article 1 of the Communiqué No. 2017/2 abolished Article 7(2) of the Communiqué No. 2010/4, which stated that "The thresholds set out in the first clause of this article are re-determined by the Board biannually." With the abolishment of the relevant clause, the Turkish Competition Board ("Board") is no longer rested with the duty to re-establish turnover thresholds for concentrations every two years. Therefore, there is no specific timeline for the review of the relevant turnover thresholds set forth by Article 7(1) of Communiqué No. 2010/4.

(II) Article 2 of Communiqué No. 2017/2 modified Article 8(5) of Communiqué No. 2010/4, which previously read as follows: "two or more transactions carried out between the same persons or parties within a period of two years shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué." The amended version of Article 8(5) reads as follows: "two or more transactions carried out between the same persons or parties or within the same relevant product market by the same undertaking concerned within a period of three years shall be considered as a single transaction for the calculation of turnovers listed in Article 7 of this Communiqué." According to the foregoing amendment, the Board would now evaluate the transactions realized by the same undertaking concerned in the same relevant product market within three years as a single transaction, as well as two transactions carried out between the same persons or parties within a three-year period.

(III) Article 3 of Communiqué No. 2017/2 has introduced a new paragraph to be included in Article 10 of Communiqué No. 2010/4, which reads as follows: "If the control is acquired from various sellers by way of a series of transactions in terms of securities within the stock exchange, the concentration could be disclosed through notification to the Turkish Competition Board after the realization of the transaction, provided that the following conditions are satisfied: (a) The Turkish Competition Board should be notified of the concentration without delay, (b) the voting rights attached to the acquired securities are not exercised or exercised solely to maintain the full value of the investments based on a derogation granted by the Turkish Competition Board. For the sake of completeness, the Turkish Competition Board may impose conditions and obligations in terms of such derogation in order to ensure conditions of effective competition." At any rate, although there was no similar specific statutory rule in Turkey on this matter until the promulgation of the Communiqué No. 2017/2, the case law of the Board had previously shed light on this matter. Indeed, in its Camargo/Cimpor decision (12-24/665-187, 03.05.2012), where the Board reviewed the acquisition of Cimpor-Cimentos de Portugal, SGPS, S.A. ("Cimpor") by Camargo Corrêa S.A. ("Camargo") by way of a public tender offer, the Board had already referred to Article 7(2) of ECMR. In the case in question, Camargo had filed this transaction following its public tender offer, but before acquiring the respective shares. As apparent from the reasoned decision, Camargo indicated that the exact date for the transfer of shares which would enable the acquisition of control over Cimpor could not be determined at the time of the filing. Accordingly, the Board resolved that even if Camargo acquired the majority of the shares (providing control) before the Board's approval decision, provided that it did not exercise these voting rights, this would not constitute a violation under the provisions of the Law No. 4054 on the Protection of Competition. To that end, even before the promulgation of the Communiqué No. 2017/2, based on the Board's Camargo/Cimpor precedent, the Board had already recognized that the parties would close a public bid on a listed company before the Board's approval, subject to the conditions that (i) the Board is notified of the transaction "without any delay," and (ii) the acquirer does not exercise the rights attached to the shares

that it acquired and which confer control over the target, pending the Board's approval.

As the Camargo/Cimpor decision is rather unique in this field and the Board's relevant case law has not been solidified further, a legislation-based clarification (providing a measure of legal certainty) on these types of concentrations, as introduced by the Communiqué No. 2017/2, is most welcomed.

New Block Exemption Communiqué No. 2017/3 for Vertical Agreements in the Motor Vehicle Sector in Turkey

New Block Exemption Communiqué No. 2017/3 for Vertical Agreements in the Motor Vehicle Sector ("Communiqué No. 2017/3" or "New Communiqué") was published in the Official Gazette on 24 February 2017. The New Communiqué spells the beginning of a new regime in the motor vehicle sector as it replaces the former Block Exemption Communiqué No. 2005/4 for Vertical Agreements and Concerted Practices in the Motor Vehicle Sector ("Communiqué No. 2005/4" or "Former Communiqué"). The Turkish Competition Authority ("Authority") also published a new set of guidelines along with the new legislation to elucidate finer and more practical issues pertaining to the implementation of the New Communiqué.

The road to the official adoption of the Communiqué No. 2017/3 had been an exemplary process, as the Authority issued white papers and sought stakeholders' input on draft versions of the secondary legislation. To that effect, the Authority previously launched a sector inquiry in 2011 to assess the impact of the Communiqué No. 2005/4, held a workshop on the motor vehicles sector in 2014, and published a draft communiqué in March 2016, which was widely noticed and favorably received by the stakeholders. The most notable changes in the Communiqué No. 2017/3 as compared to the Former Communiqué are as follows: (i) conditions for granting an exemption, (ii) non-compete obligations and multi-branding issues, and (iii) withdrawal of the exemption and calculation of market shares.

The New Communiqué sets a unilateral market share threshold in order for both quantitative distribution agreements and exclusive distribution agreements to benefit from the block exemption. Previously, the corresponding market share threshold provided for the quantitative selective distribution system was set at 40% in the Former Communiqué. The New Communiqué maintained the 30% market share threshold indicated for both sales markets and after-sales markets. As in the Former Communiqué, the New Communiqué did not quantify a threshold limit for the market share on the application of the block exemption for a qualitative selective distribution system.

Moreover, the New Communiqué excluded certain obligations and/or principles from its scope of application, including (i) the freedom to transfer the rights and obligations subject to the vertical agreement, (ii) the obligation to send a detailed and reasoned termination notice in writing, and (iii) the mandatory arbitration clause. On the other hand, the New Communiqué maintained the deep-rooted provisions propounded in the Former Communiqué concerning the time periods that apply to the termination notice. To that end, the provisions regarding (i) 6-month notice period for agreements that are made for at least 5 years, and (ii) a minimum 2-year notice period for agreements with an indefinite duration have been well-kept and remain in force.

Further, the New Communiqué separately regulates the sales of motor vehicles and after-sales services (*i.e.*, maintenance and repair services and spare parts) with respect to non-compete obligations, whereas the Former Communiqué regulated these non-compete obligations collectively.

