ISSN 2147 – 558X

ELİG
GÜRKAYNAK
Attorneys at Law

LEGAL INSIGHTS QUARTERLY

December 2019 – February 2020

LEGAL INSIGHTS QUARTERLY

December 2019 – February 2020

Aralık / December, İstanbul

Yayın Türü / Type of Publication
Yerel Süreli / Local Periodical

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

Av. Gönenç Gürkaynak
Çitlenbik Sokak No: 12,
Yıldız Mahallesi
Beşiktaş 34349,
ISTANBUL, TURKEY

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

ISSN 2147 – 558X

Preface to the December 2019 Issue

The Legal Insights Quarterly's final issue in 2019 aims to provide insight and guidance to its readers with sixteen articles under thirteen different disciplines, and to shed light on the most contemporary legal questions of 2019's last quarter.

To begin with, the Banking and Finance section explains the intricacies of financial restructuring, whereas the Corporate Law chapter focuses on how the concept of physical cash pooling is regulated in the Turkish jurisdiction.

This issue also discusses four different cases of the Competition Board, demonstrating the Board's most recent approach to *de minimis* in the context of abuse of dominance cases, the evaluation of resale price maintenance and the analysis of the interplay between consumer welfare, intellectual property and competition through the individual exemption assessment of a public information ad. The section on Data Protection explains the framework in which personal data can be transferred abroad without the explicit consent of the data subject and also examines the assumption that the country to which the personal data will be transferred will provide an adequate level of protection.

The Employment Law section examines another enlightening High Court case, in which the fundamental concepts of freedom of contract and the legal status of fixed-term employment contracts are discussed in light of the principles of labor law.

Finally, the White Collar Irregularities section provides an overview of the FCPA enforcement actions in the United States in 2019 and brings together the highlights of the year.

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

December 2019

Corporate Law

Implementation of the Physical Cash Pooling Concept Under Turkish Legislation

I. Introduction to Physical Cash Pooling

The concept of "physical cash pooling" can be defined simply as a sort of cash balancing transaction that is conducted amongst group companies, through transfer of surplus cash by relevant affiliates that hold a strong financial position to a "leader account" (or master account/header account), which is specifically designated for physical cash pooling purposes, and utilization of the monies accumulated in the leader account to meet the cash needs of other affiliates.[1] This concept mainly originates from the Anglo-American legal system, and is directly related to effective cash management and cash centralization strategies of group companies. From this aspect, physical cash pooling is a financing method applicable for group companies, which can be classified as *"intragroup external financial resources"*[2] and which enables group companies to get loans (intercompany loans) from the pool (*i.e.*, from the leader account).

II. Applicable Legislation Under Turkish Law Regarding Physical Cash Pooling

In terms of Turkish law, there is no specific legislation regarding the cash pooling concept.

On the other hand, considering that the Decree No. 32 on the Protection of the Value of Turkish Currency (**"Decree No. 32"**) and the Circular of the Central Bank of the Republic of Turkey on Capital Movements (**"Circular"**) allow legal entities operating in Turkey to obtain and provide intercompany loans under certain conditions, it could be inferred that, in certain cases, physical cash pooling or the participation of any Turkish entity in that system, may be allowed in Turkey.

It should also be noted that, as per Article 386 of the Turkish Code of Obligations (**"TCO"**), borrowing agreements for money or consumable items are described as *"an agreement in which the lender undertakes to transfer some money or any consumable item to the borrower and the borrower undertakes to give the object back in the same quality and amount to the lender."* Intercompany loans will also be subject to the supplementary provisions of the TCO, unless otherwise stipulated under the Circular and the Decree No. 32. For instance, per Article 387 of the TCO, in the case of a commercial borrowing agreement for consumable items, the lender may levy interest on the loan even if it was not contractually determined by the parties.

In addition to the above, the "control" relationship between the lender and the borrower should also be evaluated from a corporate law perspective. Pursuant to Article 195 of the Turkish Commercial Code No. 6102 (**"TCC"**), a company is deemed to control another company directly or indirectly in case of (i) possession of the majority of its voting rights, (ii) holding the majority of votes on the board of directors, (iii) ability to use the majority of voting rights based on an agreement, alone or with the other shareholders, (iv) ability to manage the company on the basis of an agreement or by other means, in which case the first company is considered as the "controlling company" and the other is known as the "controlled company."

Furthermore, pursuant to Article 202 of the TCC, a controlling company shall not exercise its control in a way that would make the controlled company incur a loss. In particular, the controlling company cannot direct the

---

[1] Özdin, Funda, *"Cash Pooling (Nakit Havuzu) ve Alman Hukukunda Sermayenin Korunmasına İlişkin Maddelerde Cash Pooling Lehine Yapılan Değişiklik (§ 57/I/c. 3 AktG, § 307I/c. 2 GmbHG)"*, Arslanlı Bilim Arşivi, accessible from: www.arslanlibilimarsivi.com, at 1 (last accessed on October 10, 2019).

[2] Ibid.

controlled company to carry out legal transactions, such as transfer of its business, assets, funds, staff, receivables or debts; to decrease or transfer its profit; to encumber its assets with *in rem* or personal rights; to undertake liabilities, such as providing surety, guarantee and aval (*i.e.*, a guarantee that a third party adds to a debt obligation); or to make payments, etc. Such steps might be allowed only if any loss incurred due to such acts is offset within that financial year, or a right to claim the "equivalent value" is granted to the controlled company, no later than the end of that financial year, with a specific explanation as to how and when this loss will be recovered. If the loss is not offset within the activity year, or if a "right of equivalent claim" has not been granted within the due period, each shareholder of the controlled company can request the controlling company, and the board members of the controlling company who caused the loss, to compensate the controlled company for its loss. If it is deemed just and equitable, rather than ruling for compensation, the judge may decide that the controlling company shall purchase the shares of the plaintiff shareholders, or decide on another solution that may be acceptable and appropriate to the particular situation at hand.

In accordance with Article 203 of the TCC, if a company directly or indirectly holds 100% of the shares and voting rights of another company, the board of directors of the parent (*i.e.*, controlling) company may give instructions on the management of the subsidiary (*i.e.*, controlled) company, even if this may cause losses to the latter, provided that such instructions are given in accordance with existing and specific policies of the group. In such cases, the bodies of the controlled company must follow such instructions. However, a specific exception is set out in Article 204 of the TCC, which provides that the parent company may not give instructions that would clearly exceed the subsidiary's payment ability, jeopardize its existence or give rise to the loss of significant assets.

In addition, Article 358 of the TCC states that shareholders may not borrow money from the company unless: (i) they have fulfilled their capital subscriptions that have become due and payable, and (ii) the company's profit, together with its free legal reserves, are sufficient to cover any previous-year losses.

Lastly, if the company becomes bankrupt as a result of the intercompany loan, as per Article 161 of the Turkish Criminal Code No. 5237, a charge of fraudulent or negligent bankruptcy may also be brought.

III. Conclusion

There is no legislation that specifically aims to regulate the concept or practice of "physical cash pooling" in Turkey. On the other hand, considering that there are no concrete restrictions on this matter, it could be reasonably concluded that the "physical cash pooling" concept can indeed be integrated into the Turkish legal system. However, it is important to point out that there is already a number of existing laws and regulations in Turkey which are indirectly linked to the cash pooling concept (*e.g.*, transfer pricing regulations, arms-length transaction requirements); therefore, those laws and regulations should also be carefully evaluated by the practitioners. Furthermore, the tax consequences of this concept/practice should be also evaluated and explained by knowledgeable tax experts.

