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LEGAL INSIGHTS QUARTERLY

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Preface to the December 2018 Issue

This issue examines numerous significant legal developments that have taken place in Turkey in the last quarter of 2018 regarding a variety of doctrines and subject matters. The Corporate Law section reviews and elaborates on regulations concerning the expiration of the terms of office of board members under the Turkish Commercial Code. The Capital Markets Law section focuses on and analyzes regulations and matters relating to capital losses and technical bankruptcies of public companies.

The Competition Law section discusses four significant decisions published by the Turkish Competition Board within the past quarter and provides in-depth examinations of matters such as hindering on-site inspections and the status of online sales channels in relation to traditional sales channels in the context of defining relevant product markets.

Compulsory use of the Turkish Lira as the applicable currency in commercial transactions, brought forth by recent Presidential Decrees, is examined in two separate articles with two distinct focuses. The mandatory use of the Turkish Lira in the context of employment agreements is assessed in the Employment Law section, whereas the general rules concerning sales agreements, service agreements, rental agreements, among others, are assessed in the Litigation section.

The Data Protection Law section explores the launch of the Data Controllers Registry Information System (VERBIS) and the associated decisions of the Data Protection Board, thus illuminating the duties and exemptions of operators regarding the newly introduced system.

A further significant matter discussed in this issue concerns the recent decision of the Constitutional Court with respect to the freedom of speech and of the press, in which the issue of access bans and the importance of freedom of speech and its contributions to democratic society were assessed. These matters are thoroughly evaluated in the Internet Law section.

Finally, the Real Estate Law section reviews and illuminates the recently adopted Regulation on Real Estate Trade, touching upon several important topics, such as the eligibility for owning a real estate business and how real estate services should be carried out.

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

December 2018

Corporate Law

Expiration of the Term of Office of Board Members

As per Article 362 of the Turkish Commercial Code No. 6102 ("***TCC***"), board members are elected for a maximum term of three (3) years. The term of office of board members may be determined freely in the articles of association of the company, or if not determined therein, at the general assembly meeting, in accordance with this basic principle.

Article 362 of the TCC sets forth the maximum length of time that board members can serve in any given election period, rather than setting an overall time limit on their terms as board members. In other words, shareholders can, once again, re-elect the same board member(s) at the end of their term(s) of office, for a further maximum term of three (3) years.

However, it should be noted there is no provision with respect to the authorities and responsibilities, if any, of board members following the expiration of their terms of office. Article 410 of the TCC regulates that the general assembly may be invited for a meeting by the board of directors even if its term has expired. However, this article relates only to an invitation of the general assembly to convene. There are differing views among legal experts with respect to Turkish legal doctrine regarding the status of board members whose terms of office have expired. Some commentators argue that, when the term of office of a board member expires, his/her board membership terminates automatically and that he/she no longer has any authority or responsibility regarding his/her board membership. On the other hand, other commentators have stated that, although one's membership of the board of directors terminates automatically when the term of office of a board member expires, such board members are nevertheless obliged to carry out necessary and urgent works (*e.g.*, making tax payments, paying rent(s) and employees' insurance premiums, *etc*.), required for the company's survival and the continuation of its business operations.

It should be noted that the decisions of the Supreme Court on this subject have also been controversial. Ultimately, the Supreme Court ruled in 2014 that, since there is no specific provision stipulating that membership of the board members will terminate automatically at the end of their terms of office; former board members must continue to carry out their duties in extraordinary and urgent cases, until new board members can be elected to replace them. Therefore, it could not be argued that a company lacks a duly authorized executive body solely due to the expiration of the term of office of some of its board members.

The Supreme Court decision mentioned above appears to provide an alternative pathway for companies that are unable to complete their general assembly meeting procedures in time, as well as for shareholders who are temporarily unable to agree on or select new board members. However, in practice (and particularly for transactions with third parties, as opposed to the internal decisions of the board of directors), we observe that the expiration of the terms of office of the board members of a company may lead public authorities to refuse to recognize the resolutions or signature circulars of that company.

Banking and Finance Law

FX Loans: Exceptions, Clarifications and Monitoring

I. General Overview

The Decree No. 2018/11185 amending the Decree No. 32 on the Protection of the Value of the Turkish Currency ("***Decree No. 32***") and the Communiqué No. 2018-32/46 amending the Communiqué on the Decree

No. 32 on the Protection of the Value of the Turkish Currency ("***Communiqué No. 2008-32/34***") were published in the Official Gazette No. 30312 on January 25, 2018, and entered into force on May 2, 2018.

Following these amendments, individuals residing in Turkey are no longer permitted to obtain foreign exchange loans from banks and financial institutions in Turkey or abroad. Certain restrictions have also been introduced with respect to the utilization of foreign exchange loans, which are applicable to legal entities residing in Turkey. Certain limitations and exceptions to this general rule have also been set forth under the amendments to the Decree No. 32.

The Central Bank of the Republic of Turkey ("***Central Bank***") has adopted a new Capital Movements Circular ("***Circular***"), which has come into effect as of May 2, 2018, as per the Decree No. 32 and the Communiqué No. 2008-32/34. This Circular introduces new exceptions to the restrictions on foreign exchange loans and determines the rules and principles relating to the utilization of foreign exchange loans from banks and other financial institutions.

The Central Bank has also amended the Regulation on the Procedures and Principles of Monitoring Transactions Affecting Foreign Exchange Position by the Central Bank ("***Amending Regulation on Monitoring Transactions Affecting Foreign Exchange Position***"), effective as of September 19, 2018. The Regulation on the Procedures and Principles of Monitoring Transactions Affecting Foreign Exchange Position by the Central Bank had introduced certain notification obligations for firms that take out foreign exchange cash loans and foreign exchange denominated loans. However, following the entry into force of the Amending Regulation on Monitoring Transactions Affecting Foreign Exchange Position, (i) the scope of the firms affected by the regulation, (ii) the deadlines for submitting the required information to the Central Bank, and (iii) the registration process for the Systemic Risk Data Monitoring System ("***System***") have all been amended.

In this article, we will address the main exceptions and clarifications newly stipulated for foreign exchange loans obtained from abroad, and also discuss amendments to the monitoring of transactions affecting foreign exchange positions.

II. New Exceptions to the Restrictions on Foreign Exchange Loans to be Obtained from Abroad

Save for the exceptions stipulated in the Decree No. 32, legal entities residing in Turkey are required to have foreign exchange revenue in order to be allowed to obtain foreign exchange loans. The Circular introduces additional exceptions to this general foreign currency income requirement, as follows:

- Investments for renewable energy resources within the scope of the Law on the Utilization of Renewable Energy Sources for the Purposes of Generating Electricity No. 5346 which benefit from a purchase guarantee are exempted from the general requirement of foreign currency income.

  Turkish legal entities that are awarded tenders within the scope of the Law on the Implementation of Privatization No. 4046 and public tenders with a contract price denominated in a foreign currency may also obtain foreign exchange loans even if they do not have foreign currency income.

- Based on the acquisition financing, legal entities residing in Turkey and incorporated with the sole purpose of acquiring the shares of a target company may obtain foreign exchange loans without having foreign currency income as well.

- Fully owned Turkish subsidiaries of multinational companies are also exempted from the general requirement of having foreign currency income, if they obtain foreign exchange loans from other group companies residing outside of Turkey.

III. Other Matters

Although there are several exceptions to the general rule (as summarized above), the documentation requirements and the permitted maximum amount of an FX loan should, in any case, be separately checked and confirmed.

According to Article 24 of the Circular, apart from banks and other financial institutions, legal entities residing in Turkey may not obtain or receive revolving loans from banks, financial institutions or any other firms/persons not residing in Turkey.

Moreover, foreign exchange loans obtained by Turkish legal entities from the foreign branches of Turkish banks or other financial institutions (including off-shore branches and excluding branches in free zones) are deemed and treated as foreign exchange loans obtained from abroad.

Intermediary banks are obliged to check and verify whether a legal entity residing in Turkey that obtains foreign exchange loans from abroad complies with the general rules regarding foreign exchange loans. Accordingly, a legal entity residing in Turkey must submit copies of its loan agreement(s) and repayment schedule(s) to the intermediary bank in order to enable such intermediary bank to check whether the entity is paying back its debts in compliance with the repayment schedule.

IV. Monitoring of Transactions Affecting Foreign Exchange Positions

The scope of firms that have notification liabilities before the Central Bank has been changed by entry into force of the Amending Regulation on Monitoring Transactions Affecting Foreign Exchange Position. In this regard, (i) real persons, (ii) private legal entities (excluding banks and other financial institutions), (iii) metropolitan municipalities, municipalities and their affiliated enterprises and administrations, (iv) economic enterprises of metropolitan municipalities and municipalities, in which they hold more than half of the capital, (v) public economic enterprises, and (vi) higher education institutions will be subject to the notification requirement when their foreign exchange cash loans utilized in Turkey and abroad, combined with their foreign exchange indexed loans, exceed USD 15 million in total.

Capital Markets Law

Public Companies: How to Deal with Capital Losses and Technical Bankruptcies

Article 376 of the Turkish Commercial Code No. 6102 ("***TCC***") stipulates compulsory measures to be taken by certain organs of joint stock companies (*i.e.*, the board of directors and the general assembly), regardless of whether or not they are public companies, in the event of a loss reaching or exceeding certain ratios in the sum of such companies' share capitals and legal reserves.

Briefly, (i) Article 376/1 addresses the cases in which one-half (1/2) of the sum of the share capital and legal reserves of a joint stock company (hereinafter referred to as simply "*company/companies*") remain uncovered as per the latest annual balance sheet, (ii) Article 376/2 addresses the cases where two-thirds (2/3) of the sum of a company's share capital and legal reserves remain uncovered as per the latest annual balance sheet, and (iii) Article 376/3 addresses the cases where a company's assets do not suffice to cover its debts (*i.e.*, financial distress or technical bankruptcy).

On the other hand, the Capital Markets Board of Turkey has also set out certain clarifications and exceptions with respect to the implementation of Article 376 for public companies, in accordance with its decision dated April 10, 2014, and numbered 11/352 ("***CMB's Decision***"). In this respect, public companies are subject to (and must comply with) the instructions put forth in the CMB's Decision.

Until very recently, it should be noted that, the implementation of Article 376 was a highly controversial topic for non-public companies, since there was no existing secondary legislation on the matter. In order to eliminate legal uncertainty and reconcile differing implementations in practice, the Ministry of Trade has introduced the Communiqué on the Procedures and Principles as to the Implementation of Article 376 of the Turkish Commercial Code ("***Communiqué on Article 376***") on September 15, 2018, which entered into force on the same date.

While practitioners and commentators were still discussing the issue and deliberating on whether the Communiqué on Article 376 would also be applicable to public companies, the CMB made an important announcement on October 4, 2018 which confirmed that the CMB's Decision and the provisions of the Communiqué on Article 376 should be taken into consideration and implemented jointly for public companies.

In light of these developments, the relevant rules, procedures and principles regarding implementation, which are collectively stipulated in Article 376 of the TCC, the Communiqué on Article 376, and the CMB's Decision, will be examined below as they relate to public companies:

I. In case one-half (1/2) of the Sum of Share Capital and Legal Reserves Remain Uncovered:

Article 376/1 of the TCC and Article 5/1 of the Communiqué on Article 376 stipulate that, if the latest annual balance sheet of a company affirms that one-half (1/2) of the sum of a company's share capital and legal reserves remain uncovered due to loss, the board of directors should immediately invite and convene the shareholders for a general assembly meeting, inform the shareholders regarding the financial situation, and provide the shareholders with a list of possible remedies that it sees fit in the relevant meeting. In such cases, the "early detection of risk committee" should also inform the board of directors, if it detects or notices this type of deterioration in the financial condition and circumstances of the company.