The Communiqué No. 2017/3 defines a non-compete obligation within the context of motor vehicles as follows: "any direct or indirect obligation imposed on the buyer, aimed at purchasing, from the supplier or another undertaking to be designated by the supplier, more than 80% of the goods or services, or substitutes of such goods or services subject

to the agreement, based on the purchaser's purchases within the previous calendar year, in the market for sales of motor vehicles." This section represents a major divergence from the Former Communiqué that set the threshold at 30%, as opposed to the new 80% threshold. Accordingly, in regard to the sale of motor vehicles, the New Communiqué increases the 30% threshold to 80%, thereby allowing for the multi-branded distribution structure to be abandoned. The New Communiqué also indicates that non-compete obligations which do not exceed 5 years —or where an extension beyond 5 years is possible with the mutual consent of the parties and there are no circumstances hindering the purchaser from terminating the non-compete obligation — will benefit from the block exemption.

In line with the Former Communiqué, non-compete obligations regarding the distribution of motor vehicles and of spare parts, as well as the provision of maintenance and repair services, are not included in the scope of the exemption following the termination of the agreement. The New Communiqué preserved the provisions on repair services and the distribution of spare parts; it set forth that direct or indirect obligations that oblige the purchaser to make more than 30% of its purchases regarding a certain type of product cannot benefit from the group exemption in terms of maintenance repair services and the distribution of spare parts. Conversely, as an exception to the foregoing provision, non-compete obligations of up to 5 years, attributed to independent spare part distributors in terms of the spare part distribution networks that are established by independent spare part suppliers, and chain services in terms of maintenance repair chains, can benefit from the group exemption.

The New Communiqué lifts the provisions that hindered the establishment of additional sales under certain conditions. However, the same approach was not adopted for the establishment of additional service points in terms of the distribution of spare parts and maintenance repair services. Furthermore, the exemption is not applicable to the direct or indirect obligations that restrict the establishment of additional facilities and service areas where the selective distribution system is being applied.

Furthermore, the New Communiqué altered the statement of 'the case in which a substantial part of the relevant market is covered,' as set forth in the Former Communiqué, to 'the case in which the application covers more than 50% of the relevant market' (Article 8 of the New Communiqué), with respect to the withdrawal of the exemption. To that end, the Board may withdraw a block exemption in cases where this threshold is exceeded.

The New Communiqué also brings about several inferences on the grounds of (i) equivalent and original spare parts, (ii) restrictions hindering benefits of group exemption, and (iii) changes made to market shares which leap to the eye and are striking in terms of their scope.

With respect to the foregoing, it is worth mentioning that the definition of 'equivalent quality original spare part' under Communiqué No. 2005/4 provided that the compliance with the mandatory standards required by law was to be documented by the manufacturer, whereas under Communiqué No. 2017/3 the definition was amended as follows to be more definitive: "compliance of a part, which has been produced with the purpose of the replacement of the original parts used in a motor vehicle, with criteria such as mass, size, material, functionality, which is determined by comparison to the original part pursuant to inspection methods, is to be documented by an accredited institution."

Lastly, there have been minor amendments in terms of the restrictions that prevent certain agreements from benefiting from the group exemption. However, it would not be going too far to state that Communiqué No. 2017/3 preserved the provisions included in Communiqué No. 2005/4 to a large extent.

Labor Law

Protection of Personal Data of Employees in Turkey

Immediately after the Law on the Protection of Personal Data No. 6698 ("Law") came into force, on 7 April 2016, in Turkey, a variety of topics related to the law were enthusiastically discussed and argued by practitioners and other interested parties. By the first anniversary of the Law, many doctrinal issues had already been clarified. However, the scope and application of the law as it relates to the protection of employees' personal data is yet to be sufficiently elaborated or clarified. The underlying reason that keeps this issue at the forefront is that, according to the law, employers seemingly will no longer be able to share the personal data of their employees per se not only with third parties, but also with their headquarters, if those headquarters are located outside of Turkey.

Despite the fact that the processing of the personal data of employees is one of the key topics that the Law regulates extensively, one may argue that this is not a primary concern for employers because Article 75 of the Labor Law No. 4857 ("Labor Law") already obliges employers to keep personnel files for each employee. However, the new law is still relevant for employers in that, once employers intend to share and/or transfer the personal information of their employees, the Law sets particular red lines to be complied with. On the other hand, even before the Law, employers were already under the obligation to protect the personal rights and the privacy of their employees. More precisely, as per Article 75/2 of the Labor Law, employers may only share their employees' data in accordance with the applicable laws and the duty of honesty, and are not allowed to disclose information if an employee has a justifiable interest in keeping it confidential. Therefore, the Law combined with the Labor Law, further regulates how employers can use and share their employee data.

In practice, the Law introduces a significant new obligation for multinational companies operating in Turkey: As per Article 9 of the Law, no information can be transferred abroad without the explicit consent of the data owner. On the other hand, multinational companies generally prefer and endeavor to gather all employee-related records at one data center, usually located at a place outside of Turkey. The transfer of data to such centers, therefore, may be illegal unless the circumstances set forth under Article 5/2 or 6/3 of the Law are satisfied. Those two Articles elucidate the conditions under which the disclosure of information to entities outside of Turkey without the explicit consent of data owners (*i.e.*, the employees) is permitted. Therefore, it's clearly foreseeable that, once multinational companies decide to continue to transfer employees' personal information abroad without obtaining the explicit consent of employees, how the Court of Appeals will approach and adjudicate this matter will constitute a vital precedent. It will provide a leading roadmap for employees' rights in Turkey.

In consequence, since the Court of Appeals' approach and attitude toward the protection of employees' personal rights is yet to be revealed, a particular uncertainty concerning the privacy of the personal data of employees will continue to prevail for a while. Once the doctrine is settled and precedents start to guide practitioners on this issue in an explicit manner, employers will have a comprehensive roadmap to avoid any legal breaches, whereas employees will be able to ensure that their personal privacy rights are duly protected.