Banking and Finance Law

Recent Developments in the Financial Restructuring Process in Turkey

I. Introduction and General Overview of the Current Financial Restructuring Rules

The concept of "financial restructuring," which may be defined as "*the process of reorganizing* *the borrowing structure of a debtor*" was set forth in Turkey through the Regulation on the Restructuring of Debts Owed to the Financial Sector, which was published in the Official Gazette No. 30510 on August 15, 2018 (amended with the Regulations on Amending the Regulation on the Restructuring of Debts Owed to the Financial Sector, published in the Official Gazette No. 30602 on November 21, 2018) ("**Regulation**"). The Regulation created an opportunity for the debtors to fulfil their repayment obligations and allowed them to restructure their debts through restructuring agreements executed within the scope of framework agreements ("**Framework Agreement**"), as drafted by the Banks Association of Turkey and approved by the Banking Regulatory and Supervisory Agency ("**BRSA**"), and regulating the minimum content of individual restructuring agreements to be executed between the debtors and the banks.

Creditors applied for financial restructuring based on the provisions of the abovementioned Regulation, until the Provisional Article 32 of the Banking Law No. 5411 ("**Law**") entered into force upon its publication with the Omnibus Bill in the (Repeating) Official Gazette No. 30836 on July 19, 2019 ("**Provisional Article**").

A few months after the implementation of the Provisional Article, new amendments were introduced to the Regulation by the BRSA through the Regulation on Amending the Regulation on the Restructuring of Debts Owed to the Financial Sector, published in the (Repeating) Official Gazette No. 30886/1 on September 12, 2019 ("**Amending Regulation**"), in order to accord with the principles put forth in the Provisional Article.

While the Provisional Article widened the scope of applicability of the financial restructuring process, it also adopted the provisions contained in the Regulation with minor changes. In a similar manner, the Amending Regulation implemented the provisions of the Provisional Article into the Regulation.

II. Changes Brought Forth by the Provisional Article 32

Firstly, the Provisional Article broadened the definition of "creditors" who can benefit from financial restructuring. Accordingly, the definition of creditors was now expanded to include non-resident banks and financial organizations that have lent directly to Turkish resident debtors, multinational banks and institutions that have directly invested in Turkey, as well as special purpose vehicles ("**SPV**") established by such creditors and investment funds established for the same purposes, as per the Capital Markets Law No. 6362 ("**CML**"); as well as deposit banks, participation banks, development and investment banks established in Turkey, financial leasing companies, factoring companies and financing companies ("**Creditor**").

Secondly, the Provisional Article clarified that the debtors would have to be companies incorporated in Turkey, but specifically excluded those entities that fell under the following laws and institutions ("**Debtor**"):

(i) Banking Law No. 5411 (*i.e., deposit banks, participation banks, development and investment banks established in Turkey*);
(ii) Insurance Law No. 5684 (*i.e., insurance companies, reinsurance companies carrying out business activities in Turkey*);
(iii) Law No. 6361 on Financial Leasing, Factoring and Finance Companies (*i.e., financial leasing, factoring and financing companies established in Turkey*);
(iv) Law No. 6493 on Payment and Securities Settlement Systems, Payment Services and Electronic Fund Institutions (*i.e., payment institutions and electronic payment institutions*); and,

(v) Capital markets institutions listed in Article 35 of the CML (*i.e., residential property finance and asset finance funds, portfolio management companies, mortgage finance institutions, central depository institutions*), with the exception of investment institutions.

On the other hand, as per paragraph 3 of the Provisional Article, the Debtor will be able to benefit from the financial restructuring provisions only if its financial status and condition has been assessed by the Creditor and it has been deemed feasible for the Debtor to enter into financial restructuring. In other words, the Debtor is expected to be able to repay its debts once they are restructured. The assessment of the Debtor's financial situation and applicability of the financial restructuring provisions will be undertaken by independent auditors, by those institutions with sufficient expertise and knowledge as stipulated under the Framework Agreements, or by the Creditor itself (subject to prior approval of the Debtor).

Contrary to the Regulation, the Provisional Article has provided further options for restructuring measures that may be applied to the Debtor. Following completion of the abovementioned analysis, the Creditor may grant certain measures to the Debtor, such as the following:

(i) Extension of maturity,
(ii) Renewal of loans,
(iii) Granting additional loans,
(iv) Reducing or waiving (fully or partially) the principal amount, interest, default interest, late payment penalties, dividends, and any other receivables arising from the loan,
(v) Reducing collaterals,
(vi) Conversion of principal amount, interest or dividends into equity (fully or partially),
(vii) Executing protocols with other banks and Creditors,
(viii) Selling or assigning the principal amount, interest or dividends to SPVs or investment funds incorporated pursuant to the CML in return for a price contingent upon payment in kind, cash or collection.

It is also important to note that the Provisional Article specifies that a reduction in the collaterals, the waiver of the principal amount or any other receivables, and similar transactions made in accordance with the Provisional Article will not be deemed to constitute grounds for an embezzlement charge, as per the applicable banking regulations.

The Provisional Article also provides several tax exemptions for the transactions and documents to be entered into within the scope of the Framework Agreement and the relevant restructuring agreements. For instance, exemption from stamp tax, resource utilization support fund tax, and banking and insurance transaction tax may be applicable; however, those Debtors who have benefitted from financial restructuring with respect to the same debts within the previous two years and who are undergoing financial restructuring again will not be able to benefit from the relevant tax exemptions and subsidies.

Lastly, the Provisional Article will be applicable only for a limited term of two years, starting from the date that the Provisional Article was published in the Official Gazette, *i.e.*, July 19, 2019. The President of the Republic of Turkey can extend such period for an additional two years.

III. Changes Brought Forth by the Amending Regulation

The main purpose of the changes made by the Amending Regulation is to align the Regulation with the new rules introduced by the Provisional Article. In this context, the definition of "creditors" under the Regulation was amended to reflect the changes made by the Provisional Article, and it now encompasses non-resident banks and financial organizations that have directly lent to Turkish resident debtors, multinational banks and institutions that have directly invested in Turkey, as well as SPVs established by such creditors and investment funds established for the same purposes under the CML. Additionally, investment institutions have been included in the definition of "debtors," and it has been clarified once again that such debtors must be incorporated in Turkey.

It should be noted that another change has been made to Article 4 of the Regulation. Pursuant to the amendment, it was reiterated that the scope of the Regulation and the Framework Agreements would encompass only those financial restructurings that sought to enable the Debtor to repay its debts within a reasonable time period, and that any extensions, instalments and other refinancing transactions that did not have this aim would not be considered to fall within the scope of the Regulation or the Framework Agreements. Furthermore, those financial restructuring agreements, that were executed prior to enactment of the Provisional Article and outside the scope of the Framework Agreements, will not be considered to fall under the scope of the Framework Agreements and the relevant restructuring agreements. As a result, such financial restructuring transactions will not benefit from any applicable tax law or criminal liability exemptions.

Furthermore, with the newly added provision to Article 5/4 of the Regulation, non-resident banks and financial organizations that have directly lent to Debtors, and multinational banks and institutions that have directly invested in Turkey can join the financial restructuring process under the Framework Agreements, irrespective of the consent or decision quorum of the Creditors. It should also be pointed out that the approval of at least 30% of the Creditors representing 75% of the total receivables is required for other creditors to be able to join the financial restructuring process, as per the Framework Agreements.

Finally, with the new changes introduced to Article 9, the BRSA can request documents and information in relation to transactions that fall within the scope of the financial restructuring provisions. Accordingly, any information that may be deemed necessary regarding the debtors, signed restructuring agreements, transactions and developments have to be submitted to the BRSA within the requested period and according to the requested form and content.

IV. Conclusion

Even though there is still a lot of work to be done to fully regulate the financial restructuring process in Turkey, it is abundantly clear from the recently introduced amendments that the lawmakers and the BRSA intend to unify the existing regulations and set forth more expansive and detailed rules on this issue. As part of this process, we expect the BRSA to revise the Framework Agreement draft in the near future, in accordance with the changes made to the Law and the Regulation.