Article 5/1 of the Communiqué on Article 376 also stipulates that, if a company falls under the threshold of Article 376/1, this situation should, in any case, be discussed in the first general assembly meeting of the company, even if the agenda of the meeting comprises different topics.

As per Article 376/1 of the TCC and Article 6 of the Communiqué on Article 376, possible remedies are not numerus clausus (*i.e.*, limited in number). They could include capital increases in cash or from internal sources (*e.g.*, undistributed dividends), solutions such as closing or downsizing of certain divisions or branches, selling subsidiaries, adopting new and different marketing strategies, among many others.

In addition to the foregoing, according to the CMB's Decision, the following actions should be also taken:

- The situation regarding the company's deteriorating finances should be communicated in the company's annual financial statements, which are subject to public disclosure rules in accordance with the Communiqué on the Principles of Financial Reporting in Capital Markets (II-14.1) ("***Communiqué on Financial Reporting***").

- In the financial statements, the following formula should be used for the calculation of the amount of the loss: [((Share Capital + Legal Reserves) – Equity) / (Share Capital + Legal Reserves)]. For companies preparing consolidated financial statements, the total amount of the equity should be taken into consideration during the foregoing calculation.

II. In case two-thirds (2/3) of the Sum of Share Capital and Legal Reserves Remain Uncovered:

Article 376/2 of the TCC and Article 5/1 of the Communiqué on Article 376 stipulate that, if the latest annual balance sheet affirms that two-thirds (2/3) of the sum of a company's share capital and legal reserves remain uncovered due to loss, the board of directors should immediately invite and convene the shareholders for a general assembly meeting, and inform the shareholders about the financial situation of the company. The responsibility of the "early detection of risk committee" to inform the board of directors should be subject to the foregoing threshold as well, although this is not explicitly stated in the relevant legislation.

Article 376/2 of the TCC and Article 7 of the Communiqué on Article 376 stipulate and describe the resolutions that could be adopted by the shareholders during the subsequent general assembly meeting. Accordingly, the general assembly should adopt one of the following two resolutions: (i) to decrease share capital to an amount equal to one-third (1/3) of the original share capital, or (ii) to provide additional share capital to restore it to its original amount (*i.e.*, share capital completion). In addition to the above, Article 7/1 of the Communiqué on Article 376 stipulates a third option, which involves a share capital increase that could be adopted and approved by the general assembly.

As per Article 9 of the Communiqué on Article 376, the completion of share capital could be realized by way of cash injection(s) by shareholders on a complimentary basis. In such a case, the injected cash amount would be unreciprocated (*i.e.*, it would be given without receiving any equivalent consideration and/or shares in return). It should be noted that the general assembly cannot force the shareholders to inject cash into the company without a unanimous decision; however, some of the shareholders may choose (of their own accord) to deliberately inject cash into company on a complimentary basis.

Also, as per Article 10 of the Communiqué on Article 376, a share capital increase could be carried out by way of: (i) decreasing share capital by an amount equal to the loss and simultaneously increasing share capital by the desired amount, or (ii) injecting cash in return for newly issued shares. If option (i) is chosen, at least one-fourth (1/4) of the increased share capital must be paid at the time of the concurrent share capital increase. Similarly, if option (ii) is selected, at least one-half (1/2) of the share capital must be paid prior to the registration of the general assembly resolution with the trade registry.

According to Article 376/2 of the TCC and Article 11 of the Communiqué on Article 376, the company shall cease to exist if (i) the shareholders do not convene, or (ii) the shareholders do convene, but fail to adopt any of the aforementioned three resolutions at the general assembly.

According to the CMB's Decision, the following actions should be taken in addition to the foregoing:

- The financial situation of the company should be stated in the company's annual financial statements, which are subject to certain public disclosure requirements in accordance with the Communiqué on Financial Reporting.

- In the financial statements, the following formula should be utilized for the calculation of the loss amount: [((Share Capital + Legal Reserves) – Equity) / (Share Capital + Legal Reserves)]. For companies that are preparing consolidated financial statements, the total amount of the equity should be taken into consideration for the foregoing calculation.

- If the latest annual balance sheet of the company affirms that two-thirds (2/3) of the sum of share capital and legal reserves remain uncovered due to loss, the board of directors should also conduct an analysis with respect to the situation and the financial distress of the company.

III. In Case of Financial Distress (Technical Bankruptcy):

Article 376/3 of the TCC and Article 12 of the Communiqué on Article 376 stipulate cases in which a company's liabilities exceed its assets. Accordingly, if there are any indications that the liabilities of a company exceed its assets, the obligation imposed on the board of directors is to initially prepare an interim balance sheet. This interim balance sheet should be prepared in compliance with the principles of both: (i) going concern concept ("***Balance Sheet of Going Concern Concept***"), and (ii) possible purchase price of assets ("***Balance Sheet of Article 376***").

As per Article 12/4 of the Communiqué on Article 376, if a company falls under the threshold of Article 376/3, it could implement one of the remedies explained in detail under Section (II) above. However, if the interim balance sheet affirms that the liabilities of the company exceed its assets (*i.e.*, the assets are not sufficient to meet creditors' receivables), then the board of directors should inform the relevant commercial court of first instance of the situation and file for bankruptcy.

According to the CMB's Decision, some of the actions that should be taken (in addition to the foregoing) can be summarized as follows:

- For companies that are subject to the requirement to prepare interim financial statements in accordance with the Communiqué on Financial Reporting;

  - For the Balance Sheet of Going Concern Concept, periodical financial statements are taken into consideration within the scope of the Communiqué on Financial Reporting.

  - The Balance Sheet of Article 376 is not subject to the provisions of the Communiqué on Financial Reporting. However, this interim balance sheet should be prepared within thirty (30) days, as of the date on which suspicions arise concerning the company's technical bankruptcy, and this interim balance sheet will have the same date as the Balance Sheet of Going Concern Concept.

- For companies that are not subject to the requirement to prepare interim financial statements in accordance with the Communiqué on Financial Reporting, the Balance Sheet of Going Concern Concept should be prepared in accordance with the principles of the Communiqué on Financial Reporting.

In light of the applicable Turkish corporate law doctrine and the CMB's Decision, it should be highlighted that all procedures that are already conducted (or are to be conducted) within the scope of Article 376, and consequently the provisions of the Communiqué, are the responsibility of the board of directors. In accordance with Article 375, this liability cannot be transferred to other executives of the company.

IV. Other Significant Points

As per Article 14 of the Communiqué on Article 376, a public company that has lost its share capital or is in technical bankruptcy could merge with another company by being absorbed by that company, as long as the merger is conducted in line with the CMB's further requirements regarding such transactions. In this respect, the company that absorbs the public company which has suffered a capital loss should have disposable equity that is sufficient to cover the loss in share capital (and legal reserves).

Furthermore, according to Provisional Article 1 of the Communiqué on Article 376, until January 1, 2023, damages arising from fluctuations of non-performed debts in foreign currencies may not be taken into consideration for the calculations relating to the financial position of a company, in terms of the application of Article 376.

Competition Law / Antitrust Law

An Insight for Competition Law Assessment on Media Related Markets: The Competition Board Unconditionally Approved Demirören Medya Yatırımları Ticaret A.Ş.'s Acquisition of Certain Media Sector-Related Assets of Doğan Şirketler Grubu Holding A.Ş.

The Turkish Competition Board (**"Board"**) recently published its reasoned decision[1] unconditionally approving the acquisition of sole control over certain assets of Doğan Şirketler Grubu Holding A.Ş. ("***Doğan Holding***") by Demirören Medya Yatırımları Ticaret A.Ş. ("***Demirören Medya***"), which is ultimately owned and controlled by Erdoğan Demirören. The transaction concerns the following assets: (i) Doğan TV Holding A.Ş., (ii) Mozaik İletişim Hizmetleri A.Ş., (iii) Doğan Gazetecilik A.Ş., (iv) Doğan Haber Ajansı A.Ş. ("***Doğan News Agency***"), (v) Hürriyet Gazetecilik ve Matbaacılık A.Ş., (vi) Doğan Media International GmbH, (vii) Doğan Dağıtım Satış Pazarlama Matbaacılık Ödeme Aracılık ve Tahsilat Sistemleri A.Ş., and (viii) Doğan Internet Yayıncılığı ve Yatırım A.Ş. The Board found that Doğan Holding's activities subject to the notified transaction overlapped horizontally with Demirören Medya's activities that were related to print and online publications. Furthermore, the target businesses vertically overlapped with Demirören Medya's media-related activities, namely in the fields of agency services, newspaper and magazine distribution services, and the sale of online advertising spaces. Accordingly, the Board examined and assessed whether the transaction could raise anticompetitive concerns on both horizontally and vertically affected relevant product markets.

For defining the relevant product market(s) comprising the horizontally overlapping activities of Doğan Holding and Demirören Medya, the Board evaluated whether online and digital publications could be considered substitutes for printed publications from the perspectives of supply, demand and advertisers. Pursuant to its analysis, the Board concluded that online publications could not fully constitute a substitute for printed press products, because (i) there was a difference in quality between the "journalism" offered by print publications—which is an important feature of the printed press—and the "news" that is offered by online platforms, (ii) online news resources were found to mostly serve as "one-stop shops," instead of offering or fulfilling the comprehensive quality standards of a printed newspaper, and that, accordingly, (iii) the advertisement revenues generated by print publications are still significantly higher than the advertisement revenues generated by the online press.

However, the Board abstained from providing a specific relevant product market definition. Instead, the Board opted to examine the competitive aspects of the proposed

[1] The Board's decision dated May 3, 2018, and numbered 18-13/248-113.

transaction, (i) first under the narrowest hypothetical markets for "daily national political newspapers" and "online news websites," and then (ii) under the broadest market definition for "printed and online news resources," conducting its analysis under the assumption that print publications and online channels are substitutable.

As for the vertically related markets, although the Board did not provide a specific relevant product market definition, it nevertheless considered that the transaction in question could potentially affect (i) the broadest market for "newspaper and magazine distribution," and (ii) the narrowest market for "agency services for non-programmatic sales of online advertising spaces", and conducted its assessment accordingly.

The Board first examined the transaction in the context of the market for "daily national political newspapers". To that end, the Board noted the existence of strong competitors in this market, such as the Turkuvaz Group, T Media, the Ciner Group and Estetik Publishing, which could diminish the risk of unilateral effects on consumers. The Board also pointed out the two-sided nature of these markets, in which consumer harm may be conceived/considered from the perspective of the audience or of the providers of advertisement services. The Board evaluated that the revenue from the sale of newspapers is limited compared to the revenue received from selling advertisements, which reduces the risk of potential consumer harm through an increase in the prices of newspapers following the consummation of the transaction. As for the effects on advertisers, the Board observed that the HHI and CR4 ratios pointed to a possible increase in the level of market concentration post-transaction. However, the Board also noted that the cost for placing advertisements in national newspapers is consistently declining, which would make it difficult for an actor to implement a price strategy based on its market power in a market where the demand for the product is continually decreasing. Moreover, the Board stressed the fact that consumers and advertisers are able to access alternative newspapers with high levels of market power, which would eliminate the post-transaction competitive concerns in this particular market.

The Board then examined the competitive effects of the notified transaction with respect to the market for "online news websites." The Board preferred to conduct its market-share analysis on the basis of advertising revenues, instead of considering the number of users or views. The Board found that: (i) the HHI and CR4 ratios were much lower than the thresholds indicating concentration in the market, and (ii) the post-transaction market share of the undertakings would be considerably lower than the market-share threshold signifying the existence of a dominant position.

Based on the foregoing considerations, the Board concluded that the transaction in question would not raise competitive concerns in these narrow markets for "daily national political newspapers" and "online news websites." The Board assumed that the same conclusions would also apply to the broadest market for "printed and online news resources" given its finding that the transaction would not lead to any competitive concerns even for the narrow markets.