Litigation

The Constitutional Court Rejected Application for Partial Annulment of Article 14 of Press Law No. 5187

The Constitutional Court, with its decision numbered 2016/165 E, 2017/76 K. and dated 15 March 2017, rejected Istanbul 2nd Criminal Court of First Instance's application for partial annulment of Article 14 of Press Law No. 5187 ("Press Law"), which regulates the obligation of publishers to publish corrections

and reply texts in certain cases. According to Article 14 of the Press Law, in cases concerning a published statement (i) where the reputation or honor of an individual is damaged, or (ii) where there are unfounded allegations about an individual, the liable manager of the relevant periodical will be obligated to publish a correction or reply sent by the libeled party. Moreover, the text of the correction or reply must be published on the same page and column as the original offending article. If the liable manager and the editor reporting to the liable manager fail to comply with a judge's order to publish a reply and correction text, these persons may be subject to a fine, pursuant to Article 18 of the Press Law.

Istanbul 2nd Criminal Court of First Instance requested the annulment of the obligation to publish the correction and reply text on the same page and column as the original offending article. The court suggested that editorial matters, such as the contractual obligation to publish an advertisement on these pages or the inconvenience of rearranging the contents of the particular page in question, may cause problems in practice and make it impossible for the relevant editors to abide by the obligation to publish the correction and reply text on a specific page and column.

Further, pursuant to the First Instance Court's application, the Constitutional Court, after emphasizing the significance of the freedom of the press and the freedom of expression, as protected by the Turkish Constitution, explained that these freedoms are not absolute, and that they can thus be limited in some circumstances. The general principle with respect to the restriction of fundamental rights and freedoms under the Turkish Constitution is that these rights or freedoms may be restricted by a law passed by parliament, provided that the very "core" of the relevant right or freedom stays intact. However, a restriction not affecting the "core" of a right or freedom still needs to be in compliance with the requirements of a democratic society and any such restriction must also be proportionate to the purpose of the law.

The Constitutional Court stated that, according to Articles 26 and 28 of the Turkish Constitution, the freedom of expression and the freedom of the press can be restricted in order to preserve the rights and reputations of other parties. The Constitutional Court also noted that this principle is laid down in Article 10 of the European Convention on Human Rights as well, regulating the freedom of expression. Based on the principles and provisions explained above, the Constitutional Court determined that imposing a restriction on the freedom of the press by imposing an obligation to publish reply and correction texts does not affect the "core" of the freedom of the press, is proportionate to the purpose of the law, and remains in compliance with the requirements of a democratic society. The Constitutional Court further asserted that a decision to the contrary would leave individuals' freedom of expression vulnerable and disadvantaged against the freedom of the press, in light of the fact that the right to have reply and correction texts published is a part of an individual's freedom of expression.

After establishing that Article 14 of the Press Law is not contrary to the Constitution in general, the Court examined the specific part of the provision in question. The Constitutional Court rejected the application for the annulment of the obligation to publish correction and reply texts on the same page and column as the original offending article due to the following reasons: The Court found that publishing a reply and correction text on a specific page is the most effective way of reaching that part of the public who follows those particular pages and columns, since all pages or columns are not equally significant for all individuals. The Court further asserted that, with this obligation, the legislator aims to render the reply and correction text effective, by enabling the text to be as widely read and recognized as the original offending article.

Furthermore, this obligation aims to balance the freedom of the press against personal rights; therefore, it cannot be considered to be a disproportionate restriction of the freedom of the press. Thus, the part of the provision in question was found to be proportionate and in compliance with the requirements of a democratic society.

Upon the Constitutional Court's rejection of the application for partial annulment of Article 14 of the Press Law, the obligation to publish correction and reply texts on the same page and column as the original offending article remains in force, provided that other conditions set forth by the same provision are met.

Pharmaceutical Law

A Peek Inside the New Regulation on Packaging Information, Directions and Tracking of Human Medicinal Products

On 25 April 2017, the Regulation on Packaging Information, Directions and Tracking of Human Medicinal Products ("Regulation") was published in the Official Gazette and entered into force as of its publication date. Upon the publication of the Regulation, the previous Regulation on Packaging and Labeling of Human Medicinal Products (published on 12 August 2005) was repealed and abrogated.

The Regulation governs the principles concerning the notifications to be made by sellers/importers for the tracking of the distribution chain, and it also includes information that must be included on packaging and in the directions or instructions for human medicinal products.

- Interior and Exterior Packaging and Directions

Articles 5 and 6 of the Regulation list the information required to be added to the exterior and interior packaging of human medicinal products. As per Article 5 of the Regulation, in cases where a Turkish version of the exterior packaging cannot be prepared, manufacturers will be allowed to attach a label on the packaging specifying the required information listed in Article 5.

Furthermore, for exterior packaging to be prepared subject to the rules of Article 5, manufacturers/importers are obliged to include the name of human medicinal products in Braille format, as per Article 13. As specified in Provisional Article 2 of the Regulation, the packaging of all human medicinal products sold in Turkey should comply with this requirement by 31 December 2018.

Directions for use of human medicinal products, on the other hand, will have to be written and prepared in line with Article 8 of the Regulation.

- Marketing Samples

The principles regarding the marketing samples of human medicinal products are set forth under Article 10 of the Regulation. According to this Article, products to be used for marketing purposes as per the Regulation on Promotional Activities of Human Medicinal Products, must also fulfill the requirements of the Regulation. With that said, the Turkish Pharmaceuticals and Medical Devices Institution ("Institution") is charged with determining the products to be exempted from the data-matrix practice applied to marketing products. Data-matrix inserted into marketing products should clearly indicate that the product is for marketing purposes and not for sale.

- Tracking of Human Medicinal Products

The Regulation, contrary to the previous (now abolished) Regulation, brings a thorough arrangement and provides clarity as to the Product Tracking System ("System") of the Institution. Article 15 of the Regulation describes the mechanism of the System as follows: "The System operates based on the principle of the recording of notifications required to be made by partners, who are identified by a Global Location Number in accordance with their identified nature, to the

central data system and the tracking of the same. The data-matrix of human medicinal products is notified to the System by the license/permit holders. The System, upon checking the uniqueness, standards, and content of the notified data-matrix, records the data-matrix to the database or rejects those that are not qualified." The term "partner" used in the foregoing section is described in Article 4 of the Regulation as "real/legal persons, institutions or organizations that can, limited to their field of authorization, conduct any operation related to the human medicinal products' supply chain, such as manufacturing, importation, purchasing, sale, usage, consumption, exportation, assignment, loss, or refund."