Capital Markets Law

Recent Amendments to the Investment Funds Legislation in Turkey

I. General Overview of the Legislation

In Turkey, the general rules and principles regarding investment funds are mainly regulated under Articles 52-57 of the Capital Markets Law No. 6362. Additionally, the Capital Markets Board ("**CMB**") has regulated further details regarding the establishment and activities of investment funds under the Communiqué on the Principles of Investment Funds (III-52.1) ("**Communiqué**"). The CMB has also introduced the Investment Funds Guide ("**Guide**") with its resolution numbered i-SPK.52.4 (dated June 20, 2014, and numbered 19/614), in order to clarify the rules and principles stipulated in the Communiqué.

The Communiqué Amending the Communiqué (III-52.1.c) ("**Amending Communiqué**") entered into force upon its publication in the Official Gazette No. 30712 on March 12, 2019. The CMB has also amended the Guide on the same date to reflect the changes introduced through the Amending Communiqué. This article will focus on the novelties introduced by the Amending Communiqué and the Guide into the investment funds regime in Turkey.

II. What is an Investment Fund?
Under the Turkish capital markets laws, an investment fund can be defined as a group of assets that does not have legal personality, which are formed by portfolio management companies in accordance with certain applicable regulations.

Portfolio management companies are Turkish capital market institutions, which are required to be established as joint-stock companies with the main objective of operating and managing investment funds. Compliance with certain conditions and obtaining the CMB license are prerequisites for establishing and operating a portfolio management company.

Investment funds are operated and managed by portfolio management companies on behalf of their investors in exchange for a consideration that is known as "a participation share." The portfolio of an investment fund can consist of cash and/or other assets and rights that are owned by the investors. The portfolio is managed by the portfolio management company based on the principle of fiduciary ownership.

III. What has Changed as a Result of the Amendments to the Communiqué?
Before the Amending Communiqué entered into force, portfolio management companies in Turkey were allowed to include only 20% of the participation shares in their portfolios. Following the amendment made to Article 15/6 of the Communiqué, such portfolio management companies are now permitted to include participation shares in their portfolios without being restricted by a limited threshold. Additionally, an advance payment may be granted by the portfolio management companies to the investment funds, prior to commencement of the sale of the participation shares.

Article 17 of the Communiqué stipulates certain limitations on the assets to be included in the portfolios of investment funds and on the issuers of such assets. For instance, a fund cannot invest more than 10% of its net asset value in a single issuer, regardless of whether such investment is in the form of monetary funds, capital market instruments, or other derivatives based on such instruments. Furthermore, if an issuer receives investments exceeding 5% of the total value of the investment fund, the total value of money and capital market instruments of the relevant issuer cannot be more than 40% of the total value of the said investment fund.

The Central Bank of the Republic of Turkey, the Ministry of Treasury and Finance, as well as mortgage finance institutions, are exempt from the limitations regarding the assets to be included in the portfolios of investment funds. Following the amendment made to Article 17/1 of the Communiqué, the exemption was also extended to money and capital market instruments issued by the Turkey Wealth Fund; however, the limitation was maintained whereby the investments that are issued by said institutions with respect to a single asset cannot exceed 35% of the net asset value of the investment fund. With this limitation, it can be reasonably concluded that the CMB intends to minimize the concentration (*i.e.*, non-diversification) risks arising from concentrated investments on a single asset.

Lastly, the Amending Communiqué has authorized the CMB to determine different minimum and/or maximum rates for assets and transactions to be included in the portfolios of the investment funds, as well as the upper limit of the management fees, depending on the type of the fund.

IV. What has Changed as a Result of the Amendments to the Guide?

The principles relating to the operation of money market funds have been specified through the newly introduced Article 4.7 of the Guide. Accordingly, at least 50% of the total value of money market funds must be utilized in deposit/participation accounts. However, the amount that may be deposited in a single bank cannot exceed 6% of the total value of the fund. Furthermore, the total amount of investments made by such funds in reverse repo transactions, and in the Settlement and Custody Bank money market and domestically organized money market transactions, cannot exceed 40% of the total value of the fund.

Furthermore, it has been determined that the management fees that will be derived from money market funds shall be set at 1/2 of the management fee amounts specified in the fund prospectus and the investor information forms. Finally, it is provided that any applications made for the purpose of increasing the current management fees will not be taken into account by the CMB, as of March 15, 2019.

V. Conclusion

In conclusion, in order to meet the expectations of portfolio management companies, the threshold for the participation shares to be included in the portfolios of such companies has been removed, which has enabled portfolio management companies to include their own participation shares in their portfolios to boost investment environment in Turkey. Moreover, the Turkey Wealth Fund has been exempted from the 10 limitations on the assets to be included in fund portfolios, in order to enable funds established by the Turkey Wealth Fund to invest in capital market instruments issued by the Turkey Wealth Fund, thereby contributing to the diversity of the investment vehicles in the capital markets. However, the CMB has also introduced a 35% threshold to this exemption to avoid concentration risk arising from investing on a single market. Following the amendment made to the Communiqué, the CMB has gained discretionary powers to determine different rates for assets and transactions to be included in the fund portfolios, as well as the upper limit of the management fees. Lastly, the amendments made to the Guide have introduced certain limits on the treatment of money market funds and they have determined the management fees to be received from this specific type of funds.

Competition Law / Antitrust Law

The Turkish Competition Board Reassessed the Allegations of Refusal to Supply against Maysan Mando further to the Administrative Court's Annulment and Imposed an Administrative Monetary Fine for Resale Price Maintenance

The Authority published the Board's reasoned decision[3] reassessing its previous decision[4] not to initiate an investigation against Maysan Mando Otomotiv Parçaları San. ve Tic. A.Ş. (“**Maysan Mando**”), subsequent to the annulment of this decision by the 15th Administrative Court of Ankara (“**Court**”). The allegations included that Maysan Mando had distorted competition by way of (i) refusing to supply, and (ii) colluding with the

[3] The Board's decision dated June 20, 2019 and numbered 19-22/353-159.

[4] The Board's decision dated February 18, 2016 and numbered 16-05/107-48.

competitors of Tok Oto Market (“**Tok Oto**” or the “**Complainant**”) in order to exclude Tok Oto from the downstream market.

As background information, Maysan Mando is a supplier of shock absorber products, including passenger cars, light commercial vehicles, buses and heavy trucks, along with the railways and certain products with military applications. Tok Oto, a dealer of Maysan Mando, lodged a complaint before the Authority alleging that (i) Maysan Mando had the highest market share in the relevant market in Turkey due to its reasonably priced products, (ii) Maysan Mando verbally informed Tok Oto that it will no longer supply its products to Tok Oto and thus refused to supply its products to Tok Oto due to Tok Oto’s competitors’ pressure, and therefore (iii) Maysan Mando excluded Tok Oto from the downstream market.

In its assessment of the complaint, the Board started out by defining the relevant product market as the market for *“production and sales of shock absorbers”*, *“sales of automotive spare parts”* and *“distribution and sales of shock absorbers*” taking into consideration the activities of both Maysan Mando and the Complainant. The relevant geographic market is defined as “*Turkey*.” The Board then proceeded with its evaluation of the allegations put forth in the case file, and indicated that the relevant allegations should be assessed within the scope of Articles 4 and 6 of the Law No. 4054.