Finally, the Board examined the effects of the notified transaction on the vertically related markets, and concluded that the transaction would not raise any anticompetitive concerns for the following reasons: (i) Doğan News Agency did not possess a high market share and the transaction could not vest a sufficiently high buying power on Demirören Medya to foreclose the market to competing news agencies; (ii) the Board took into consideration the requirements imposed on the undertakings operating in the newspaper and magazine

distribution services market, pursuant to the Press Law No. 5187, which prohibits undertakings from refusing to distribute rival newspapers or engaging in discriminatory practices; (iii) the Board argued that the presence of foreign players in the markets for "sales of online advertising spaces" and "agency services for non-programmatic sales of online advertising spaces" creates competitive constraints upon the parties, and thereby prevents potential coordination between vertically integrated undertakings.

In light of the foregoing considerations, the Board approved the transaction unconditionally. The decision provides useful insights regarding the definition of the relevant product market and the assessment of market power and levels of concentration in media-related markets. This decision can also be viewed as an important precedent in which the Board considered the specific market characteristics of the media sector in Turkey for its assessment of the effects of the notified transaction, despite the prominent market positions of the transaction parties.

The Board Imposed a Fine on Mosaş Akıllı Ulaşım Sistemleri A.Ş. for Hindering an On-site Inspection

The Board recently published its reasoned decision concerning Mosaş Akıllı Ulaşım Sistemleri A.Ş. ("***Mosaş***") for hindering the on-site inspection conducted by the officials of the Competition Authority ("***Authority***") on June 5, 2018, at the premises of Mosaş.[2]

Pursuant to the preliminary investigation launched upon the Board's decision regarding the signalization market,[3] an on-site inspection was carried out on June 5, 2018, at Mosaş's premises in Konya. The Board, whilst summarizing the events that occurred during the on-site investigation, stated that the case handlers had presented their authorization for the on-site inspection and furnished their official identification cards, informed the Mosaş personnel about the preliminary investigation, and stated that, in accordance with the preliminary investigation, an on-site inspection would be carried out at the premises.

The Board determined that internet access had been disconnected twice while the on-site inspection was being carried out. Following the disconnections, a case handler noticed that the e-mails under review were being deleted by Mosaş personnel. As this situation was being investigated, another case handler noticed that a Mosaş employee was communicating about the undertaking through an online chat group. The case handlers requested and obtained the phone used for this communication, and also observed that the online conversations were displayed on the computer of the employee in question.

During the examination of the relevant online conversations, it was ascertained that (i) photographs of the Authority officials were being shared through the chat group with Mosaş employees, and (ii) Mosaş employees were being instructed to "*disconnect the internet so they cannot gain access,*" "*break the modem device,*" and "*erase e-mails*." The Authority officials took screenshots of these conversations.

The Board further explained in its decision that, as the officials from the Authority were taking these screenshots, a senior Mosaş employee and one of its lawyers arrived on-site. They informed the case handlers that they would hold a meeting to assess whether allowing the on-site inspection to continue would be in Mosaş's best interests, and that they may decide to halt or discontinue the on-site inspection. According to the Board,

[2] The Board's decision dated June 21, 2018 and numbered 18-20/356-176

[3] The Board's decision dated March 8, 2018, and numbered 18-07/124-M.

following this conversation, as the Authority officials were taking screenshots showing that the e-mail messages under review were being deleted, there was a power outage at the inspection site. After a while, despite electricity being restored, the internet connection could not be sustained or repaired. Mosaş personnel stated that they had requested assistance from the internet service provider, Türk Telekom, to restore the internet connection. The Authority requested information from Türk Telekom to verify this claim; however, Türk Telekom did not have any records indicating that they had received such a request from Mosaş, nor of a systematic internet connection failure in the area where Mosaş is located.

Additionally, the Board stated that, despite being repeatedly informed of the penalties for obstructing an on-site inspection by the Authority officials, Mosaş representatives continued to prevent the Authority officials from implementing inspection procedures and carrying out their duties. Furthermore, the computer system units that had been previously examined by the Authority officials were seized by a Mosaş representative, which ultimately prevented the completion of the inspection. In addition, Mosaş did not allow the Authority officials to print or copy the gathered information on external hard drives, despite being warned about the potential repercussions of such obstruction for Mosaş. Following the negotiations between Authority officials and Mosaş personnel, the Authority officials were allowed to copy the relevant documents, during which Mosaş personnel recorded the process on video. Mosaş personnel also refrained from signing the affidavit documenting the hindrance and obstruction of the on-site inspection.

In this respect, the Board declared that, since on-site inspections are one of the most significant and useful tools for determining whether the Law No. 4054 on the Protection of Competition ("***Law No. 4054***") has been infringed, on-site inspections must be exercised efficiently and effectively in order to attain beneficial results. The Board also noted that, pursuant to Article 15 of the Law No. 4054, hindering or obstructing an on-site inspection triggers an administrative monetary fine.

Based on the foregoing information, the Board concluded that Mosaş had hindered the on-site inspection process, and thus, pursuant to Article 16(1)(d) of the Law No. 4054, ruled that an administrative monetary fine of TL 81,500.87 should be imposed on Mosaş (the amount was calculated at the rate of 5/1000 of Mosaş's gross revenues generated in its 2017 financial year).

In addition, the Board imposed an administrative monetary fine of TL 8,150.09 (corresponding to 5/10000 of its gross revenues for 2017), pursuant to Article 17 of the Law No. 4054, for every day that Mosaş refrained from inviting the Authority to conduct the on-site inspection and thus ending the violation.

Calculation of Turnover in Terms of a Concession Agreement: The Board's Decision on the ERG Verbund Transaction

The Competition Authority published on its official website the Board's reasoned decision[4] to unconditionally approve the acquisition of sole control over ERG Verbund Elektrik Üretim ve Ticaret A.Ş. ("***ERG Verbund***") by the Çelik Family, which consists of Fadli Çelik, Hasan Çelik, Mehmet Çelik, Bilal Çelik, and Tahir Çelik. As regards the question of whether the transaction was notifiable in Turkey, the Board primarily assessed that there would be a change in the control structure of ERG Verbund on a lasting basis after the consummation of the transaction, given that

[4] The Board's decision dated May 3, 2018, and numbered 18-13/233-108.

the Çelik Family would acquire all shares in ERG Verbund. Therefore, the Board considered the transaction at hand to be an "acquisition" within the meaning of Article 5 of the Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board ("***Communiqué No. 2010/4***").

Consequently, the Board examined whether the turnovers of the parties exceeded the jurisdictional notification thresholds set forth under Article 7 of the Communiqué No. 2010/4. In this respect, the parties submitted in the merger control filing that, as the acquiring parties were natural persons and since ERG Verbund did not engage in any activities in Turkey, they did not generate any turnover in Turkey. Nevertheless, the Board determined that the acquiring natural persons had control over several undertakings that were active in the electricity, insurance and construction sectors. In this respect, the Board determined that these natural persons had been generating turnover in Turkey through those undertakings. In particular, the Board reached this conclusion by referring to Paragraph 21 of the Guidelines on Undertakings Concerned, Turnover and Ancillary Restraints ("***Guidelines on Turnover***"), which provides that natural persons will be deemed and treated as undertakings if those natural persons themselves conduct economic activities, or if they conduct economic activities through any undertakings over which they maintain control. To that end, pursuant to Article 8 of the Communiqué No. 2010/4, in terms of the calculation of the turnover of the natural persons in question, the Board took into account the total turnover generated by the economic units that were controlled by those parties.

In terms of the assessment of whether there was any turnover attributable to ERG Verbund, the Board found that ERG Verbund's economic activity consisted merely of the concession agreement executed between ERG Verbund and the Turkish Ministry of Energy and Natural Resources ("***Ministry***"), which concerned (i) the operation and rehabilitation of the current units of the Afşin Elbistan (A) Thermal Power Plant ("***Thermal Plant***") and the construction and operation of the expanded units of the Thermal Plant, and (ii) the operation and rehabilitation of the coal fields and the facilities that provide coal to the facilities of the Thermal Plant. Although the operating rights for the Thermal Plant are yet to be transferred, the Board indicated that, further to the concession agreement in force, and after the conclusion of the ongoing negotiations between ERG Verbund and the Ministry, the operating rights of the Thermal Plant will eventually be transferred to ERG Verbund. Therefore, the Board concluded that, pursuant to the concession agreement, ERG Verbund had legally acquired the operating rights to the Thermal Plant and the coal fields providing coal to the Thermal Plant. In this respect, the Board determined that the turnover of the Thermal Plant should be attributed to ERG Verbund in terms of the calculation of the turnover amount within the meaning of the Communiqué No. 2010/4.

Accordingly, as the turnover figures of the parties exceeded the turnover thresholds provided under Article 7(1)(a) of the Communiqué No. 2010/4, the Board ruled that the concentration at hand would be deemed as an acquisition requiring the approval of the Board.

As regards the competitive analysis, given that the undertakings controlled by the Çelik Family and ERG Verbund were active in the production of electricity in Turkey, the Board found that the activities of the parties overlapped horizontally. Furthermore, given that the Çelik Family was also active in the market for retail sales of electricity, which is the downstream market of the electricity production market, the concentration at hand would lead to vertical overlap between the

activities of the parties in Turkey. Having said that, the Board considered that the market shares of the parties in the affected markets were significantly low and determined that the concentration at hand would not result in the creation or strengthening of a dominant position and that it would not significantly impede competition. Therefore, the Board unanimously granted unconditional approval to the acquisition of sole control over ERG Verbund by the Çelik Family.

Are Online Channels Substitutable with Traditional Channels?: The Board's Reasoned Decision on the Acquisition of D&R by Turkuvaz

The Board recently published its reasoned decision[5] regarding the acquisition of Doğan Müzik Kitap Mağazacılık Pazarlama A.Ş. ("***D&R***") and its two subsidiaries (Hür Servis Sosyal Hizmetler ve Tic. A.Ş. and AGT Tanıtım Kağıt Ürünleri Sanayi ve Tic. A.Ş.) by Turkuvaz TK Kitap ve Kırtasiye A.Ş. ("***Turkuvaz***"), owned by Zirve Holding A.Ş. ("***Zirve***"), and ultimately controlled by Ömer Faruk Kalyoncu.

The acquirer, Turkuvaz, is active in the sales of books, stationery, electronic devices and accessories, toys, and souvenirs. The acquisition target, D&R, is a retailer of books, e-books, music-related products (*i.e.*, CDs, DVDs, and Blu-Ray), home videos (*i.e.*, VCDs, DVDs, and Blu-Ray), stationery, games, toys and hobbies, magazines, electronics and accessories, souvenirs, personal products, as well as food, sports and outdoor recreational products.

The Board identified the horizontally affected markets as consisting of the following: (i) the retail sales of books, (ii) the retail sales of periodical publishing products, (iii) the retail sales of stationary products, (iv) the retail sales of games, toys and hobby products, (v) the retail sales of user electronics, and (vi) wholesale of books. Moreover, it defined the vertically affected markets as: (i) the distribution of periodical publishing and non-media products, and (ii) the printing of periodical and non-periodical publishing products.

The Board's centred its attention on its assessment of the relevant product market and the relationship between retail sales and online sales. To that end, following an in-depth analysis of its own precedents and decisional practice, as well as the precedents of various foreign competition authorities (including the findings of the UK Competition and Markets Authority), the Board determined that: (i) the usage rate of e-commerce services in Turkey is increasing, primarily due to the lower prices available in online channels; (ii) even though online and traditional retail sales differ in terms of their investment costs, number of employees, and business methods from the perspective of the undertakings, no significant difference exists between the two channels from the consumers' point of view; (iii) online channels can exert competitive pressures on traditional channels since the availability of lower prices online is the most important factor leading consumers to prefer and choose online channels over traditional retail channels, especially for books and music products. Accordingly, the Board concluded that, even though there was no substitutability on the supply side, there was a demand-side substitutability relationship between these two channels; therefore, the Board found that the online channel and the traditional channel constituted a single market, which is the market for the "retail sales of books."