In this respect, Article 15 of the Regulation lists incidents that should be disclosed to the System through notification by partners as well as by pharmaceutical warehouses. The principles concerning the recording and protection of the data gathered in the System are regulated under Articles 16 and 17 of the Regulation. As to the distribution of human medicinal products, partners are required to comply with the rules set forth under Article 17, which lays out the general transport packaging requirements.

- Transition Process

The Ministry has specified a transitional period for fulfilling the requirements under the Regulation. Transitional periods, as set forth by Provisional Article 1 of the Regulation, are as follows:

(1) Human medicinal products that were licensed or permitted or subject to a license/permit application before the enforcement of the Regulation will have to be brought into conformity with the packaging and direction requirements of the Regulation by 30 September 2017.

(2) Human medicinal products manufactured before 31 December 2017 can be preserved with their current packaging until the expiration of their shelf lives.

(3) For human medicinal products manufactured after 30 December 2017, the packaging and direction requirements of the Regulation are in effect and must be fulfilled.

(4) Foods for special medicinal purposes that are not reimbursed but brought under the scope of the data-matrix practice as per Article 5 of the Regulation should join and partake in the data-matrix practice by 31 December 2018 at the latest.

(5) Bulky parenteral, radiopharmaceuticals, and individualized human medicinal products should become participants in the data-matrix practice (under the scope of the guidelines specified in Article 20) by 31 December 2018 at the latest.

Data Protection Law

A Comparative Look at the Calculation of Administrative Fines under the Data Protection Law

The Law No. 6698 on the Protection of Personal Data ("DP Law"), which came into force on 7 April 2016, imposes administrative fines on those who fail to fulfill the obligations set out by the DP Law. The administrative fines range from 5,000 up to 1,000,000 Turkish Liras. The DP Law does not provide guidance as to the methods of calculation or the criteria to be used by the Personal Data Protection Board ("Board") for deciding on the amounts of administrative fines.

The calculation of these administrative fines is currently at the discretion of the Board, which will determine them in accordance with the general criteria set out by the Law No. 5326 on Minor Offences. That law states that if an administrative fine is regulated by guidelines indicating the minimum and maximum amounts that could be imposed, then (i) the wrongful content of the minor offence, (ii) the perpetrator's fault, and (iii) the perpetrator's financial status are to be taken into account in the calculation of the administrative fine to be issued. However,

these criteria alone are insufficient for the proper calculation of administrative fines under the DP Law. Currently, there is no precedent or clear guidance on the calculation of these fines or the potential consequences of data protection breaches in Turkey.

With that said, it is reasonably foreseeable that the practice in Turkey will, to a certain extent, be similar to the practice in Europe, considering that the DP Law was prepared in light of the European Union's Data Protection Directive (Directive 95/46/EC) ("Directive"). Therefore, it would be useful to look at the cases related to data protection breaches in the Member States and examine the sanctions imposed in those cases, in order to understand the practice in the European Union, which can provide much-needed insight with respect to the implementation of administrative fines in the Turkish jurisdiction.

In April 2017, the British Data Protection Authority ("ICO") fined 11 charities, including Cancer Research UK, Macmillan Cancer Support, Oxfam, International Fund for Animal Welfare and the National Society for the Prevention of Cruelty to Children (NSPCC), for breaches of the data protection law. The charities had given out the personal data of their donors and supporters to wealth-screening companies in order to rank them based on their wealth. Furthermore, they had matched the telephone numbers and e-mail addresses with the names of their supporters, and had shared their supporters' data with other charities as well. The penalties imposed on the charities ranged from £6,000 (Oxfam) up to £18,000 (International Fund for Animal Welfare).

Oxfam was fined for using data-matching techniques to obtain information such as telephone numbers, which had not been provided by its supporters, by exploiting other personal data that the supporters had given. Oxfam admitted that it had "tele-matched" a total of 267,521 records of donors and that it had used these telephone numbers to make marketing calls without informing the individuals in question that their data would be processed in this way. ICO was satisfied that these practices constituted a serious contravention of the law, taking into account (i) the length of time during which the practice took place, (ii) the number of data subjects whose rights had been infringed, and (iii) the fact that the data subjects were likely to have been significantly affected by the contraventions in practical ways, such as by receiving additional marketing communications from Oxfam. Consequently, ICO decided to impose a monetary penalty. ICO evaluated the mitigating and aggravating factors in determining the amount of the penalty.

The mitigating factors were set out as follows: (i) Oxfam's cooperation with ICO's investigations, (ii) the fact that Oxfam is a charity and sought to further its objectives in the public interest, (iii) the fact that Oxfam had taken remedial action, (iv) Oxfam's practice may have reflected, to an extent, commonplace approaches in the charitable sector, and (v) the proposed monetary penalty may have negative reputational consequences.

On the other hand, there were certain aggravating factors as well, including the following facts: (i) Oxfam had pursued unlawful practices over a period of several years, and on a continuing basis, (ii) Oxfam's status as a charity was not an excuse for its behavior, given that the unlawful practices were motivated at least in part by the prospect of financial gain, (iii) Oxfam violated the fundamental rights of a very large number of individuals, and (iv) Oxfam did so in a way that was substantially distressing to those individuals. ICO also took into account the underlying objective of promoting compliance with the data protection laws. ICO stated that, given the seriousness, nature and extent of the violations, the penalty could have been significantly higher, had it not been the case that ICO took into account the circumstances of Oxfam's actions in the context of similar

investigations into other charities.[6]

The International Fund for Animal Welfare ("IFAW") was among the charities that were similarly investigated by ICO. IFAW was fined for (i) using data-matching practices to obtain information (such as telephone numbers) that had not been provided by its supporters, by employing other personal data that the supporters had given, (ii) sharing 685,956 records in 2012 and 2013 with wealth-screening companies to rank its supporters based on their wealth, and (iii) sharing 4,948,633 records with around 60 other charities between 2011 and 2015 through a scheme run by an external company, enabling participating charities to share and swap the personal data of their supporters. ICO was satisfied that these practices constituted a serious violation, taking into account the same circumstances as it did in the Oxfam case. Consequently, ICO decided to impose a monetary penalty. Once again, ICO evaluated the mitigating and aggravating factors in determining the amount of the penalty.