In its substantive assessment, the Board first assessed whether Maysan Mando violated Article 4 of the Law No. 4054 by way of determining the resale prices of its dealers’ products through its supply agreements. In this regard, the Board stated that resale price maintenance behaviors constitute a vertical restraint and such practices are generally considered to restrict intra-brand competition. In accordance with Article 6 of the Block Exemption Communiqué on Vertical Agreements in the Motor Vehicles Sector (**“Communiqué No. 2017/3”**), the prohibition of the distributor’s freedom to determine its own selling price is considered as one of the restrictions which aims to prevent competition and the agreements containing such restrictions are excluded from the block exemption regime provided under the Communiqué No. 2017/3.

The Board also emphasized that, considering that price is one of the most important elements of competition, resale price maintenance practices constitute a competition constraint by object and it is not possible to grant an individual exemption under Article 5 of the Law No. 4054.[5] As a result of the close competition between the dealers, it was found that there would be no incentive to make investments to reduce the distribution costs of the dealers and therefore there will be no improvement in the products and services offered by the dealers, which ultimately indicates that no consumer benefit can occur. In short, subsequent to the on-site inspection and documents submitted as evidence, the Board found that Maysan Mando had determined the resale price of its dealers from 2014 to 2018, which falls under the scope of Article 4 of Law No. 4054. Furthermore, the Board stated that Maysan Mando’s behavior did not benefit from either Communiqué No. 2017/3 or Article 5 of Law No. 4054 governing the individual exemption regime. Thus, the Board concluded that Maysan Mando had infringed Article 4 of the Law No. 4054 by way of resale price maintenance.

[5] Article 5 of Law No. 4054 sets out four requirements which must be satisfied by the undertakings in order to obtain an individual exemption: (a) ensure new developments and improvements, or economic or technical development in the production or distribution, (b) benefit the consumer from the abovementioned, (c) not eliminate competition in a significant part of the relevant market, (d) not limit competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b).

The Board then evaluated whether the delays in supply and the non-delivery of shock absorbers to Tok Oto had the object or effect of excluding Tok Oto from the downstream market within scope of Article 6 of the Law No. 4054 governing the abuse of dominance. The Board indicated that the refusal to supply constitutes an anti-competitive behavior, if it (i) relates to a product or service that is indispensable for competing in the downstream market, (ii) is likely to lead to the elimination of effective competition in the downstream market, and (iii) is likely to lead to consumer harm.

In the case at hand, the Board stated that subsequent to the investigation that was initiated further to the Court's annulment decision, it was found that the Complainant continued to distribute shock absorbers. The Board evaluated the ratio of Maysan Mando products within the Complainant's overall sales. The Board thereon noted that between 2012 and 2015, the ratio of Maysan Mando products in the Complainant's sales were low and thus, the lack thereof would not prevent the Complainant from being active in the spare parts market. As for a narrower market for shock observers, the Board found that even though the ratio of Maysan Mando products decreased, the ratio of other product brands had increased. Accordingly, the Board found that Maysan Mando's products were not indispensable because the alternatives in the same market as Maysan Mando products were also included in the Complainant's sales. Thus the indispensability criterion was not satisfied and an infringement within the meaning of Article 6 of the Law No. 4054 did not occur.

The Board ultimately decided unanimously that (i) Maysan Mando did not abuse its dominant position within the meaning of Article 6 of Law No. 4054; but that (ii) its dealership agreements violated Article 4 of Law No. 4054; and that the conditions for the relevant agreements benefiting from the block exemption regime under the Communiqué No. 2017/3 or from the individual exemption regime under Article 5 of Law No. 4054 were not satisfied. Accordingly, the Board decided to impose an administrative monetary fine on Maysan Mando.

Moreover, the Board also decided that the dealership agreements entered into with Maysan Mando's dealers could benefit from block exemption under the Communiqué No. 2017/3, provided that the terms of the agreements are amended in line with the provisions under Communiqué No. 2017/3 and the duration of the non-compete obligation therein is limited to 5 years.

In conclusion, despite the fact that the Board had taken an approach of adopting effect basis analysis for investigations on resale price maintenance behaviors in certain decisions, there is reason to believe that the Board's recent decisions including Maysan Mondo are signaling the departure from such approach. Indeed, the Board did not adopt an effect analysis in the case at hand but rather decided the relevant resale price behavior to be a restriction by object.

The Turkish Competition Board Declines to Grant Individual Exemption to a Public Information Ad: An Assessment of the Interplay Between Consumer Welfare, Intellectual Property and Competition

The Authority has published the Board's reasoned decision[6] rejecting the joint negative clearance/individual exemption application of the Association of Air Conditioning and Refrigeration Manufacturers (**"ISKID"**) and the Association of Natural Gas Appliances Industrialists (**"DOSIDER"**), regarding the decisions of their executive boards with respect to the release of a public information ad. The ad in question was planned to be made jointly by these associations and was intended to be

[6] The Board's decision dated April 4, 2019, and numbered 19-14/186-84.

released as a public information ad by the Turkish Ministry of Trade's Department of Consumer Protection.

The applicants, ISKID and DOSIDER, were defined by the Board as associations of undertakings; thus, their conduct was considered to fall within the scope of the Law No. 4054. ISKID was established to address the problems of climatization sector in Turkey and to work for the development and advancement of the sector, with members currently representing 90% of the climatization market in Turkey. DOSIDER is active in the enhancement of services regarding appliances that work with natural gas and ensuring that consumers receive appliances and services that are up to the applicable standards. A substantial number of undertakings are members of both associations and active in the relevant sectors in Turkey.

The parties explained in their negative clearance/individual exemption application that after-sale services for climatization products are provided by both authorized and independent services. The authorized service providers are generally in a contractual vertical relationship with the suppliers in the market, and can therefore utilize the trademarks and logos of the suppliers, along with the title "*authorized service*." The application also stated that a number of independent service providers are in breach of the Law No. 6769 on Intellectual Property ("**Law No. 6769**"), by using the suppliers' trademarks and logos and the term "*authorized service*" without receiving authorization or license from the suppliers, and thus misleading the consumers. The parties also contended that consumers who have used the independent services have been publishing their complaints about the suppliers themselves via online platforms and other channels.

As a result, the claim brought forth by the parties was that the brand image of the suppliers had been harmed. Lastly, the parties also declared that, once the Board had reached a decision on the current application, they would also apply to the Supreme Council of Radio and Television ("**RTÜK**") in accordance with the Public Information Ads Circular ("**Circular**") for their joint public information ad. To that end, the applicants claimed that, although they would pursue legal action regarding the misleading advertisements made by the independent services, the need for creating consumer awareness was also paramount due to the large number of independent services in existence, which rendered it difficult to pursue comprehensive legal action.

Prior to its substantial assessment on the case, the Board requested an opinion from the Ministry of Trade's Department of Consumer Protection and Market Monitoring ("**Department of Consumer Protection**") with respect to the application. In summary, the Department of Consumer Protection made the following points in response to the Board:

- Pursuant to the Law on the Protection of Consumers, commercial advertisements are required to be factually correct and in line with those principles laid out by the Board of Advertisement, such as the principles regarding public morality, order of law, and the rights of individuals; therefore, advertisement are not allowed to mislead consumers or abuse or exploit their lack of knowledge.

- Similarly, the Regulation on Commercial Advertisements and Unfair Commercial Practices declares that names, emblems, logos or other identifying elements pertaining to a third party, such as certifications, diplomas, permits or accreditations cannot be used to mislead consumers, and any intellectual property owned by a third party cannot be used in an unfair manner.

- In this context, those service providers that falsely advertise themselves as "authorized" are penalized by the Board of Advertisement; consequently, it would be beneficial to prepare public information ads to prevent any wrongdoing vis-à-vis the consumers.

In its assessment regarding the relevant market, the Board noted that, due to the activities of both associations, the relevant market assessment would be twofold. For climatization, the Board determined that the relevant market consists of boilers, radiators, air-conditioning for households, as well as central air-conditioning for malls, hospitals, etc. For natural gas, the sales and after-sale services for appliances that operate with natural gas were included in the relevant market definition. The Board noted that most members of DOSIDER were also active in climatization, and thus, members of ISKID as well.