The Board also examined whether stores located in shopping malls and on the streets are in the same relevant product market, and ultimately decided not to distinguish between: (i) online and traditional retail sales, and (ii)

[5] The Board's decision dated May 29, 2018, and numbered 18-16/293-146.

retail activities in shopping malls and retail activities in stores on the streets.

With regard to the relevant geographical market, the Board determined 47 district-based geographical markets for each relevant product market at the retail level. At the wholesale level, whilst noting that there are no geographical differences in market conditions, the Board, defined the geographical market as "*Turkey*".

With regard to the horizontally affected markets, the Board concluded that the parties' market shares did not lead to a significant level of concentration. In terms of the vertically affected markets, the Board assessed potential input effects and customer foreclosure effects, and, in light of the competitive dynamics of the sector at hand, determined that no competition law concerns would arise after the acquisition in question was completed. Accordingly, the Board unconditionally approved the transaction.

Employment Law

The Compulsory Use of Turkish Lira in Employment Agreements

The Presidential Decree ("***New Decree***") on the Amendment of the Decree No. 32 on the Protection of the Value of the Turkish Lira ("***Communiqué No. 32***") was published in the Official Gazette on September 12, 2018. Undoubtedly, this is one of the strongest precautionary measures taken against the Turkish Lira's significant plunge in value during the course of 2018. Whereas the New Decree introduces an attention-grabbing obligation regarding the mandatory use of the Turkish Lira for ongoing as well as prospective agreements in Turkey, the specific details on which type of agreements are subject to the Presidential Decree and the question of how to convert foreign currency amounts into Turkish Lira for pending/existing agreements had remained vague and ambiguous. To eliminate such uncertainty, the Communiqué No. 2018/32-51 ("***Communiqué***") on the Amendment of the Communiqué No. 32 was published in the Official Gazette on October 6, 2018. By this Communiqué, Article 8 of the Communiqué No. 32 has been re-drafted. In view of the new version of the Communiqué No. 32, what becomes readily apparent is that employment agreements are one of the subjects that are most significantly affected by the Communiqué.

The new Article 8/3 of the Communiqué No. 32 declares the fundamental principle that all employment agreements that are made by parties who are settled in Turkey, shall be required to determine the primary contractual payment obligation, as well as other secondary payment obligations, in Turkish Lira. In other words, a Turkish employer and a Turkish employee, both of whom are residing in Turkey, will not be allowed to denominate, for instance, the salary of the employee in a foreign currency.

This rule applies to ongoing employment agreements as well as future employment agreements, according to the Provisional Article 8 of the Communiqué No. 32. However, Article 8/3 of the Communiqué No. 32 regulates two exceptions to this rule. Firstly, if the contractual obligations subject to the agreement will be performed abroad, it is legally permissible to determine the contractual payment obligation in a foreign currency. Secondly, if either party to the agreement resides outside of Turkey, once again, there is no requirement to determine the contractual payment obligation in Turkish Lira.

In addition to the foregoing, other paragraphs under Article 8 provide further exceptions for employment agreements. To that end, Article 8/4 of the Communiqué No. 32 allows the use of foreign currency in employment agreements under the following circumstances: (i) if either party to an employment agreement is not a Turkish citizen, or (ii) if the subject of the employment agreement relates to export

activities, transit trade, sales and deliveries falling under the scope of export activities, and foreign-exchange earning activities, or (iii) if the contractual obligation will be performed abroad, or (iv) if the subject of the agreement is electronic communications, where the service starts in Turkey but finishes abroad, or vice versa.

Moreover, there are two other exceptions set forth under the Communiqué No. 32, one of which is contained in Article 8/11. Article 8/11 states that if one of the parties to the employment agreement is not a Turkish citizen, but resides in Turkey, the payment obligations arising out of the employment agreement could be legally determined in (or otherwise indexed to) a foreign currency. The second exception is provided by Article 8/16, which regulates that contract prices and other payment obligations arising from employment agreements executed by branches, representatives, offices, and liaison offices of those parties residing abroad, or by companies whose majority shares (50% or more) are owned by persons residing abroad, or by companies operating in free trade zones, can once again be determined in a foreign currency or indexed to a foreign currency.

Having said that, the critical question is what happens when the parties to an agreement come into conflict on this subject, and which procedure(s) the parties will be obliged to follow in order to re-determine the contractual amounts that must be converted into Turkish Liras. According to Article 8/24 of the Communiqué No. 32, if the parties to an existing contract cannot come to an agreement on re-determining the contract price and other payment obligations in Turkish Lira, then the Turkish Central Bank's effective foreign currency exchange rates for January 2, 2018 (1 USD = 3.7776 TL and 1 EUR = 4.5525 TL) must be used for existing agreements in order to re-determine the contract price and other payment obligations in Turkish currency. However, in order to calculate the final amount of the payment obligation in Turkish lira, the monthly consumer price index rate (as determined by the Turkish Statistical Institute) from January 2, 2018, until the date of re-determination, must also be applied to the amount calculated by using the relevant exchange rate.

In order to provide detailed guidance to concerned parties, the Turkish Ministry of Treasury and Finance published a "*Frequently Asked Questions*" list on this issue on October 12, 2018, which can be accessed at: https://hazine.gov.tr/sikca-sorulan-sorular-dovize-endeksli-sozlesmeler?type=icon. This document shows how to convert the primary and secondary payment obligation amounts into Turkish Lira by providing a formula for the calculations one may use as a reference tool while re-determining the contractual obligation payments in one's own employment agreements.

To sum up, the Communiqué No. 32 mandates that, *inter alia*, all employment agreements specified thereunder will be subject to the mandatory usage of Turkish Lira as the payment currency. However, in light of the relevant market dynamics and the sensible reasons that exist for using foreign currencies in foreign-related matters, there are certain exceptions provided by the Communiqué, wherein the parties are entitled to continue to determine their primary and secondary payment obligations in foreign currencies or to index them to currencies other than the Turkish Lira.

Litigation

Restrictions on the Use of Foreign Currencies in Certain Agreements Between Turkish Residents

As discussed in the previous section on employment agreements, the Presidential Decree dated September 12, 2018, on the

Amendment of the Decree No. 32 on the Protection of the Value of the Turkish Lira (“***New Decree***”), introduced significant restrictions on the use of foreign currencies in certain agreements between Turkish residents. Below, we explain the scope of the New Decree in further detail, and discuss possible issues and problems that may arise in relation to the implementation of the New Decree. We also assess the potential effects of the Communiqué No. 2018/32-51 on the Amendment of the Communiqué on Decree No. 32 on the Protection of the Value of the Turkish Lira (No. 2008/32-34) (“***Communiqué***”), which was published in the Official Gazette on October 6, 2018, and which lists the exceptions to the restrictions imposed by the New Decree.

1. What Does the New Decree Bring?

With the New Decree, the following paragraph was added to Article 4 of the Decree No. 32 on the Protection of the Value of the Turkish Lira (“***Decree No. 32***”), which regulates foreign currency transactions in Turkey:

“Except under certain circumstances to be specified by the Ministry [of Treasury and Finance], contract prices and other payment obligations in sales agreements for movables and immovables, lease agreements for movables and immovables, including vehicle leases and financial leasing agreements, leasing agreements, employment agreements, service agreements, and contracts for work between Turkish residents, cannot be determined in a foreign currency or indexed to a foreign currency.”

Moreover, the following provisional article (Article 8) has been added to the Decree No. 32 with the New Decree:

“Except under certain circumstances to be specified by the Ministry [of Treasury and Finance], contract prices that were denominated in a foreign currency in agreements that were executed prior to this Decree and that are subject to Article 4(g) of this Decree shall be re-determined by the parties in Turkish currency within thirty days as of the date on which Article 4(g) of this Decree comes into force.”

Therefore, the New Decree has not only introduced significant restrictions on the use of foreign currencies in certain agreements to be executed between Turkish residents in the future, but it has also imposed an obligation to revise contract prices and re-determine them in Turkish Lira for certain agreements that had already been executed before the announcement of the New Decree.

2. Agreements Falling into the Scope of the New Decree and the Communiqué

As the New Decree imposes significant restrictions on the use of foreign currencies in certain agreements, it is of paramount importance to first determine which agreements fall within its scope. In this respect, the New Decree only provides a general list of several types of agreements that are covered by the new rules, and also authorizes the Ministry of Treasury and Finance (“***Ministry***”) to specify exemptions to the New Decree. Accordingly, the Communiqué published on October 6, 2018, which provides detailed provisions on this front, must also be taken into account when delineating the scope and examining the effects of the New Decree.

2.1. Turkish Residency Requirement

The first and most fundamental precondition for an agreement to be covered by the New Decree is that both parties to the agreement must be “*resident in Turkey*.” Therefore, an agreement may only fall within the scope of the New Decree if it is executed between real and/or legal persons resident in Turkey.

As per Article 2(b) of the Decree No. 32, “*persons resident in Turkey*” comprises real or legal persons who have legal residency in

Turkey, including Turkish citizens who are working abroad as employees, self-employed persons, or private business owners who maintain a legal residence in Turkey. Pursuant to this definition, Turkish citizens and foreigners who are legally resident in Turkey and companies that are established in Turkey are deemed as "*persons resident in Turkey*" for the purposes of the New Decree.

Pursuant to the Communiqué, (i) foreign branches, representatives, offices, and liaison offices of persons resident in Turkey, (ii) funds established abroad that are operated or managed by persons resident in Turkey, (iii) companies established abroad whose majority shares (50% or more) are owned by persons resident in Turkey, and (iv) foreign companies that are directly or indirectly owned by persons resident in Turkey, are also considered and treated as "*resident in Turkey*" in terms of the New Decree and the Communiqué.

The Communiqué provides a number of exceptions in terms of the residency requirement for certain individuals, institutions, and types of agreements. For instance, there are specific exclusions for public institutions and companies belonging to the Turkish Armed Forces Foundation. Moreover, the Communiqué provides certain exemptions for contractors who carry out work related to the performance of agreements executed by public institutions in foreign currencies. Another significant exception is provided for banks with regard to the agreements that they have concluded in relation to the Public Finance and Debt Management Law No. 4749. Commercial airlines, companies providing technical maintenance services to airplanes or for their motors and other components, as well as companies delivering ground services at airports and their affiliates are also allowed to conclude and implement certain agreements in foreign currencies.

Other specific cases and circumstances, in which certain real or legal persons are exempted from the currency restrictions provided in the New Decree and in the Communiqué are discussed under the relevant sections below.

Pursuant to the Communiqué, if parties who are exempted from the scope of the New Decree nevertheless mutually agree to conclude an agreement using the Turkish currency or to re-determine a contract price for an agreement that was previously concluded in a foreign currency (despite being entitled to continue using foreign currencies in their agreements under the Communiqué), such contract prices must still be re-determined in Turkish Lira and/or converted into the Turkish currency.

Therefore, all existing agreements must be carefully examined in terms of the residency status of the contracting parties, in order to determine whether they are covered by and subject to the New Decree.

2.2. Types of Agreements Specified by the New Decree and the Communiqué

As indicated above, (i) sales agreements for movables and immovables, (ii) rental agreements for movables and immovables, including vehicle rentals and financial leasing agreements, (iii) leasing agreements, (iv) employment agreements, (v) service agreements, and (vi) contracts for work, all fall within the scope of the New Decree. That being said, the Communiqué provides a number of significant exemptions for certain agreement types and puts these kinds of agreements out of the purview of the New Decree. We will further elaborate on these exemptions below.

2.2.1. Sales Agreements for Movable and Immovable Properties

The New Decree covers sales agreements for movable and immovable properties. However,

the Communiqué makes a critical distinction between the sale of movables and immovables. Accordingly, contract prices and other payment obligations arising from sales agreements for immovables, including residences and roofed workplaces, located in Turkey, as well as in free zones, executed between Turkish residents cannot be determined in a foreign currency or indexed to a foreign currency. On the other hand, contract prices and other payment obligations arising from sales agreements between Turkish residents for movables other than vehicles (including construction equipment and work machinery) are allowed to be determined in a foreign currency or indexed to a foreign currency.