The mitigating factors in this case were the same as in the Oxfam case. However, ICO emphasized that one of the aggravating factors in the IFAW case was the fact that the number of persons affected by the various breaches of the data protection laws was considerably higher, because some of the violations had occurred before ICO was authorized to impose a monetary penalty. It is apparent from the facts of the case that, since the contraventions were more serious and affected a larger number of people, ICO decided to impose a much higher penalty (triple the monetary penalty issued to Oxfam) on IFAW.

It seems to be the case that ICO imposes higher penalties for data protection breaches in cases concerning sensitive personal data. For example, in May 2016, ICO fined Blackpool Teaching Hospitals NHS Foundation Trust £185,000 for inadvertently publishing the private details of 6,574 members of staff, including their National Insurance numbers, dates of birth, religious beliefs and sexual orientations. Also in May 2016, Chelsea and Westminster Hospital NHS Foundation Trust was fined £180,000 after it revealed the email addresses of 781 users of an HIV service. ICO stated that it took into account the fact that the recipients of the e-mail addresses could infer the HIV status of the owners of the e-mail addresses, as well as the fact that 730 of the 781 e-mail addresses contained the full names of the service users, whilst deciding the amount of the fine.

The Office for Personal Data Protection in the Czech Republic ("Czech DPA") held T-Mobile Czech Republic responsible for a breach, following the theft of customer data by an employee, for not implementing proper technical measures to prevent the employee from copying data. The Czech DPA imposed a CZK 3,600,000 (approx. EUR 133,000) fine, out of the maximum of CZK 10,000,000 (approx. EUR 370,000), taking into consideration the fact that over one million customers had been affected. The mitigating factors in this case were the following: (i) T-Mobile adopted preventative measures following the leak, and (ii) the leak was a direct consequence of the criminal offence of the employee involved.

In one of the most recent cases, the Italian Data Protection Authority ("Italian DPA") imposed the largest fine ever imposed by a European Data Protection Authority, amounting to more than EUR 11 million for five companies, which attributed money transfers to persons who had not provided consent. The Italian DPA took into account (i) the seriousness of the violations, (ii) the number of persons concerned, and (iii) the importance of the database involved, in the course of determining the amount of the sanction to be imposed.

The Italian DPA's record fine brought the level of fines closer to the ones set out under

[6] https://ico.org.uk/media/action-weve taken/mpns /2013884/oxfam-monetary-penalty-notice.pdf

the EU's General Data Protection Regulation ("GDPR"), which will come into force in May 2018 and replace the Directive. Under GDPR, infringements of certain obligations may be subject to administrative fines up to EUR 20,000,000 or, in the case of an undertaking, up to 4% of the total worldwide annual turnover of the preceding financial year, whichever is higher.

The Bavarian Data Protection Authority ("Bavarian DPA") issued a guidance paper on various aspects of the GDPR, one of which was the amount of the administrative fines. The Bavarian DPA stated that the worldwide annual turnover of the whole group of companies will be taken into account, instead of the individual company's turnover, when determining the fine under the relevant GDPR provision (*i.e.*, up to 4% of the total worldwide annual turnover of the preceding financial year).

In conclusion, examples in Europe provide insight into the possible considerations that the Turkish Personal Data Protection Board may take into account when deciding on the amount of the administrative fine to be imposed. It is also important to note that the European Union is in a period of transition to a new data protection regime, and that GDPR will be entering into force shortly, replacing the Directive. It is likely that the Personal Data Protection Board will be taking into account not only the Directive, but also the GDPR, when construing the provisions and implementing the Law.

Internet Law

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

The owner of the website "borsagundem.com" ("Applicant") applied to the Constitutional Court for the annulment of Istanbul 2nd Criminal Court of First Instance's decision ("Court"), which had decided to impose an access ban on 18 pieces of content published on this website. The Applicant argued that banning access to the contents of its website constituted a violation of the freedom of the press and the freedom of expression. Furthermore, the Applicant stated that its right to a fair trial had also been contravened, since the Court had not made a proper and sufficient evaluation of the content in question, had not taken the statements of the Applicant, and declined to provide the reasoning underlying its decision.

In order to provide a brief background, the facts of the case can be summarized as follows: A person who was the subject of the news articles published on the website "borsagundem.com" applied to Istanbul 5th Criminal Judgeship of Peace for the removal of the news related to him from the website, claiming a violation of his personal rights. The 5th Criminal Judgeship of Peace decided that the content in question did not violate his personal rights and rejected the request for removal. Upon rejection, the Court reviewed the objection of the requesting party, partially agreed with the objection and decided to ban access to 18 out of 25 contents, reasoning that these contents violated the personal rights of the requesting party. The Applicant appealed this access ban decision to the Constitutional Court.

One of the news articles subject to the access ban decision reported that two brothers were tried in the court for being members of an organization that provided fraudulent guidance on stocks.

The Constitutional Court, after further review, decided to grant the Applicant's request, based on the fact that the Applicant's claims regarding the violation of the freedom of the press and the freedom of expression were not groundless.

According to the Constitutional Court, the freedom of the press includes the publication and distribution of thoughts, ideas, information, news and criticism and the

freedom of the press and the freedom of expression are vital for a democracy. It also asserted that the press has a duty to convey to the public every matter that includes or confers a public benefit and that it is not the duty of judicial authorities to determine the methods used by the press for reporting the news.

The Constitutional Court declared that access banning the news articles on the website of the Applicant undoubtedly constituted a violation of the freedom of the press and of expression. It further stated that, according to Articles 26 and 28 of the Constitution, the freedom of expression cannot be interfered with or restricted unless such a restriction is allowed and set forth by existing legislation and unless there is a legitimate interest that is stipulated under the relevant articles of the law. The Constitutional Court also stated that a determination should be made as to whether the restriction on the freedom the of press and the freedom of expression is in compliance with the conditions stipulated under Article 13 of the Turkish Constitution and whether or not the access ban decision is necessary and appropriate in a democratic society. It further noted that if a restriction on the freedom of the press or of expression does not satisfy a specific need or if it is not used as a last resort, then it cannot be viewed as an injunction that complies with the requirements of a democratic society.

The decision also noted that some of the news articles subject to the access ban decision included details of an official written accusation by the Public Prosecutor's Office and that some of them referred to civil lawsuits that had been initiated against certain people on the basis of this official written accusation. Therefore, the Constitutional Court concluded that the contents subject to the access ban decision could not be said to include any defaming statements and that they had a factual basis.