With respect to the relevant product market definition, the Board considered that the actual sales of products constitute the "*primary*" market, whereas the market for spare parts, repair and maintenance services and other services required after the initial sales of the relevant products were defined as the "*aftermarket*" or "*secondary*" market. The Board observed that, as the application in question concerned the after-sale service providers, the application would also have possible effects on the secondary market. However, the Board refrained from putting forth a conclusive product market definition, whereas it defined the relevant geographic market as "*Turkey*."

Subsequently, the Board defined public information ads as informative or educational films and audios, which are deemed to serve public welfare by RTÜK and which are regulated by the Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services ("**Law No. 6112**") and the relevant Circular adopted by RTÜK. Pursuant to the Circular, the content of public information ads must be informative or educational, and such ads cannot serve the purpose of advertisement, carry any secret commercial communication or advertisements, and cannot include names, trademarks, logos, images, activities or products of those parties that have been involved with the preparation of such public information ads.

In its assessment, the Board initially observed that the application alleged that the trademarks, logos and the word "authorized" were being utilized contrary to the Law No. 6769, and that the independent services were therefore misleading the consumers.

To that end, the Board stated that, even though new regulations could be introduced by regulatory bodies with respect to the unfair utilization of trademarks and logos, regardless of whether it constitutes unfair utilization as per the Law No. 6769, a public information ad that will target all independent private services could not be granted a negative clearance, as this could create a negative perception about all private independent services, regardless of whether they had actually breached the law.

Consequently, the Board examined whether the application for the public information ad could be granted an individual exemption under Article 5 of the Law No. 4054, which regulates the exemption regime. As a result of this evaluation, the Board found that, in the case at hand, the primary and obvious effect of the public information ad would be to direct consumers away from independent private services and towards authorized services. To that end, the Board declared that there was no factual evidence which demonstrated that consumers were always harmed when they used independent private services. On the contrary, the Board held that consumers believed that they could receive services from independent private services for cheaper prices that were nearly equivalent in quality to those provided by (more expensive) authorized services.

Furthermore, the Board considered that the wording of the public information ad, which read "(...) *you could even be charged unnecessarily if your product is within the warranty period*," did not satisfy the criteria for receiving an individual exemption. In the Board's view, this was because the enhancement of consumer rights relating to warranties is a matter that should be dealt with through specific legal regulations, rather than a public information ad that may affect the operation of the market.

For the third condition (*i.e.*, not eliminating competition in a significant part of the market), the Board noted that the proposed public information ad had the potential to lead consumers towards authorized services for the life span of their products, and thus to restrict the competition in the relevant market by excluding the independent private services from the secondary market.

In conclusion, the Board decided to reject both the negative clearance and individual exemption applications submitted by ISKID and DOSIDER with respect to the relevant public information ad. Overall, this decision constitutes an interesting outlook with regard to assessing the consumer welfare and the competition in the market from different legal perspectives, which interconnect multiple legal disciplines, such as intellectual property, public advertisement and competition law.

The Turkish Competition Board Takes a De Minimis Approach to Abuse of Dominance: No Full-fledged Investigation Against Local Natural Gas Company for Exclusionary Practices

The Authority published the Board's reasoned decision[7] on the preliminary investigation initiated upon a complaint against Eskişehir Şehir İçi Doğalgaz Dağıtım Tic. ve Taah. A.Ş. ("**ESGAZ**") and KA Sigorta Aracılık Hizmetleri Ltd. Şti. ("**KA Sigorta**"). The complainants claimed that ESGAZ had abused its dominance by excluding competitors in the market for insurance for natural gas installation, as ESGAZ had directed engineering companies to procure insurance services from one of its group companies, namely KA Sigorta.

In its dominance assessment, the Board observed that gas distribution services are associated with natural (legal) monopolies, in light of the fact that an undertaking assigned by the Energy Market Regulatory Authority ("**EMRA**") will have the exclusive license for gas distribution in a particular city, in accordance with the provisions of the Law No. 4646 on the Natural Gas Markets. Accordingly, the Board held that ESGAZ was dominant in the market for natural gas distribution in Eskişehir. As the allegations against ESGAZ concerned the market for insurance services for internal installation processes, rather than the distribution services in which ESGAZ was found to be dominant, the Board subsequently focused its evaluation on whether ESGAZ had abused its dominant position in the relevant market or any related markets within the scope of Article 6(d) of the Law No. 4054.

In this regard, the Board analyzed the evidence that consisted of (i) various correspondence collected during the dawn raids, and (ii) information received from the complainants (including competitors and engineering companies). The Board initially observed that ESGAZ's practices, which allegedly involved forcing engineering companies to procure insurance from KA Sigorta, might have gone beyond mere marketing activities. More particularly, given the critical position and role of ESGAZ in the approval process regarding the project drawings, the Board considered that ESGAZ's communications

[7] The Board's decision dated April 4, 2019, and numbered 19-14/189-85.

might have resulted in the exclusion of other insurance agents from the market, and therefore, might have fallen within the scope of Article 6 of the Law No. 4054.

The Board determined that the insurance policies of KA Sigorta were low in value and ratio among all other policies of rival insurance companies, which led to significantly low market shares for KA Sigorta in the overall insurance market. The Board subsequently focused its attention on the information submitted by ESGAZ during the investigation, which concerned the revisions made to ESGAZ's software (called "Suges") used in the application process for project drawings, which had also enabled engineering companies to directly purchase insurance from KA Sigorta. ESGAZ explained that they had made revisions to the software to allow the engineering companies to easily assess their insurance options and to freely choose whether or not to acquire the insurance policy through the software in question. Furthermore, ESGAZ also expressed its willingness to provide the engineering companies with a letter emphasizing that they could obtain their insurance services from alternative suppliers. The Board eventually assessed the revisions introduced into the Suges system as a positive initiative to ameliorate and amend the negative effects of ESGAZ's earlier actions.

All in all, although ESGAZ's practices were found to have the potential and/or impact of excluding KA Sigorta's competitors from the relevant market, the Board ultimately rejected the complaints, based upon the following findings:

(i) The decision of the 13th Chamber of Council of State, numbered E. 2010/4818 and dated May 30, 2014, in which the 13th Chamber held that, when violations are found to be negligible or the impact of the violation had been ruled out during the pre-investigation period, a full-fledged investigation is not necessary.

(ii) The limited size of the relevant market and the relatively small market position of the insurance companies insuring the natural gas installation sector in the overall insurance market.

(iii) The limited potential anti-competitive effects of ESGAZ's practices in the relevant market.

(iv) The steps taken by ESGAZ with regards to its software in order to eliminate any potential anti-competitive effects of its practices.

While the Board ultimately did not initiate a full-fledged investigation against ESGAZ, it did decide to issue an opinion letter to ESGAZ, ordering the company to avoid any practices that could restrict competition, and directing ESGAZ to send a letter to engineering companies stressing their freedom to choose any insurance company. The Board also decided to send a letter to the EMRA, as the potential violation of ESGAZ's practices had arisen due to the regulation that grants gas distributors the power and authority to approve project drawings. The Board's letter requested the EMRA to inspect and evaluate the involvement of distribution companies in the activities of insurance agencies belonging to the same economic unit.