At this point, it would be beneficial to elaborate on what is considered as "movable" and "immovable" property in Turkey. Under Turkish law, land, independent and continuous rights that can be registered in a land registry, and real estate that can be recorded on an applicable land registry are categorized as "immovables." As a rule, all types of property that fall outside the scope of the "immovable" category are considered as "movable" property. For instance, anything that can be moved from one place to another, as well as natural resources such as electricity and natural gas, receivables, industrial property rights, agreements regarding economic rights, and all vessels (regardless of whether or not they are registered) are considered as "movables" under Turkish law. Furthermore, these definitions and classifications are also applicable to other types of agreements, as will be explained below.

Therefore, we note that, as a general rule, the New Decree prohibits the use of foreign currencies with respect to the sales of immovable properties, while foreign-currency use is permitted for the sales of movables, except for vehicles (including construction equipment and work machinery).

2.2.2. Rental Agreements and Leasing Agreements

As explained above, rental agreements for movables and immovables, including vehicle rentals and financial leasing contracts, and leasing agreements are covered by and subject to the New Decree. The Communiqué sets forth the applicable rules in more detail regarding such leasing and rental agreements.

Just like in sales agreements, the Communiqué makes a crucial distinction between rental agreements for movables and immovables. Although contract prices and other payment obligations in rental agreements for immovables located in Turkey including free zones (including residences and roofed workplaces) executed between Turkish residents cannot be determined in or indexed to foreign currencies, this restriction does not apply to rental agreements for movables, except for vehicles (including construction equipment and work machinery).

There are other exemptions and exclusions stipulated in the Communiqué with respect to leasing and financial leasing agreements for vessels, as well as for financial leasing agreements that fall under the scope of Articles 17 and 17(A) of the Decree No. 32. These agreements generally concern loans obtained from domestic and foreign sources. Accordingly, foreign currencies can continue to be used in such agreements under the New Decree.

2.2.3. Employment Agreements

As discussed in the Employment Law section, employment agreements generally fall within the scope of the New Decree and are subject to its restrictions with respect to the use of foreign currencies. However, there are certain exceptions provided by the Communiqué with regard to employment agreements. As all of these are already explained in the Employment Law section, we deem it fit to refer to that section.

2.2.4. Service Agreements

In accordance with the New Decree, the Communiqué prohibits the use of foreign currencies in service agreements, including consultancy, brokerage, and transportation and carriage agreements. However, there are four important exceptions provided by the Communiqué, stipulating the circumstances in which contract prices and other payment obligations can be determined in or indexed to a foreign currency: (i) service agreements to be executed by persons who are not Turkish citizens, (ii) service agreements that are concluded for exports, transit trades, sales and deliveries falling under the scope of export activities, and services/activities that earn and bring foreign currencies into Turkey, (iii) service agreements concluded with Turkish residents regarding activities to be conducted abroad, and (iv) service agreements between Turkish residents for electronic communications starting in Turkey and ending abroad, or vice versa.

Moreover, the final exemption provided for employment agreements is also deemed to be applicable to service agreements by the Communiqué. Accordingly, contract prices and other payment obligations in service agreements that are concluded by branches, representatives, offices, and liaison offices of parties residing abroad, or by companies whose majority shares (50% or more) are owned by persons residing abroad, or by companies operating in free trade zones, can be determined in or indexed to a foreign currency.

2.2.5. Contracts for Work

Pursuant to the Communiqué, agreements to produce a piece of work (*i.e.*, contracts for work) are also covered by the New Decree, with only one exception. This exception pertains to agreements to build vessels (which are legally deemed as "contracts for work") as well their repair and maintenance, and asserts that such agreements will be excluded from the scope of the New Decree. Therefore, contract prices and other payment obligations arising from such vessel construction agreements can be determined in a foreign currency or be indexed to a foreign currency.

2.2.6. Other Exceptions

In addition to the exceptions provided above, the Communiqué also states that foreign currencies can be used in agreements related to sales, licensing and service agreements for software and hardware products produced abroad for use in the information technology sector.

Moreover, provided that the relevant provisions of the Decree No. 32 are observed and complied with, the use of foreign currencies in issuance, sales, and other transactions related to capital market instruments (including foreign capital market instruments, depositary receipts, and shares of foreign investment funds) based on the Capital Markets Law No. 6362 and other related legislation, is also permitted.

3. What is the Scope of "Indexing to a Foreign Currency"?

The New Decree introduces a prohibition against determining contract prices and other payment obligations arising from certain agreements in a foreign currency or "indexing" them to a foreign currency. As per the Communiqué, this means that negotiable instruments that are issued in relation to an agreement that is covered by the New Decree and the Communiqué cannot be drawn in a foreign currency or be indexed to a foreign currency.

Furthermore, pursuant to the Communiqué, agreements indexed to the prices of precious metals or commodities, whose prices are determined in a foreign currency in the international markets and/or indirectly indexed to a foreign currency, are also considered and treated as agreements in which prices are

"*indexed to a foreign currency*." Therefore, the Communiqué expands the meaning of "*indexing to a foreign currency*" by specifically including the practice of indexing contract prices to the prices of precious metals or commodities in its scope.

4. Effects of the New Decree and the Communiqué on Existing Agreements

It is important to note that the New Decree and the Communiqué not only impose restrictions on the use of foreign currencies in agreements to be concluded after the New Decree enters into force, but also require the amendment of existing agreements whose contract prices or other payment obligations were previously denominated in or indexed to foreign currencies. Accordingly, prices that were established or determined in foreign currencies in certain existing agreements (as specified above) must also be re-determined by the parties in Turkish currency within thirty (30) days as of the date on which the New Decree enters into force (*i.e.*, September 13, 2018). Therefore, such price re-determinations must have been completed by October 13, 2018.

Agreements falling into the scope of the exclusions and exceptions provided by the Communiqué, and which were concluded before the New Decree entered into force on September 13, 2018, are also exempt from the obligation to re-determine contract prices and other payment obligations in Turkish currency. Therefore, such agreements can continue to be executed and performed as is, without having to re-determine contract prices and other payment obligations in Turkish currency.

However, it should be noted that there is one crucial exception to this rule. Although rental agreements for vehicles (including construction equipment and work machinery) are covered by the New Decree and should be subject to the rule regarding price re-determination in Turkish Lira, the Communiqué indicates that rental agreements for vehicles (including construction equipment and work machinery) that were concluded before the New Decree entered into force will be excluded from the price re-determination requirement. Therefore, rental agreements for vehicles (including construction equipment and work machinery) that were concluded before the New Decree entered into force can continue to be executed in a foreign currency, while rental agreements for vehicles (including construction equipment and work machinery) that will be executed after the New Decree entered into force must use Turkish currency to determine contract prices and other payment obligations. The Communiqué is regrettably silent on the issue of whether it is possible to continue with the use of a foreign currency after the renewal of a rental agreement for vehicles (including construction equipment and work machinery) that was concluded before the New Decree entered into force. Considering that this would constitute merely a time extension, rather than the implementation of a new agreement, it can be reasonably concluded that foreign currencies can be used after the renewal in this scenario also.

4.1. What Does "Re-Determination" Mean?

As indicated above, the New Decree and the Communiqué require the "re-determination" of contract prices and other payment liabilities in Turkish Lira for certain agreements.

It is important to observe that both the New Decree and the Communiqué refer to a process in which the "re-determination" is carried out by the parties to an agreement, without providing any further guidance or helpful direction as to how such re-determinations should be carried out. Although, at first glance, one might reasonably assume that such re-determinations can/should be carried out by

using the applicable exchange rates at the time of re-determination to convert prices into Turkish Lira, it would actually be a mistake to jump to this conclusion, as the New Decree and the Communiqué both refrain from using the term "conversion", possibly on purpose.

Therefore, it is possible to conclude that "re-determination by the parties" actually refers to the process of *determining* the contract price and other payment obligations in Turkish currency, which would presumably be undertaken by the parties as if they were concluding the agreement *for the first time*. This would surely involve a significant amount of re-negotiation between the parties and would require the mutual consent of both sides to the re-determined prices. At this point, the most crucial question for practitioners is: What happens if the parties cannot come to an agreement on the re-determination of the contract price and other payment obligations in Turkish currency?

4.2. What Happens if the Parties to a Contract Cannot Agree on Price Re-Determination?

Unfortunately, the New Decree fails to provide any definitive answers with respect to the question of what happens if the parties to an existing contract cannot come to an agreement on re-determining the contract price and other payment obligations in Turkish currency through negotiation.

The New Decree's silence on this critical issue has raised serious concerns among scholars, legal practitioners, and in judicial and business circles, since this omission causes a significant amount of legal and commercial uncertainty. However, the Communiqué has provided some clarity on this point by establishing a reference date for the currency exchange rates that must be used in cases of disagreement with respect to price re-determination.

Accordingly, if the parties to an existing contract cannot reach a mutual agreement on re-determining the contract price and other payment obligations in Turkish currency, then the Turkish Central Bank's effective foreign currency exchange rates for January 2, 2018 (1 USD = 3.7776 TL and 1 EUR = 4.5525 TL), must be used to re-determine the contract price and other payment obligations in the covered agreements in Turkish currency. However, the monthly Consumer Price Index rate (as determined by the Turkish Statistical Institute) from January 2, 2018, until the date of the re-determination of the contract price or other payment obligations, must also be applied to the amount calculated by using the relevant exchange rate, in order to arrive at the final amount of the payment obligation in Turkish Lira.

The Ministry has also published a document containing responses to Frequently Asked Questions related to the Communiqué on its website.[6] This document contains several explanations and examples with respect to re-determination in case the parties fail to reach an agreement on how to re-determine payment obligations in Turkish currency. The explanations provided for such re-determinations are given below:

- **Date of Agreement:** February 18, 2017
- **Date of Re-Determination:** October 11, 2018
- **Contract Price in Foreign Currency:** Annual contract price contained in the agreement dated February 18, 2017.
- **Turkish Central Bank's Exchange Rate:** Effective foreign currency exchange rates for January 2, 2018.
- **Consumer Price Index Rate (CPIR):** Total change in consumer price index rate as determined by the Turkish

[6] Republic of Turkey, Ministry of Treasury and Finance https://hazine.gov.tr/sikca-sorulan-sorular-dovize-endeksli-sozlesmeler?type=icon (accessed November 11, 2018)

Statistical Institute between January 2, 2018, and October 11, 2018. The following formula is used to determine the relevant applicable rate: [(CPIR September 2018 / CPIR December 2017) -1]. (Please note that the CPIR values for the months preceding the applicable dates are used for this calculation.)
- **Re-Determined Contract Price:** (Contract Price x Turkish Central Bank's Exchange Rate) x (1 + CPIR)

A sample calculation based on this explanation is provided below:

- **Date of Agreement:** February 18, 2017
- **Date of Re-Determination:** October 11, 2018
- **Contract Price in Foreign Currency:** USD 1,000
- **Turkish Central Bank's Exchange Rate**: 1 USD = 3.7776 TL
- **Consumer Price Index Rate (CPIR):** 19.37%
- **Re-Determined Contract Price:** (1000 x 3.7776) x (1 + 0.1937) = TL 4,509.32

In terms of rental agreements for residences and roofed workplaces, the Communiqué stipulates that the re-determination must be carried out for two (2) rental years. In case of a dispute between the parties to the agreement regarding the contract price for the next rental term, the Consumer Price Index rate (as determined by the Turkish Statistical Institute) must be applied to the latest amount that was determined in Turkish currency, and the increase will be in effect until the end of the relevant rental year. Consequently, this means that the re-determined Turkish currency contract price shall remain in effect for two (2) rental years as of the date of re-determination with increases at the beginning of each rental year, and, after that period, the agreement will be allowed to revert back to a foreign currency. However, it should be noted that this rule is only in effect for rental agreements for residences and roofed workplaces that were concluded before the New Decree.