The Constitutional Court also indicated that even though the Court had stated that some of the statements on the news website were in violation of personal rights, it had not specifically identified the contents that violated personal rights and that the Court's decision did not provide a sufficient discussion of its reasoning.

The importance of protecting stock prices from manipulation and providing transparency in the stock market were also mentioned in the Constitutional Court's decision. Therefore, the Constitutional Court argued that, even though the person subject to these news articles became a target for criticism, the fact that the news articles subject to the application are related to stock market and that these news articles may have effect on the stock market should also be taken into consideration.

In light of the foregoing, the Constitutional Court, in its decision of 16 February 2017, stated that banning access to these news articles published on the website of the Applicant was not a proper and necessary restriction of the freedom of the press and determined that the access ban violated the freedom of the press and the freedom of expression, in contravention of the rights set out under Articles 26 and 28 of the Constitution.

Recent Amendments to the Regulation on Internet Mass Use Providers

A new Regulation on Internet Mass Use Providers ("Regulation") was published in the Official Gazette on 1 April 2017, and entered into force on the same date.[7] The Regulation was enacted based on Article 11 of Law No. 5651 on the Regulation of Broadcasts via the Internet and Prevention of Crimes Committed through Such Broadcasts ("Law"), and sets out the liabilities, obligations and auditing processes of Internet mass use providers.

[7] Text of the decision in Turkish can be found at: http://www.resmigazete.gov.tr/eskiler/2017/04/20170411-3.htm

The amendments are not major or extensive, but they nevertheless impose wider obligations on Internet mass use providers, which are defined as "real persons or legal entities providing the opportunity to the public to use the Internet at a certain place and in a certain period of time." It should be noted that this definition is extensive; for instance, an employer providing Internet use at its workplace might also fall thereunder.

As stated above, there are new obligations imposed on the Internet mass use providers. According to the public statement of the Information and Communication Technologies Authority ("ICTA") dated 11 April 2017,[8] to protect children from unlawful and unethical contents on the Internet, Internet mass use providers are obliged to use a filtering system to prevent access to unlawful content, keep access logs, and store them electronically on their systems for 2 years. Moreover, in case it is demanded by consumers, the right to demand and obtain secure Internet services (in addition to the filtering system) is included in Article 4 of the Regulation. Secure Internet services are regulated by ICTA, and these services should be provided by Internet service providers free of charge to their subscribers.

Additionally, public domain Internet mass use providers are obliged by the amendment to build a system that identifies its users with various methods, such as short message service (SMS). To comply with this provision, an Internet user might be forced to provide its phone number to the Internet mass use provider, for the identification of the relevant subscriber. Therefore, the Regulation introduces certain specific technical measures for Internet mass use providers.

[8] See https://www.btk.gov.tr/File/?path=ROOT%2F1%2FDocuments%2FBas%C4%B1n+B%C3%BClteni%2F%C4%B0nternet+Toplu+Kullan%C4%B1m+Sa%C4%9Flay%C4%B1c%C4%B1lar%C4%B1+Hakk%C4%B1nda+Y%C3%B6netmelik+D%C3%BCzenlemesi.pdf

The following liabilities are set forth in Article 5 of the Regulation, entitled "Liabilities of Internet mass use providers for commercial purposes":

- to keep the content filtration system active and up-to-date and to prevent the shutdown of the filtration system which is being used,
- to notify the local authorities about the changes of static IPs within 15 days,
- to keep access logs and to store them electronically on their systems for 2 years,
- to notify the local authorities about the closure or transfer of the workplace and to deliver the license within 15 days in accordance with the Regulation No. 2005/9207 on Establishing Business and Working Licenses, dated 14 July 2005.

Article 10 of the Regulation stipulated that the local authorities were responsible for auditing Internet mass providers. With the amendment, this duty passes to a commission which will be established within the body of the local authorities. Therefore, the following statement has been added to Article 10: "At least three members of the commission should carry out the auditing process. As a result of the audit, a report should be written and signed by the members in attendance. A copy of the report should be given to the owner or the manager of the workplace should acknowledge the receipt of the report by signing for it."

The lower limit of the administrative sanction for Internet mass use providers was reduced with the amendment to Article 11. The former article only set forth an administrative fine. However, the new article prescribes "a written warning for the first breach, a cessation of commercial activities for up to 3 days if the breach continues, and an administrative fine ranging from a thousand Turkish Liras to fifteen thousand Turkish Liras, if the breach is repeated."

In addition, the Prime Minister had been responsible for the supervision of the enforcement of the Regulation. With the

amendments, this duty is transferred to the President of the Information and Communication Technologies Authority.

In conclusion, with the amendment, the Regulation has been adapted to the Law, while imposing additional obligations and liabilities on Internet mass use providers. Considering the fact that the definition of Internet mass user providers is far-reaching, the amendments might be relevant to a large section of the public.

Real Estate Law

Principles on Real Estate Acquisition by Foreign Companies under Turkish Law

In Turkey, companies with foreign capital and foreign real persons can purchase immovable properties (*i.e.*, real estate) as long as they comply with certain legal limitations brought forth by the Land Registry Law No. 2644 ("Law").

Articles 35 and 36 of the Law, in this respect, establish certain restrictions and requirements on foreigners who wish to acquire real estate in Turkey.

- Foreign companies

As per Article 35 of the Law, commercial companies that are treated as legal persons and that are established in a foreign country in accordance with the local laws of that country, are allowed to acquire property and restricted real rights in Turkey, so long as they fall under the scope of a certain specific legislation (*i.e.*, Law No. 6326 on Petroleum, Law No. 4737 on Industrial Zones, and Law No. 2634 on Incentivizing Tourism).

Consequently, foreign companies, other than the ones contemplating the acquisition of property as per the Law on Petroleum, the Law on Industrial Zones, and the Law on Incentivizing Tourism, would not be able to acquire property in Turkey.

Article 35 also grants the Council of Ministers the right to determine, limit, partially or entirely cease or prohibit the acquisition of immovable property or limited real rights by foreign companies in rem, with respect to country, person, geographical area, duration, number, proportion, qualification, area meter, and quantity.