The Turkish Competition Board Once Again Looks into the Matter of Export Bans in Turkey and the Geographic Scope of their Own Jurisdiction

The Board published its reasoned decision[8] on the investigation initiated upon a complaint by a pharmaceutical warehouse, namely Çınar Ecza Deposu ve Dış Tic. A.Ş. ("**Çınar**"), against Novartis Sağlık Gıda ve Tarım Ürünleri San. ve Tic. A.Ş. ("**Novartis**") and its subsidiary, Alcon Laboratuvarları Tic A.Ş. ("**Alcon**"). Çınar alleged that Novartis had

[8] The Board's decision dated April 11, 2019, and numbered 19-15/215-95.

violated the Law No. 4054 by refusing to supply its pharmaceutical products, and that it had therefore abused its dominant position. Çınar further claimed that Novartis had prohibited the pharmaceutical warehouses from making sales to Çınar.

According to the reasoned decision, Çınar alleged that Novartis had terminated the General Sales Agreement ("**Agreement**") executed between Novartis and Çınar, without just cause. Furthermore, Çınar asserted that, as a result of the termination, it could no longer conduct sales to the pharmacies that had been its customers for many years, as the pharmacies usually tended to procure all of the products they required from a single pharmaceutical warehouse. Therefore, in order to be able to supply Novartis products to its customers, Çınar attempted to purchase Novartis products from other pharmaceutical warehouses. However, Çınar claimed that those pharmaceutical warehouses refused to supply Novartis products, without first obtaining Novartis's consent, due to the agreements they had in place with Novartis.

The Board found that Novartis had instituted an export ban in all of the agreements with the pharmaceutical warehouses, and that the agreements in question did not include any other *de jure* or *de facto* restrictions on the sales conducted among the pharmaceutical warehouses, with the exception of the rule pertaining to exports or reasonable suspicion of exports.

- Potential vertical restraints under Article 4 of the Law No. 4054

The Board analyzed the sales restriction under Novartis's agreements with the pharmaceutical warehouses and found that this restriction was, in fact, an export ban that only concerned and applied to sales to foreign countries, not to sales within Turkey or the Turkish Republic of Northern Cyprus. In addition, Novartis argued that one of its products (named Galvus) had been illegally exported to Iraq by Çınar, Pharma Turca, and Yunus Eczanesi, by exchanging the product barcodes and the medicine tracking system numbers with each other. Moreover, when Novartis requested information on the export of Galvus, Çınar responded Novartis with contradictory statements and it had breached its contractual obligation to Novartis. Furthermore, a number of warehouses explained to the Authority that they did not sell Novartis products to Çınar, due to their contractual obligations to Novartis with respect to not selling its products to third parties who might export or raise a reasonable suspicion of exporting such pharmaceutical products to foreign countries. Against this background, the Board concluded that there was no evidence indicating the existence of an agreement or concerted practice that had the underlying aim of excluding Çınar from the relevant market. Additionally, the Board decided that Novartis's agreements did not contain any restrictions concerning the sales of its products between warehouses, and thus concluded that the clause regarding the export ban did not constitute a violation of Article 4 of the Law 4054.

- Potential refusal to supply under Article 6 of the Law No. 4054

The Board found that three cumulative conditions had to be satisfied for a dominant firm to infringe Article 6 through a "refusal to supply": (i) the refusal should relate to a product or service that is indispensable for competing in a downstream market, (ii) the refusal should be likely to lead to the elimination of effective competition in the downstream market, and (iii) the refusal should be likely to lead to consumer harm.

In the case at hand, the Board held that the commercial relationship between the supplier and the warehouse was merely a resale and distribution agreement, and that the warehouses did not add value to the products sold. Thus, the Board found that the indispensability condition was not satisfied.

As regards to the second condition, the Board determined that, if the seller merely resells the products supplied by a dominant undertaking, there is no meaningful relationship between the dominant firm and the reseller; and thus, the reseller cannot be harmed by a refusal to supply.

As for the third and final condition, the Board held that, where the dominant undertaking is not vertically integrated in the downstream market, market foreclosure effects cannot be considered. The Board noted that Çınar's activities merely consisted of redistribution of the products, without any added value to the final product, and that Novartis was not active in the downstream market. Against this background, the Board concluded that Novartis had not violated Article 6 by engaging in "refusal to supply," since the effects on a small-scale pharmaceutical warehouse such as Çınar would not lead to elimination of effective competition in the market, and thus would not create any harm to consumers by impeding competition.

Based on the foregoing considerations, the Board unanimously decided that Novartis had not violated Article 4 or Article 6 of the Law No. 4054

Employment Law

High Court Rules on Validity of Penalties Attached to Early Termination of Fixed-Term Employment

Freedom of contract can be restricted by mandatory legal provisions, and such restrictions are common in the case of employment contracts, since the majority of employment law provisions aim to protect the employee. Thus, such mandatory provisions cannot be altered by way of a contract between the employer and the employee.

Under Turkish Labor Law, the term of employment contracts are considered to be indefinite unless the contract is specified as being fixed-term by the parties, subject to existence/fulfilment of the conditions sought for admissibility of a fixed-term employment relationship. As per Article 11 of the Labor Law No. 4857, which is a mandatory provision, a fixed-term employment contract is admissible only if the employment is for (i) completion of a certain work/project (*i.e., there is such work that will no longer continue once finished; for example, building a machine or installing a computer software, etc.*), (ii) materialization of a certain event (*i.e., cases where employment might be needed due to exceptional circumstances; for example, an employee taking maternity leave, sick leave, or any other reason*), or if (iii) the work itself is fixed-termed (*i.e., cases where the required work emanates from a particular matter or event; for example, an organization, a conference, or sports event*).

Fixed-term employment contracts that do not meet these conditions or those that no longer meet the conditions despite having satisfied them in the past, are deemed as indefinite-termed employment contracts *ab initio*. To wit all the terms of the agreement remains the same, except the agreement is not considered to be fixed-termed but indefinite-termed.

There is one aspect of fixed-term employment contracts that crates a divergence of opinions when that contract is considered as indefinite-termed with the reason indicated above, which is the penalty clause. Fixed-term employment contracts usually include a penalty clause for both parties, stipulating payment of a penalty in case the contract (*i.e.*, employment) is terminated by one party without just cause, before the expiry of the fixed term. In principle, a penalty clause is an ancillary obligation, the validity of which, depends on the validity of the contract in which it is stipulated. In that sense, if a fixed-term employment contract turns into an indefinite term employment contract due to failing to satisfy the conditions sought for fixed-term employment, one argument would be that then the penalty clause stipulated in regard to the fixed term would also be invalid.

There was, however, a divergence of opinions in the Turkish court practice in cases where a fixed-term employment contract was accepted and treated as an employment contract with an indefinite term, due to failing to satisfy the required conditions for a fixed-term contract, and a dispute has arisen that concerns the issue of whether the penalty clause (related to early terminations without just cause) stipulated in a fixed-term employment contract would still be valid and enforceable. Certain Civil Chambers of the High Court of Appeals have held the view that the term-related penalty clause must be given effect in such cases, while some others have concluded that the penalty clause cannot be deemed valid; hence, the resulting ambiguity in case law regarding this issue and the reason that the Civil General Assembly of the High Court of Appeals has taken the case in question to bring much-needed clarity to this issue.

The binding decision of the Civil General Assembly of the High Court of Appeals ("**General Assembly**"), numbered 2017/10 E., 2019/1 K. and dated March 8, 2019, unified the case law of the Turkish courts and determined that the penalty clause attached to unjustified termination before the expiration of the fixed term of the employment contract is valid, regardless of the fixed-term employment contract turning into an indefinite-term employment contract due to failing to satisfy the conditions required for a fixed-term contract. In effect, the General Assembly upheld the principles of freedom of contract, as opposed to the restrictions brought by the mandatory provisions of labor law.

Indeed, the General Assembly concluded that a fixed-term employment contract turns into an indefinite-term employment contract if it fails to satisfy the legally required conditions, which, in principle, emanates from the purpose of protecting employees, as the rights of employees working under fixed-term contracts are fairly limited compared to those working under indefinite-term contracts. The General Assembly also added that a term-related penalty does not violate this purpose, as long as the penalty clause is applicable to both parties, and not just to the employee.