Finally, it is important to emphasize that the obligation for price re-determination in Turkish currency does not apply to receivables that have already been collected or receivables that are due but have not yet been collected.

4.3. Is Termination of an Existing Agreement an Option for the Parties?

If one of the parties to an existing agreement covered by the New Decree does not wish to continue with the agreement due to the requirement of re-determining the contract price and other payment obligations in Turkish currency, does that party have the right to terminate the agreement without potentially being exposed to legal consequences? Regrettably, neither the New Decree nor the Communiqué provides a clear answer to this critical question.

Theoretically, the party who would prefer not to continue with the agreement in light of the price re-determination requirement should be allowed to argue that, as the obligation to amend the contract price arose after the agreement had already been executed, it would be unfair to oblige the party to continue honoring such an agreement. This party could reasonably contend that an essential element of the agreement had been changed without its consent after the agreement was concluded, since contract price is undoubtedly a fundamental and objective component of any agreement. On the other hand, the counterparty in such a dispute may also reasonably claim that the party wishing to terminate the agreement is using the New Decree as an excuse to wriggle out of the contract and avoid its obligations thereunder, which would essentially constitute an "abuse of right" claim. Therefore, we can expect that commercial and legal disputes will arise with respect to this issue, and that such claims and counterclaims will be brought before the courts in these types of contract termination lawsuits in the not-too-distant future.

As both the New Decree and the Communiqué are silent on the question of whether parties to an existing agreement may be entitled to terminate such agreements due to the newly introduced obligation of price re-determination in Turkish currency, the legal uncertainty on this front persists at the time of writing.

5. Possible Sanctions in Case of Non-Compliance with the New Decree and the Communiqué

The New Decree was promulgated by the President of Turkey under Article 1 of the Law No. 1567 on the Protection of the Value of the Turkish Lira ("***Law No. 1567***"), with the declared aim of protecting the value of the Turkish currency. As per Article 3 of the Law No. 1567, parties who fail to comply with the obligations set forth in Presidential decrees pursuant to the Law No. 1567 will be sanctioned with an administrative monetary fine ranging from TL 3,000 to TL 25,000. If such non-compliance is undertaken or perpetrated for the benefit of a legal person, the same administrative monetary fines shall be imposed on that legal person as well. The law in question also states that the sanctions will be doubled if there is a repeat violation. These sanctions are imposed by the public prosecutors.

Hence, we note that such administrative monetary fines may be imposed on parties who determine the contract price or other payment obligations in an agreement covered by the New Decree and the Communiqué in a foreign currency or who index the contract price or other payment obligations to a foreign currency. Furthermore, these fines will also be applicable to those parties who fail to re-determine contract prices and other payment obligations in Turkish currency by the applicable deadline (*i.e.*, October 13, 2018) for agreements that were concluded before September 13, 2018, and that fall under the scope of the New Decree and the Communiqué.

It is also important to remember that each non-compliance or breach of the New Decree entails a separate legal sanction. In other words, for each agreement that fails to comply with the requirements of the New Decree and the Communiqué, there will be a separate and additional administrative monetary fine imposed on the liable parties.

The Court of Appeals' Noteworthy Precedent Regarding the Contradictions Between Private Expert Opinions and Official Expert Reports

As per Article 293 of the Turkish Code of Civil Procedure No. 6100 ("***TCCP***"), the parties to a lawsuit are entitled to obtain (and submit to the court) a private expert opinion on the subject matter of the lawsuit, along with the official expert report, which is regulated under Article 266 and the subsequent articles of the TCCP. According to Article 266, the court may decide to obtain an expert opinion upon the request of one of the parties or on its own initiative in cases that require specific or technical knowledge on a non-legal subject matter. Nevertheless, private expert opinions differ substantially from official expert reviews, since the party who obtains the private expert opinion determines both (i) the private expert who furnishes the opinion, and (ii) the subject matter of the opinion itself.[7]

Pursuant to Article 293 of the TCCP, which regulates the expert review that is one of the types of admissible evidence listed under the TCCP, the parties to a lawsuit are entitled to obtain information and evidence from private and technical experts in order to prove their claims and defenses, and to illuminate the facts of the dispute at hand. Granting the right to obtain a private expert opinion and submit

[7] Prof. Dr. Hakan Pekcanıtez, Makaleler: Özel Uzman (Bilirkişi) Görüşü ve Değerlendirmesi, On İki Levha Yayıncılık, August 2016, p. 393.

it to the court, this law is aimed at protecting the legal rights and privileges of the parties; therefore, if the parties are not satisfied with the official expert report included in the interim decision of the judge, they are entitled to seek a private expert opinion and submit it to the court for consideration in deciding the outcome of the lawsuit.

Within this framework, the 15th Chamber of the Court of Appeals has stated in a recent decision[8] that, when a private expert opinion on matters that require specialized or technical knowledge is submitted to the court and this private expert opinion is related to the subject matter of the lawsuit, the court is obliged to take such a report into consideration and evaluate it while making its decision. In other words, the court must include an assessment of the private expert opinion in its decision-making process in the case. Moreover, the Court of Appeals declared that, if one of the parties to a lawsuit objects to the conclusions of the official expert report by relying on a differing private expert opinion, the court is obliged to take such objections into consideration in its assessment of the case. Otherwise, the submitter's "right to be heard"— considered to be the most significant element of the "fair trial" principle, which is regulated under Article 6 of the European Convention on Human Rights, Article 36 of the Turkish Constitution and Article 27 of the TCCP—may be deemed to be violated, according to the decision of the 15th Chamber of the Court of Appeals.

In this manner, the 15th Chamber of the Court of Appeals reversed the decision of the local court, by ruling that the local court had failed to eliminate the contradictions and discrepancies between the private expert opinion that was submitted to the court and the official expert report that had been received and relied upon by the court in its decision. Thus, the decision of the Court of Appeals reiterates that the courts should evaluate the private expert opinions that are submitted to them, and, if necessary, they should once again seek the help of experts in order to obtain an additional report that may clarify or reconcile the contradictions and discrepancies between the private expert opinions and the official expert reports in a given case. Per the decision of the Court of Appeals, additional reports should include justifications of the explanations they put forth (*i.e.*, the positions they take) and they should be convenient to the inspection of judges. Then, in case the additional expert report includes said criterion, judges may be able to shape their decisions by interpreting each aspect of the additional expert report(s) and by this way, they may clarify the contradictions and discrepancies between the private expert opinions and the official expert reports.

Consequently, this decision of the 15th Chamber of the Court of Appeals appears to be an encouraging sign with respect to protecting the rights and benefits of the parties in cases where the official expert report is insufficient or unsuitable for resolving the factual and substantial dispute at the heart of a lawsuit. Therefore, this noteworthy precedent will assist judges in monitoring and examining the reliability of experts and will provide them with a brand-new perspective on which to base their decisions. Regrettably, one drawback of the private expert opinion system is that such opinions are commissioned and obtained by the parties themselves. Therefore, the fees for private expert opinions are paid by the requesting party; consequently, these opinions are often obtained by the "wealthier" party. Thus, the disparity between the financial resources of the opposing parties in a lawsuit may also play a part in the expert opinions presented to the court, and may therefore lead to unjust outcomes in certain cases.

[8] The 15th Chamber of the Court of Appeals' decision dated April 19, 2018, with file number 2017/2121 E. and 2018/1651 K.

Data Protection Law

Update on the Data Controllers' Registration Obligation in the Turkish Jurisdiction

Recently, there have been remarkable developments in the Turkish jurisdiction with respect to the registration obligations of data controllers. The Turkish Personal Data Protection Authority ("***DPA***") has launched the long-awaited Data Controllers Registry Information System ("***VERBIS***"), through which data controllers will enroll to the Data Controllers' Registry. Meanwhile the Turkish Data Protection Board ("Board") has published two important decisions, one of which concerns the grace periods for registration (Decision No. 2018/88) and the other of which addresses exemptions from the registration obligation (Decision No. 2018/87).

Under the Turkish Data Protection Law ("***DP Law***"), real persons and legal entities processing personal data are obliged to enroll to the Data Controllers' Registry ("***Registry***") prior to processing data. The procedures and principles with regard to the registry have been stipulated under the Regulation on Data Controllers' Registry ("***Regulation***"). According to the Regulation, all transactions regarding the registry should be conducted by the data controllers through VERBIS, an online platform. Although the Regulation was published in 2017, VERBIS was not yet established, and it was not de facto possible to enroll to the Registry at the time.

VERBIS went live on October 1, 2018. Simultaneously, the DPA published a privacy notice and explained that the information provided by data controllers during their registration to VERBIS (e.g., name, tax number, representative's personal information, etc.) would only be used by the DPA in relation to the registration obligation, and that data subjects may apply to the DPA, which will be acting as the data controller in terms of such information, regarding the use of their data. In order to access VERBIS, data controllers are first required to sign up to the system by filling up a form. There are three different categories in VERBIS for data controllers: (i) real person or legal entity residing in Turkey, (ii) real person or legal entity residing abroad, and (iii) public institutions. The information and documents requested from the data controllers differ based on this tripartite categorization.

As for the deadline to register, the DP Law states that registration should be completed before commencing any data-processing activities. However, as VERBIS has only recently been launched, the Board issued a decision and provided various grace periods for the data controllers to complete their registrations. The Board determined and published the following time periods for data controllers' compliance with their registration obligations:

(i) between October 1, 2018 and September 30, 2019, for data controllers whose number of yearly employees exceeds fifty (50) or whose annual financial balance sum exceeds twenty-five million Turkish Lira (TL 25,000,000),

(ii) between October 1, 2018 and September 30, 2019, for data controllers who are resident/established abroad,

(iii) between January 1, 2019 and March 31, 2020, for data controllers whose number of yearly employees is less than fifty (50) and whose yearly financial balance sum does not exceed twenty-five million Turkish Lira (TL 25,000,000), but whose main business activity concerns the processing of special categories of personal data,

(iv) between April 1, 2019 and June 30, 2020, for data controllers who are public entities or public institutions.

There was also some uncertainty as to whether this registration obligation would be applicable to all real persons and legal entities processing

personal data, as the DP Law indicated that, in some cases, the Board may provide exemptions to the obligation to enroll to the Registry. Recently, the Board issued an important decision (No. 2018/87) to clarify the scope of the registration obligation.

According to the Board's Decision No. 2018/87, data controllers whose number of yearly employees is less than fifty (50) and whose annual financial balance sum does not exceed twenty-five million Turkish Lira (TL 25,000,000) will be exempt from the registration obligation, as long as their main business activity does not involve the processing of special categories of personal data.

As we are still within the grace periods provided by the Board at the time of writing, we might hear further developments and clarifications from the DPA in the upcoming days as to the registration obligation, and data controllers might need to follow these developments closely in order to ensure full compliance with the Turkish data protection laws.

Internet Law

The Constitutional Court's Recent Decision on the Freedom of Expression and the Freedom of the Press on the Internet

The Turkish Constitutional Court recently ruled (in its decision of July 18, 2018, No. 2015/15242) ("***Decision***") that the access ban of a news article on a newspaper's website violated the freedom of expression and the freedom of the press.[9]

The application was filed before the Court on August 8, 2015, by three applicants ("***Applicants***"). These applicants comprised the news editor of the relevant newspaper's website, the journalist who had drafted the news article, and a well-known news agency that was the publisher of a mainstream newspaper and the owner of the website.