- Foreign-controlled companies

Article 36 states that Turkish companies with 50% or more direct or indirect foreign shareholding or Turkish companies in which foreign shareholders, directly or indirectly, have the right to appoint 'the majority of seats with management rights' ("Foreign-Controlled Companies") are allowed to acquire real estate in Turkey to carry out the activities mentioned in their Articles of Associations. Other companies with foreign capital, which do not fall under this definition (*e.g.*, companies with less than 50% foreign shareholding), would be subject to the same process for real estate acquisition as a company with domestic capital.

The acquisition of real estate within or near military zones or military security zones, as defined by the Law No. 2565 on Military Forbidden Zones and Security Zones ("Military Zones"), are subject to the approval of either the Turkish Armed Forces General Staff, the Provincial Directorate of Security, or the Provincial Gendarmerie Command (collectively, "Security Authorities") or the relevant Governor's Office.

The secondary legislation of the Law, (*i.e.*, the Regulation Regarding the Acquisition of Immovable Property and Restricted Real Rights by Companies within the Meaning of Article 36 of the Land Registry Law No. 2644 ("Regulation"), sets forth a clearance mechanism for Foreign-Controlled Companies who wish to acquire real estate in Turkey. As per Article 4 of the Regulation, to acquire a real estate property, Foreign-Controlled Companies shall first apply to the relevant

Governor's Office with the documents listed under the same article. Upon application, the Governor's Office will request information from the relevant Security Authorities as to whether the immovable property in question is located within a Military Zone (except for Special Security Zones) and, if so, whether the Foreign-Controlled Company's acquisition would pose a threat against national security. The Governor's Office will then determine whether the immovable property is located within Special Security Zones and, if so, whether it can be acquired by the Foreign-Controlled Company. If the immovable property in question is not within or near Military Zones or Special Security Zones, the Governor's Office will permit and notify the Foreign-Controlled Company to register this acquisition with the relevant title deed.

Anti-Dumping Law

Developments on Anti-Dumping Practices: The European Commission's Amendment Proposal to Anti-Dumping and Anti-Subsidy Legislation

After China, the world's largest merchandise exporter, joined the World Trade Organization (WTO) in 2001, it agreed to a 15-year transitional period during which other members would be allowed to use the "non-market economy" method for dumping calculations. This transitional period ended on 11 December 2016, and forced certain WTO members to revise their anti-dumping strategies.

On 9 November 2016, once this deadline was already on the horizon, the European Commission ("Commission") adopted a proposal to change the European Union's ("EU") anti-dumping and anti-subsidy legislation, which suggests a new method for calculating dumping on imports from countries where there are significant market distortions or state intervention.

As put forward by the Commission,[9] the motivation behind the proposal involves dealing with significant market distortions in certain countries, which can lead to industrial overcapacity.

The most significant aspects of the proposal are as follows:

– Current System: Non-Market Economy Method

Under the current system, anti-dumping duties are imposed if dumped imports cause injury to the domestic market. For calculation of "dumping," under current WTO rules, authorities compare the export price of a product with the domestic prices or the costs of the product in the exporting country.

However, in certain circumstances, due to state influence or governmental intervention, domestic prices and costs can be kept artificially low. In such cases, the current (and yet antiquated) system of the WTO, which divides countries into groups depending on whether they meet a set of market-economy criteria, allows players to use a method called the "non-market economy method," in which the price data from an "analogue country" (*i.e.*, another market-economy country) is used as the basis for the calculation.

This being said, the "analogue country" methodology will continue to be applied to non-market economy countries that are not members of the WTO.

– Proposed System: Market Distortion Approach

The newly proposed method, although similar to the existing one, suggests focusing on WTO members whose economies are "distorted" because of continued state intervention. Therefore, where distortion exists, benchmarks reflecting undistorted costs of production and

[9] See the Commission's press release at http://europa.eu/rapid/press-release_IP-16-3604_en.htm

sale (*i.e.*, corresponding costs in an appropriate representative country with a similar level of economic development) will be taken into account for dumping calculations.

- *When does state interference occur?*

The Commission explains that state interference occurs (i) when enterprises operate under ownership, control or guidance of state authorities, or (ii) due to discriminating public policies. The Commission provides (i) "discriminating public policies in favor of domestic suppliers," and (ii) "exporters' access to financing by institutions that implement public policy objectives" as examples of state interference.

- *Tracking distortions*

The proposal would also direct the EU's executive arm to publicly release available public reports on countries or sectors where it identifies distortions. These reports will then be available for anti-dumping investigations, as well as for industry players to use in their complaints to support their cases.

– Existing Investigations and Trade Remedy Measures Already in Place

The Commission has clarified that the new calculation method would only apply to cases initiated subsequent to the entry into force of the amended provisions. To this end, any ongoing anti-dumping investigations, as well as measures currently in place, will continue to be governed by the current disciplines.

White Collar Irregularities

Compliance Programs to Prevent Corporate Misconduct

With the proliferation of official investigations into international bribery allegations in recent years, as well as the huge fines imposed as a consequence of such investigations, much of the attention of the compliance community has lately been focused on anti-bribery efforts. However, equally important and potentially damaging for an employer is possible corporate misconduct by its employees, perpetrated within the scope of the activities of the company. In fact, recent years have witnessed as many internal investigations into corporate misconduct as internal investigations into corrupt behavior. Most commonly, corporate misconduct may manifest itself in the shape of criminal acts, such as misappropriation of assets, forgery of documents, and fraud, or sometimes in the guise of ordinarily non-criminal acts, such as conflicts of interest. Not only may companies be the victims of such employee behavior; in cases of fraud committed by an employee within the scope of the company's activities and to the benefit of the company, Turkish law also imposes an administrative fine against the company itself. Furthermore, in some cases, the existence of such irregular behavior may signal or presage further irregularities in employee behavior, such as bribery or bid-rigging.

However, this article will delve not into issues of corruption, but corporate misconduct and how to tackle it. In the face of such significant (potential) damage through fraud, companies are advised to establish and enforce compliance programs that are ready to deter and capable of detecting any possible corporate misconduct and fraudulent acts.