Consequently, the General Assembly ruled that the principle of freedom of contract must be observed in terms of validity of the penalty clause, even if the fixed-term contract itself might be deemed as an indefinite-term contract due to failing to satisfy the required conditions for a fixed-term contract.

Litigation

Turkey Signed the "United Nations Convention on International Settlement Agreements Resulting from Mediation" ("Singapore Convention on Mediation")

During the signing ceremony held in Singapore on August 7, 2019, Turkey signed the United Nations Convention on International Settlement Agreements Resulting from Mediation, also known as the "Singapore Convention on Mediation" ("**Convention**"), which applies to international settlement agreements resulting from mediation ("**Settlement Agreement**"), together with 45 other countries, including the United States, China, India, and South Korea. The Convention was drafted by the United Nations Commission on International Trade Law ("**UNCITRAL**") and adopted by the General Assembly during the 62nd plenary meeting held on December 20, 2018. The primary motivation of the Convention is "*to become an essential instrument in the facilitation of international trade and in the promotion of mediation as an alternative and effective method of resolving trade disputes*."[9]

[9] *See* Singapore Convention on Mediation, *About the Convention*, at https://www.singaporeconvention.org/about-convention.html (last accessed October 7, 2019).

Indeed, mediation has always been a low-cost, swift, and efficient way to resolve disputes, in comparison to other dispute resolution methods, which can also be observed from the data obtained in Turkey, from a micro-perspective.

The mediation procedure has become a compulsory stage in commercial litigation process in the Turkish jurisdiction, as of January 1, 2019, following on from its initial introduction in the context of labor disputes. After only eight months of practice, it appears that the success rate of mandatory mediation procedures is 57%, according to the data published by the Mediation General Office of the Turkish Ministry of Justice. Since the national mediation procedures appear to be useful and effective thus far, Turkey has taken a new step and signed the Convention, which provides enforceability to international settlement agreements.

The scope of the Convention comprises the international settlement agreements that are concluded following a commercial dispute. However, such settlement agreements, even in the context of commercial disputes, are still required to satisfy certain specific qualifications for the Convention to be applicable:

• The settlement agreements that are included within the scope of the Convention have been clearly defined under Article 1/1 of the Convention. Furthermore, the qualifications that are required for applicability of the Convention have been described in Article 2 of the Convention. With reference to Article 1 of the Convention, the parties are required to satisfy the qualifications that (i) the agreement shall be borne from a mediation process, (ii) the agreement shall be concluded in written form, (iii) the agreement shall be resolving a commercial dispute, and (iv) the dispute shall be international.

• As per the Article 1/2 of the Convention, the Convention shall not apply to settlement agreements (i) which were concluded to resolve a dispute arising from transactions engaged in by one of the parties (a consumer) for personal, family or household purposes, or (ii) which are related to family, inheritance or employment law.

• Furthermore, as per Article 1/3 of the Convention, the Convention does not apply to (i) settlement agreements that have been approved by a court, or concluded in the course of proceedings before a court; and which are enforceable as a judgment in the State of that court, or (ii) settlement agreements that have been recorded and are enforceable as an arbitral award.

To be able to enforce a mediation agreement, the party relying on the mediation agreement must provide a signed copy of the settlement agreement and furnish the necessary evidence documenting that the agreement has been concluded as a result of a mediation process. The Convention offers a few examples of such pieces of evidence, such as mediator's signature on the settlement agreements; the list of evidence required is not *numerus clausus* (*i.e.*, closed list), and it can be tailored according to the conditions of the case at hand. The competent authority can always require any necessary documentation in order to verify that the requirements of the Convention are met, as per Article 4/4 of the Convention.

The Convention will apply to the settlement agreements that are issued after the Convention enters into force, *i.e.*, six months after the deposit of the third instrument of ratification, acceptance, approval or accession, which has already been completed by 45 signatory States.

Turkey is adopting an approach that encourages mediation in order to lower litigation-related costs and to reduce the time spent on long and complex litigation procedures. A comparison of the Convention and the mediation regulations in Turkish Law reveals that their provisions are very similar to each other with respect to legal understanding, overall system and procedural conduct. Moreover, the Convention stipulates that enforcement actions will be taken according to the countries' applicable domestic laws, in compliance with the conditions of the Convention.

Ultimately, as a result of application of the Convention, there will be no need to initiate lawsuits based on "breach of contract" claims in order to enforce settlement agreements, as the mediations agreements that satisfy the qualifications and have the characteristics explained above will be directly enforceable under the Turkish legal system. Therefore, the number of lawsuits based on breach of contract claims that are launched to enforce settlement agreements and mediation agreements will diminish significantly, which will help to uphold the principle of procedural economy. As mentioned earlier, the Convention does not stipulate or specify enforcement procedures, leaving this issue up to each country's domestic enforcement system. As this is the case, settlement agreements in Turkey should be enforced as court decisions, which is the procedure applied to settlement agreements that are signed by both the parties and their attorneys and concluded as a result of mandatory mediation procedures.

Data Protection Law

The Turkish DPA Announces the Criteria to be Considered for the Determination of the Countries with Adequate Levels of Protection

Article 9 of the Law No. 6698 on the Protection of Personal Data ("**DPL**"), which regulates the transfer of personal data abroad, provides that personal data can be transferred abroad without the explicit consent of the data subject only if it satisfies either one of the conditions set out under paragraph two of Article 5 and paragraph three of Article 6, and provided that the country to which the personal data will be transferred offers an adequate level of protection. If the level of data protection in such country is not deemed to be adequate, then the data controllers in Turkey and abroad can provide a written undertaking, warranting the delivery of an adequate level of protection, which can be approved by the Turkish Data Protection Board ("**Board**"). The same provision also states that the Board shall determine the countries in which there is an adequate level of data protection and announce them (*i.e.*, publish a list of such countries).

The countries with adequate levels of data protection are yet to be announced by the Board.[10] However, in accordance with the foregoing requirements, the Board published the decision numbered 2019/125 and dated May 2, 2019 ("**Decision**")[11] which stipulates the criteria and methodology used for determining the countries with adequate levels of protection. According to this Decision, the Board will evaluate each country based on the criteria set forth under the Decision, and announce the list of safe countries in this respect.

The criteria to be considered for the determination of the countries with adequate levels of protection had already been regulated under Article 9 of the DPL prior to the Decision, which set out the following criteria for the Board to evaluate in determining the countries with adequate levels of protection:

> The international agreements to which Turkey is a party to,
> The reciprocity related to data transfer between Turkey and the country demanding personal data,

[10] As of the date that this newsletter went to press.
[11] See https://www.kvkk.gov.tr/Icerik/5469/-Yeterli-korumanin-bulundugu-ulkelerin-tayininde-kullanilmak-uzere-olusturulan-form-hakkindaki-02-05-2019-tarihli-ve-2019-125-sayili-Kurul-Karari (last accessed on September 17, 2019).

> The category of the personal data, as well as the purpose and period of processing for each specific data transfer,
> The relevant legislation and practice in the foreign country to which the data will be transferred,
> The measures that the data controller (in the foreign country to which the data will be transferred) commits to provide.