According to the Decision, the relevant news article concerned the owners of luxury houses in a building complex that had been built by the municipality for an urban transformation project. The Decision stated that the article had criticized the government and had alleged that the project was not in accordance with the applicable urban transformation regulations. The article had also claimed that a governor had bought a house in the building complex at a low price, along with other politicians who were members of (or had connections to) a particular political party. Furthermore, a connection had been made in the news article between the low purchase price paid by the governor and an earlier investigation led by the governor as a chief civil inspector that was related to the purchase of a piece of land by the company that later built the houses in question. According to the news article, the governor had closed the inquiry by stating that there was no need to investigate, and this action was allegedly related to his later purchase of the luxury houses at below-market prices.

According to the Decision, after the news article was published, the governor filed a complaint before a criminal judgeship of peace and requested an access ban decision under Article 9 of the Law No. 5651 ("***Internet Law***") by claiming that the content/allegations in the news article had harmed his reputation and dignity. The governor also argued that the allegations contained in the news article did not reflect the truth. The request was granted by the criminal judgeship of peace, who declared that the limits of the right to inform the public had been exceeded in the case of this particular news article.

The Applicants filed an objection against the judgeship's decision and their appeal was

[9] Official Gazette, Presidency of the Turkish Constitutional Court, decision dated July 18, 2018http://www.resmigazete.gov.tr/eskiler/2018/09/20180925-6.pdf (accessed November 11, 2018)

rejected on July 21, 2015, by the higher court hearing the case, and the access ban decision thereby became final and binding. As the Applicants' ordinary legal remedies had been exhausted, they filed an individual application before the Constitutional Court on August 31, 2015, by claiming that their rights to freedom of expression and freedom of the press had been violated.

The Constitutional Court first evaluated the standing criteria and rejected the news agency's application. The Court stated that the news agency had not filed an appeal against the criminal judgeship of peace's decision, and thus had failed to exhaust its ordinary and domestic legal remedies prior to applying to the Constitutional Court. However, the Court found the other applicants to have standing.

The Constitutional Court then proceeded to evaluate the access ban procedure under Turkish law, and noted that access ban decisions based on the Law No. 5651 should only be granted in urgent cases indicating the existence of a "*prima facie violation*." In other words, the Court stated that such access bans should only be granted when the violation is apparent on its face, without the need for a detailed examination and the Court cited one of its earlier decisions, *Ali Kidik Application*, a case involving nude pictures or videos of an individual.[10] According to the Constitutional Court, an individual has the opportunity to file a lawsuit before civil or criminal courts, since, in the present case, when there is detailed information in order to determine whether the content of the news article reflected the truth and whether the content in question harmed the reputation and dignity of the governor.

[10] The Presidency of the Turkish Constitutional Court, decision dated 26.10.2017 http://www.anayasa.gov.tr/icsayfalar/basin/kararlarailiskinbasinduyurulari/bireyselbasvuru/detay/pdf/2014-5552.pdf (accessed November 11, 2018)

The Constitutional Court indicated that the criminal judgeship of peace had failed to provide a convincing rationale for its decision regarding the urgent need to access ban the news article by showing or proving the *prima facie* violation. The Constitutional Court further stated that the reasoning of the criminal judgeship of peace was not relevant or sufficient to access ban the news article in question. The Constitutional Court also noted that the governor had other (and more effective) remedies he could have sought, such as filing a lawsuit before civil or criminal courts, instead of obtaining an access ban decision from the criminal judgeship as a preliminary injunction, which was ordered for an indefinite period of time.

Consequently, the Constitutional Court ruled that the news article had aimed to contribute to the proper functioning of a democratic society by discussing the (mis)use of public resources, and thus should be protected under the freedom of expression and the freedom of the press, and that access banning the contents was in violation of the freedom of expression and of the press, which are protected under Articles 26 and 28 of the Turkish Constitution. The Constitutional Court granted the applicants' individual application by stating that the informative value of the news article published on the newspaper's website was high and that it contributed to a discussion concerning the public interest.

In conclusion, the Constitutional Court decided that: (i) the application of the news agency was not admissible since all legal remedies had not been exhausted, (ii) the applications of the other applicants, which were based on claims regarding the violation of the right to freedom of expression and the freedom of the press, were rightful and admissible, (iii) a copy of the order would be sent to the relevant criminal judgeship of peace to remedy the consequences of the violation, and (iv) each applicant would be paid 4,000 Turkish Lira, in the form of non-pecuniary damages.

Telecommunications Law

Regulation Amending ICTA's Administrative Sanctions

The Regulation on Amending the Regulation on the Information and Communication Technologies Authority's Administrative Sanctions[11] ("***Amending Regulation***") was published in the Official Gazette of September 29, 2018, and entered into force on the same day. The Amending Regulation amends certain provisions (Articles 3, 6, 12 and 19) of the Regulation on the Information and Communication Technologies Authority's Administrative Sanctions ("***Sanctions Regulation***").

The Sanctions Regulation sets out the administrative fines and other sanctions that the Information and Communication Technologies Authority ("***ICTA***") may impose on the operators. Under the Law No. 5809 ("***Electronic Communications Law***"), an operator is defined as an entity who provides electronic communications services and/or operates electronic communications networks within the scope of the authorisation granted to it. The Amending Regulation envisages new sanctions regarding violations related to numbering obligations, consumer rights, and cyber-security.

Article 2 of the Amending Regulation introduces a new provision regarding violations of the requirements with respect to calling line identifications ("***CLI***"). These requirements and liabilities are defined and regulated under the Regulation on Authorization Regarding Electronic Communications, and oblige the operators to refrain from establishing blank, deficient or misleading CLIs, or carrying and terminating such CLIs.

The new provision states that the operators who infringe their obligations arising from CLIs will be sanctioned with an administrative fine of up to 3% of their net sales during the previous calendar year. This provision also states that, if ICTA determines that the violation constitutes gross fault, the operator's authorization will be terminated and/or cancelled. Furthermore, the new provision indicates that operators who breach the relevant numbering laws, except for the numbering requirements listed under the first three paragraphs of Article 6 of the Sanctions Regulation, will be subject to an administrative monetary fine of up to 3% of their net sales within the previous calendar year.

Article 3 of the Amending Regulation imposes a new administrative fine on operators who are found to be acting with the purpose of misleading or deceiving consumers while providing value-added electronic services. Such operators will be subject to an administrative fine of up to 3% of their net sales during the previous calendar year. This provision also declares that, if ICTA determines that the violation amounts to gross fault, the operator's authorization will be terminated and/or cancelled. The provision further states that operators who violate consumer laws, except for the requirements put forth under Article 12 of the Sanctions Regulation, will be subject to an administrative monetary fine of up to 3% of their net sales during the previous calendar year. This is a brand new fine; previously, the relevant provision of the Sanctions Regulation did not omit misleading or deceiving consumers, but stated that, in case of a violation relating to any value-added electronic communications, an administrative fine of up to 1% of the operator's net sales during the previous calendar year would apply.

Article 4 of the Amending Regulation, which amends Article 19 of the Sanctions Regulation, introduces a new provision addressing "*natural persons*" and "*private legal entities*

[11] Official Gazette, The Regulation on Amending the Regulation on the Information and Communication Technologies Authority's Administrative Sanctions http://www.resmigazete.gov.tr/eskiler/2018/09/2018 0929-4.htm (accessed November 11, 2018)

which are not operators" under the Electronic Communications Law. According to the new provision, parties who fail to comply with the obligations determined by ICTA regarding national cyber-security activities and protective measures against cyber-attacks, or fail to implement the measures taken by ICTA, will be subject to an administrative monetary fine in the amount from 1,000 to 1,000,000 Turkish Lira. This provision further indicates that ICTA will request any real persons or legal entities who are affected by this provision to submit their written explanations regarding the violation within a time period to be determined by ICTA (ranging from 15 to 30 days), and written explanations that are not sent in due time will not be taken into account in the determination of any potential administrative fines. Previously, the Sanctions Regulation had not specified any fines regarding natural persons or entities that are not considered as operators, but merely envisaged fines against operators, in the amount of up to 3% of the operator's net sales during the previous calendar year.

The new provision addresses natural persons and private legal entities that are not considered as operators, which may be extended to all natural persons and private legal entities and interpreted to mean that they will be subject to ICTA's regulations and measures. Therefore, this provision appears to have a wide and ambiguous scope. Although the actual scope of the application of this provision is yet unknown, there is a possibility that ICTA may enforce this provision in the requests that it directs at legal entities that are not acting as "operators" under ICTA's authorization or supervision. In this regard, ICTA may also be expected to issue a list of rules and obligations within the scope of this provision in the future.

Real Estate Law

Regulation on Real Estate Trade

The Regulation on Real Estate Trade ("***Regulation***"), which sets forth and regulates the procedures and the principles with respect to the real estate trade, and which is based on Article 16(1)–b of the Law on Retail Trade No. 6585 ("***Law***"), has been published in the Official Gazette on June 5, 2018.

The Regulation defines the scope of real estate trade as follows: (i) all activities relating to the purchase and sale of real estate, (ii) agency and brokerage services relating to the marketing and rental of real estate, and (iii) consultancy and management services relating to real estate, regardless of whether or not such real estate is registered to the land registry (*i.e.*, listed in the book of real estate registers).

As per Article 5 of the Regulation, real estate trade can be carried out by merchants, tradesmen and craftsmen who receive a license (also known as a "certificate of authority") through the Real Estate Information System ("***Information System***"), which must be obtained on behalf of the real estate enterprise from the provincial directorate of its place of business. A license is granted exclusively for each individual business and cannot be transferred or assigned to another business. In case there are multiple merchants, tradesmen or craftsmen who are engaged in the real estate trade within a single enterprise, then only a single license will be granted to that enterprise, rather than furnishing a separate license to each person engaged in the real estate trade. A license is valid for five (5) years. Enterprises should affix their licenses in an easily visible location in their workplaces.

In order to receive the real estate license, enterprises must (i) meet the requirements set forth under Article 12 of the Regulation, which stipulates and regulates the essential physical properties of the enterprises, (ii) be registered with the relevant trade association, and (iii)

be an individual income or corporate taxpayer. If the enterprise consists of real person merchants, tradesmen or craftsmen, such person must (i) be at least 18 years old, (ii) be a high school graduate, (iii) not have declared bankruptcy, and (iv) not have been convicted of or sentenced for certain crimes set forth under the Regulation. Furthermore, these rules also apply to the representatives and authorized agents of a company or legal entity that is engaged in the real estate trade, as well as the branch managers of any local offices or branches of such entities.

Moreover, all such persons must also attain and possess a "professional proficiency certificate", which is based on the national qualification standards for authorized real estate consultants (Level 5).

The Regulation lists the services that are subject to the real estate trade regulations as follows:

- Marketing activities or agency and brokerage services concerning the purchase and sale or rental of real estate, whether such real estate is registered to the land registry or not,
- Examination, research and reporting services regarding the real estate that is subject to the purchase and sale or rental activities,
- Providing information to the client with respect to the market purchase and sale or rental value of the real estate,
- Facilitating or assisting in title deed transactions,
- Executing agreements with the buyers or the lessees, following up with rental payments and utility subscription procedures, ensuring that services such as the repair, maintenance and restoration of the real estate are provided, and informing the client regarding the procedures and developments with respect to these issues,
- Providing consultancy and management services regarding the real estate,
- Carrying out other services related to the real estate trade.

Services related to the real estate trade must be provided on the basis of a written authorization agreement, which will be signed between the client and the real estate trade enterprise. At a minimum, such agreements must include the components that are enumerated under Article 15 of the Regulation. As per Article 18 of the Regulation, the real estate trade enterprise may cooperate with one or more other enterprises in providing real estate services, provided that such cooperation is included and declared in the authorization agreement signed by the enterprise and the client. Following the purchase and sale brokerage services provided by the enterprise, a real estate brokerage agreement for the purchase/sale must be signed between the buyer, the seller and the enterprise. Likewise, following the rental brokerage services provided by the enterprise, an agency/brokerage agreement regarding the real estate rental must be signed between the lessee, the lessor and the enterprise. The minimum components that must be included in such agency/brokerage agreements are listed separately in Articles 16 and 17 of the Regulation. Services for showing or displaying a piece of real estate, for whose purchase/sale or rental the enterprise is providing brokerage services, can be carried out by issuing a separate "real estate display certificate" for each real estate that is shown or displayed to potential buyers or lessees. The minimum components that must be included in such real estate display certificates are listed in Article 19 of the Regulation.