Internal fraud can manifest in different and often unexpected forms. Nevertheless, most schemes can be classified under particular categories. For example, when an employee uses an asset that was provided to him/her for a particular purpose but uses such an asset in order to benefit himself/herself or others, such a scheme may be categorized as a "misuse of assets", and it may be punishable by imprisonment from 6 months to 2 years and a judiciary fine (Article 155 of the Turkish Criminal Code No. 5237, "TCC"). This could occur, for example, when an employee is provided and entrusted with money to be

deposited in a creditor's bank account, fails to deposit the money as instructed, but instead uses the money to purchase goods for himself/herself or others.

Forgery of documents may occur in two ways: (i) forgery of official documents, or (ii) forgery of ordinary documents. According to the TCC, those who draw up an official document falsely or who change a valid official document and those who use the forged official document are to be punished with imprisonment from 2 to 5 years (Article 204, TCC). Moreover, those who draw up an ordinary document falsely or alter an ordinary document and use it, are to be punished with imprisonment from 1 to 3 years (Article 207, TCC). This could occur, for example, when fake signatures are used on official or ordinary documentation, when fake government permits are drafted, or when fake invoices are issued, among other circumstances.

Fraud occurs when one party deceives others through fraudulent conduct and secures a benefit for themselves or for others to the detriment of the deceived parties or others. Perpetrators of fraud face imprisonment from 1 to 5 years and judicial fines for up to five thousand days (Article 157, TCC). Fraud could occur, for example, when an employee deceives the company (*i.e.*, his/her employer) by claiming that he/she has achieved a higher amount of sales than he/she actually has, in order to receive a higher performance bonus from the company. False expense claims can also be an example of fraud—depending on the type of the forged expense documentation, this behavior could also fall under "forgery of documents."

Conflicts of interest are usually of a non-criminal nature and can occur when an employee creates the potential to compromise the best interests of the company by prioritizing the employee's own best interests. This could happen, for example, when an employee persuades the company to work with a third party whose owner is a close family member of the employee. Hiring or working with friends or relatives often results in a conflict of interest scenario, where the decisions may be based on or influenced by personal feelings or loyalties. Conflicts of interest may lead to questions regarding the qualifications of the business partner at best, and may even lead to more destructive forms of fraud (such as incidents of fraudulent supplier invoices, as mentioned above) at worst.

- How to protect businesses from corporate misconduct?

Effectively combating issues such as fraudulent or corrupt behavior essentially comes down to creating a culture of compliance within the company. Employees should be educated on what constitutes internal fraud or corporate misconduct, and be clearly informed that there are ground rules that they must abide by and that the company employs a zero-tolerance policy when it comes to issues of corporate misconduct (such as not tolerating fake expense invoices) Furthermore, it should be made crystal clear to employees that their actions will have consequences and that the company will impose disciplinary action for fraudulent behavior. By implementing these steps and having clear guidelines in place, a company can deter and prevent fraudulent behavior. For detection of potential wrongdoing, the company should regularly engage in internal audits and establish a whistleblower hotline. All these elements, as explained in detail below, constitute the key elements of a compliance program that is ready to detect and capable of deterring employee wrongdoings, and can therefore mitigate internal fraud and corporate misconduct risks for businesses.

- Code of Conduct: A company's Code of Conduct should clearly lay the ground rules of what is acceptable and expected behavior in that company and what is not. The Code of Conduct constitutes the fundamental document and the cornerstone of the

compliance program, and also sets out what happens when employees do not act in accordance with it. The Code of Conduct also addresses issues such as what the employees can (or are expected to) do when they encounter improper behavior. As this is a document that the employees will turn to when they are confused or uncertain about their behavior or responsibilities, it should be highly explanatory and include practical, real-life examples as much as possible. The Code of Conduct should be written in the local language of the jurisdiction.

- **Continuous Risk Assessment:** The compliance program and all of its components should be based on the particular risks faced by each company. These risks may change with sectors, with company size or with time. A continuous risk-based approach to compliance will ensure that resources will always be provided and spent on the areas where they are needed the most.

- **Commitment from Senior Management:** Senior leadership's support for and implementation of the anti-fraud policies is crucial to set an example for the employees and for the employees to take the policies seriously. Senior management should be supplemented and fully supported by middle management in this role. In order to prevent valuable and proprietary company information from spreading, the company may ask its high-level employees to sign a confidentiality agreement.

- **Effective Supervision:** A compliance program which is not adequately monitored could become ineffectual with time, regardless of how good it looks on paper. Thus, supervisors need to have sufficient autonomy (*e.g*, having direct access to the board of directors) and enough resources to do their jobs properly. The supervisors (*e.g.*, the legal head or compliance head of the company) should be given sufficient resources and the necessary authority to carry out his/her duties.

- **Employee Training:** Employee training is an essential tool to cultivate a culture of compliance throughout the company. Training sessions are where the employees learn that the compliance program is not just a paper fiction or a legal fig leaf, and that the company actually spends its resources on training because it takes issues of compliance very seriously. Training sessions should focus on the key issues and behaviors that the employees may think of as common acceptable practice even though they constitute fraudulent misconduct (such as issuing fake invoices to cover other expenses) and aim to change the employees' perspective. Conducting training sessions in the local language and including real-life examples is a must.

- **Third-Party Due Diligence:** Using third parties to conceal the misuse of assets and other types of fraud is a common phenomenon. Therefore, companies should conduct due diligence before engaging in business with third parties in order to find out whether they are qualified and trustworthy. Furthermore, when necessary, companies may provide compliance training to these third parties as well. A thorough due diligence could also be useful in uncovering potential conflicts of interest.

- **Enforcement:** One of the most effective ways of deterring fraud is enforcement of existing disciplinary measures against perpetrators. The enforcement patterns and the penalties imposed for fraudulent behavior should not differ between managers and regular employees in order to foster a culture of compliance.

- **Whistleblower Hotline:** In order for a company to discover potential wrongdoing (and to deter such behavior, due to the possibility of being caught), it is important that all employees are encouraged to report potential wrongdoing, without the fear of retaliation. A whistleblower hotline, especially an anonymous one, would encourage potential

witnesses to speak up and share their knowledge of corporate malfeasance. The company could then conduct an internal investigation to uncover the merit of the allegations, if it chooses to do so.

A compliance program should not be enacted just to fight corruption. It can also be designed to detect and deter all unethical employee behavior within the company. Therefore, companies should be mindful of the fact that they can make use of compliance programs to fight internal fraud and corporate misconduct as well, in addition to rooting out and penalizing corrupt behavior.

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