The service fee rate for real estate purchase/sale transactions cannot exceed 4% of the sale price, excluding VAT. Service fees for rental transactions cannot exceed one month's rental fee, excluding VAT, for rental agency/brokerage services.

The enterprise qualifies for and becomes entitled to the service fee following the registration of the purchase/sale of the real estate in the land registry, or at the conclusion (*i.e.*, signing) of the rental agreement between the client and the lessee.

For all other real estate service agreements (*i.e.*, excluding purchases/sales and rentals), the enterprise will receive the service fee after the conclusion of such agreement. The service fee will be equally allocated between the client and the buyer or the lessee, unless otherwise stipulated in a written agreement.

As per Article 22 of the Regulation, in case of a breach of the provisions of the Regulation, an administrative monetary fine in the amount of TL 3,000 (for failing to submit commercial books, documents, and other records or related information), or in the amount of TL 2,000 (for hindering or impeding the duties of the audit personnel), will be imposed on the violators. Additionally, in case of recurrence, such fines will be multiplied.

Anti-Dumping Law

Anti-Dumping Measures to Expire Within the First Half of 2019

Up until the recent changes in Turkey's governmental system, the Ministry of Economy had the sole authority to initiate dumping or subsidy examinations. Along with the transition of the governmental system to an "executive presidency," the Ministry of Trade ("***Ministry***") has been granted this authority through the Presidential Decree on Presidential Organization No. 1, dated July 10, 2018.

Although the General Directorate of Imports is now affiliated with the Ministry of Trade, these recent changes did not have any significant practical effects, as "the Board of Assessment of Unfair Competition in Imports" (stationed within the General Directorate of Imports) is still responsible for resolving matters that relate to the actions and measures to be taken with the aim of protecting a domestic industry against damages caused by dumped and/or subsidized imports in case of unfair competition.

Within the scope of this authority, the Ministry has announced, through the Communiqué on the Prevention of Unfair Competition in Imports No. 2018/26, dated August 16, 2018, that several ongoing anti-dumping measures, which had been put into effect in 2014, will expire as of the first half of 2019, unless an expiry review investigation is initiated. In the event that an expiry review investigation is initiated, the Ministry will have to re-examine the current conditions and circumstances of the relevant industry and assess the level of threat caused by the importers, and subsequently decide the rates at which the anti-dumping duties will be applied, if any.

Below is a bullet-point summary of the anti-dumping cases and measures that will expire as of the first half of 2019:

- Communiqué No. 2014/4, dated January 23, 2014, concerning synthetic fiber blankets (except electric blankets) and knee blankets, other blankets and knee blankets, and only rolled or cut knitted pile fabrics, originating from the People's Republic of China:

The Ministry had announced its decision upon the completion of the expiry review investigation in relation to the current dumping measures on imports of synthetic fiber blankets (except electric blankets) and knee blankets classified under the CN code 6301.40, other blankets and knee blankets classified under the CN code 6301.90, and only rolled or cut knitted pile fabrics classified under the CN codes 6001.10.00.00.11 and 6001.92, originating from the People's Republic of China. In this respect, the Ministry had decided that imports of these products were threatening to cause injury to the domestic industry, and consequently decided to impose an anti-dumping duty of 4 USD/kg.

- Communiqué No. 2014/9, dated March 27, 2014, concerning textured yarns of nylon and polyamides with layers of 50 tex, originating from the People's Republic of China:

The Ministry had announced its decision upon the completion of the expiry review investigation in relation to the current dumping measures on imports of textured yarns of nylon and polyamides with layers of 50 tex classified under the CN code 5402.31, originating from the People's Republic of China. In this respect, the Ministry had decided that imports of these products were found to be threatening to cause injury to the domestic industry, and thus decided to impose an anti-dumping duty at a rate of 37.40% of the CIF cost.

- Communiqué No. 2014/2, dated April 8, 2014, concerning yarns of synthetic and artificial discontinuous fibers (staple fiber yarn), originating from Malaysia, Egypt, Pakistan, Thailand and Vietnam:

The Ministry had announced its decision upon the completion of the anti-dumping investigation on products classified as yarns of synthetic and artificial discontinuous fibers (staple fiber yarn) classified under the CN codes 55.08, 55.09, 55.10, 55.11, except those classified under the subheadings CN Codes 5509.52, 5509.61, 5509.91 and 5510.20, originating from Malaysia, Egypt, Pakistan, Thailand and Vietnam. Accordingly, the Ministry decided to apply anti-dumping duties at a rate of 18.32% of the CIF cost for products originating from Malaysia, excluding two companies for which the Ministry decided to apply anti-dumping duties at rates of 11.26% and 17.03% of the CIF cost; at a rate of 12.18% of the CIF cost for products originating from Pakistan, excluding three companies for which the Ministry decided to apply anti-dumping measures at lower rates, varying from 6.62% to 10.02% of the CIF cost; at a rate of 20.24% of the CIF cost for products originating from Thailand, excluding two companies for which the Ministry decided to apply anti-dumping measures at rates of 7.79% and 14.02% of the CIF cost; and at a rate of 26.25% of the CIF cost for products originating from Vietnam, excluding ten companies for which the Ministry decided to apply anti-dumping measures at lower rates varying from 19.48% to 23.91% of the CIF cost. As to the imports from Egypt, the Ministry decided that there was no causal link between the dumped imports from Egypt and the injury to domestic production. Thus, the Ministry did not impose any measures regarding the imports from Egypt within the scope of this investigation.

- Communiqué No. 2014/8, dated April 26, 2014, concerning non-refillable pocket gas lighters, products classified as "containing electrical ignition systems" and pneumatic troughs made of plastic (whether containing gas or not), originating from the People's Republic of China:

The Ministry had announced its decision upon the completion of the expiry review investigation in relation to the current anti-dumping measures on imports of non-refillable pocket gas lighters classified under the CN code 9613.10.00.00.00, products classified as "containing electrical ignition systems" classified under the CN code 9613.20.00.00.11, and pneumatic troughs made of plastic (whether containing gas or not) classified under the CN code 9613.90.00.00.11, originating from the People's Republic of China. In this respect, the Ministry had decided that imports of these products were threatening to cause injury to the domestic industry, and thus decided to impose an anti-dumping duty of 0.05 USD/unit for each product.

- Communiqué No. 2014/14, dated May 3, 2014, concerning laminate parquets (whether in plates or not), originating from the People's Republic of China:

The Ministry had announced its decision upon the completion of the expiry review investigation in relation to the current anti-dumping measures on imports of laminate parquets (whether in plates or not) classified under the CN codes 4411.13.90.00.11,

4411.14.90.00.11, 4411.92.90.00.11 and 4411.93.90.00.11, originating from the People's Republic of China. In this respect, the Ministry had decided that imports of these products were threatening to cause injury to the domestic industry and proceeded to impose an anti-dumping duty of 2.40 USD/m2, excluding five companies for which the Ministry decided to apply an anti-dumping duty of 1.60 USD/m^2.

White Collar Irregularities

An Overview of Corruption Risks in the Pharmaceutical Sector

It has been argued that the pharmaceutical industry is one of the sectors that is remarkably vulnerable to corruption. With the prioritization of anti-corruption efforts and the concomitant increase in the number of anti-corruption regulations and legislations, pharmaceutical companies (especially multinational firms operating in a wide range of jurisdictions) appear to be straining to adopt and enforce adequate compliance policies. As a result, medicine and medical device companies occasionally find themselves linked to (if not the subject of) anti-corruption investigations. Most recently, in September 2018, an acclaimed pharmaceuticals company based in France agreed to pay USD 25.2 million to resolve bribery allegations.

The sector's vulnerability to corruption accusations might stem from several factors, the most important of which is the highly complex and multifaceted structure of the sector itself. As is well-known, the pharmaceutical industry consists of multiple actors, high-value products and contracts, and this is particularly true in the medical device sector. Demand is generally set by the healthcare professionals to whom the pharmaceutical companies sell their products, and this demand is mostly varying and unpredictable. This complicated state of affairs creates multiple points of potential vulnerability to incidents of the bribery of public officials and other corruption risks. The various stages in the lifespan of an essential medicine (including registration, selection and promotion) stand out in terms of their exposure and susceptibility to potential corruption. It has also been argued that pharmaceutical companies could be exposed to a certain degree of risk with regard to the activities of their distributors, as the commercial chain becomes even more complex and convoluted when it comes to the interactions of distributors with hospitals and medical practitioners in multiple geographic regions.

There are several distinct stages in the pharmaceutical supply chain, and most of them are usually within the control of governments, or at least subject to the regulations set forth by governmental bodies. It may not be so easy to grasp the details and intricacies of every country's regulations, or to delineate the line between the private sector and the public sector in each country. Nevertheless, it would be safe to assume that healthcare officials, physicians and staff who are government employees often fall within the definition of a "government official". Financial demands made by healthcare officials and physicians, who could be underpaid government officials and who often view these compensation arrangements (such as conference sponsorships or other benefits) as their professional privileges, can be counted among the practices that could increase the risk of running afoul of anti-corruption laws for pharmaceutical companies. The ongoing debates regarding conflicts of interest and medical ethics are also brought into the spotlight by promotional activities of pharmaceutical products to healthcare professionals. The overriding concern in such cases is that such suspicious and unrecorded transactions could influence a physician's drug prescription decisions through a range of incentives, which could result in irrational prescriptions and increased healthcare costs.

The European Union Commission's study on this issue,[12] published in October 2017, concluded that the healthcare sector is particularly susceptible to corruption. Furthermore, the study declared that, although the relationship between physicians and the industry contributes to product development and the observation of how medicines are used in practice, and although the industry supports continuous medical education of healthcare professionals through its sponsorships, such relationships may nevertheless increase the risk of corrupt practices, such as influencing doctors' prescription decisions. Other significant findings laid out in the study included the following: (i) bribery in the pharmaceutical sector remains one of the key challenges in the fight against corruption, especially in many Eastern and Southern European Member States, and (ii) tailoring the tender specifications or the tender process to one (preferred) supplier, has been observed to constitute a common method of influencing procurement decisions.

Transparency International's publication on this matter, titled "*Corruption in the Pharmaceutical Sector*"[13] published in June 2016, also addresses the issue of pharmaceutical companies influencing healthcare professionals. In this regard, the study expressed the view that pharmaceutical companies influence doctors as well as national politics as a consequence of their considerably large spending power, which they use to persuade doctors to prescribe their own drugs, even when cheaper or more useful alternatives already exist. According to Transparency International, the promotion of transparency and accountability within the sector and ensuring accountability through increased monitoring, enforcement and sanctions could help to find a solution to these illegal arrangements.

Ultimately, it seems likely that only a genuine commitment to anti-corruption policies by governments and pharmaceutical companies, collaboration, and the empowerment of whistleblowers by all the actors in the healthcare sector, as well as the implementation of a well-structured and transparent supply chain, would help to mitigate the corruption risks in the healthcare sector and alleviate the legal problems related to anti-corruption enforcement that still hang over the heads of pharmaceutical companies.

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[12] European Commission's "Updated Study on Corruption in the Healthcare Sector" https://ec.europa.eu/home-affairs/sites/homeaffairs/files/20170928_study_on_healthcare_corruption_en.pdf (accessed November 11, 2018)

[13] Transparency International UK's "CORRUPTION IN THE PHARMACEUTICAL SECTOR" https://www.transparency.org.uk/publications/corruption-in-the-pharmaceutical-sector/#.W8oKTXszbIU (accessed November 11, 2018)

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