With the recent Decision, the Board has introduced further criteria, in addition to those already laid out in Article 9 of the DPL (discussed above), and provided further details. The following criteria are also in line with the conditions set forth under Article 45 of the General Data Protection Regulation ("**GDPR**"), which regulates the data transfers on the basis of an adequacy decision:

> Reciprocity,
> The legislation and practice of the relevant country regarding personal data processing,

In terms of this criterion, the Board evaluates the information as to (i) whether protection of personal data is a constitutional right, (ii) the existence of a fundamental law regarding the processing of personal data, (iii) the enforcement date of the fundamental law, (iv) the secondary legislation and compliance of such secondary legislation with the Turkish legislation, (v) fundamental notions regarding the protection of personal data, (vi) general principles related to the protection of personal data, (vii) the compliance of the personal data processing conditions with the personal data processing conditions set forth under the DPL, (viii) the existence of special processing conditions and additional security measures for the processing of special categories of personal data, (ix) the requirements of legal assurances ensuring that the personal data processing operations are in compliance with the transparency principle, (x) the requirements to implement technical and administrative measures to ensure that a sufficient level of security exists for the prevention of illegal processing and access of personal data, and the assurance of the protection of personal data through technical measures and administrative measures, (xi) information on whether administrative and/or criminal sanctions are applied for data breaches and whether other mechanisms are in place to ensure the prevention of data breaches, (xii) the rights of the data subjects, (xiii) the rights of the data subjects to apply to the data controller and to complain to the data protection authority, (xiv) information on whether parties whose rights regarding personal data are violated have the right to claim compensation, within the scope of general provisions, (xv) reference guides and/or publications on the practice, (xvi) the exemptions regarding the application of the relevant law, and (xvii) the data transfer regime.

> Information on whether there is an independent data protection authority,

In terms of the independent data protection agency criterion, the Board evaluates the following matters:

(i) its structure, (ii) its status as an independent authority, (iii) its duties and authorities, (iv) its audit/examination competence, (v) information on whether an appeal process against the decisions of the data authority exists.

> Accession to international agreements on personal data protection and membership in international organizations. In the Decision, these agreements and organisations were listed as follows:

(i) Convention No. 108 for the Protection of Individuals with regard to Automatic Processing of Personal Data, (ii) Additional Protocol No: 181 to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows, (iii) Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS 182), (iv) European Convention on Human Rights, (v) International Conference of Data Protection and Privacy Commissioners (ICDPPC), and (vi) Global Privacy Enforcement Network (GPEN).

> Status of membership in global and regional organizations in which Turkey is a member,
> Volume of trade between Turkey and the relevant country, and
> Other criteria.

The Board will apparently evaluate each country based on the foregoing criteria and methodology, and we might expect the Board to announce a list of safe countries, or to issue data protection adequacy decisions, in the near future.

Internet Law

Regulation on Radio, Television and On-Demand Broadcasts on the Internet

The Radio and Television Supreme Council ("**RTÜK**") published the Regulation on Radio, Television and On-Demand Broadcasts on the Internet ("**Regulation**")[12] in the Official Gazette of August 1, 2019. The main aim of the Regulation is to regulate Internet broadcasts.

The Regulation sets out the rules and procedures relating to the provision of broadcast services through the Internet, the broadcast licenses to be granted to media service providers, the broadcast transmission authority to be granted to platform operators, and the supervision of such broadcasts.

The Regulation excludes individual communications from its scope, and declares that (i) platforms that are not dedicated to the broadcasting radio, television and on-demand broadcasts through the Internet, and (ii) real persons and legal entities that only provide hosting services to radio, television and on-demand broadcast services, will not be considered or treated as "platform operators."

The broadcast license is exclusively granted to joint-stock companies, established as per the Turkish Commercial Code, for the purpose of providing radio, television and on-demand broadcast services. The application for the relevant license is made to RTÜK, along with a petition of request, signed license application forms drafted by RTÜK, and any other necessary documents specified in Article 7 of the Regulation.

The Regulation will also be applicable for content or hosting providers located in a foreign country, media service providers that are under the jurisdiction of another country, or media service providers broadcasting over the Internet in Turkish and targeting Turkey, or broadcasting in another language but targeting Turkey and also including commercial broadcasts to Turkey.

1. Sanctions Set Out by the Regulation

In case RTÜK is notified of, or discovers *ex officio*, the existence of any online broadcast services that are made without a broadcast license, the finding is announced on RTÜK's website, whereby the authority puts the broadcaster on notice. This announcement informs the broadcaster that they can request a broadcast license by way of a petition and a letter of undertaking, along with payment of license fees for three months, whereupon they will be allowed to continue broadcasting while their license application is under review, and, in case of a failure to do so, an access ban request will be issued to the criminal judgeship of peace, and a criminal complaint will be filed, unless the broadcaster in question stops broadcasting within 72 hours of the announcement. If the broadcaster fails to

[12] *See* http://www.resmigazete.gov.tr/eskiler/2019/08/20190801-5.htm (last accessed on October 1, 2019).

submit the petition and the undertaking letter, and does not pay the 3-month license fees, then the access ban procedure will be initiated.

If RTÜK determines that the entities who do not possess temporary broadcast rights and/or broadcast licenses, or whose broadcasting licenses have been cancelled are providing broadcasting services through the Internet, it may apply to a criminal judgeship of peace to render a decision for removal and/or access ban of the contents of such broadcasting services. The judge will render its decision within twenty-four hours at the latest, without holding a hearing. However, it is still possible to appeal such decisions under the provisions of the Turkish Code of Criminal Procedure. The article also refers to the fifth paragraph of Article 8/A of the Law No. 5651, which requires access ban decisions to be rendered with respect to specific URL addresses (as opposed to entire websites), and also sets forth monetary fines for those parties who do not comply with access ban decisions.

Media service providers who provide their services without a license may be faced with a monetary fine ranging from 1% up to 3% of their commercial communication revenue from the previous month. Furthermore, the general manager of a non-compliant media service provider, and the members of its board of directors, may also be sentenced to imprisonment from one up to two years, and a monetary fine ranging from a thousand days up to five thousand days (*i.e.*, between TRY 2,000 and TRY 500,000) may also be imposed.

2. Practical Effects of the Regulation

The Regulation states that broadcast services provided on the Internet under a license and/or authorization from RTÜK shall be conducted in accordance with the Regulation, which includes provisions setting forth certain requirements, restrictions and measures regarding such broadcasts and their contents. Therefore, RTÜK will be authorized to supervise such broadcasts and their contents, and empowered to decide on measures such as broadcast bans and monetary fines that are determined within the scope of the Regulation. Additionally, media service providers that are willing to broadcast their radio, television and on-demand broadcast services solely through the Internet are obliged to get a broadcast license from RTÜK, and platform operators that are willing to transmit these broadcasts on the Internet are required to obtain broadcast transmission authorization from RTÜK.

In conclusion, pursuant to the Regulation, RTÜK has been entitled and authorized to intervene in certain online broadcasts. Entities that provide radio, television and on-demand broadcasting services through the Internet will need to assess whether such services fall under the Regulation and determine whether they will need to obtain a broadcast license from RTÜK to continue their services, and they will have to adjust and modify their broadcasts according to the provisions of the Regulation in order to avoid potential restrictions or penalties.

Telecommunications Law

Communiqués on Exportation and Importation of Goods Which Possess Electronic Identity Information

Two Communiqués, namely the Communiqué on the Exportation of Goods which Possess Electronic Identity Information ("**Exportation Communiqué**")[13] and the Communiqué on the Importation of Goods which Possess Electronic Identity Information ("**Importation Communiqué**"),[14] issued by the Ministry of Trade, were published in the Official Gazette of June 18, 2019. As per Article 6 of each

[13] The Official Gazette dated June 18, 2019, http://www.resmigazete.gov.tr/eskiler/2019/06/20190618-4.htm (last accessed on October 1, 2019).

[14] The Official Gazette dated June 18, 2019, http://www.resmigazete.gov.tr/eskiler/2019/06/20190618-5.htm (last accessed on October 1, 2019).

Communiqué, these Communiqués came into force twenty days after their publication date, on July 8, 2019.

Shortly afterwards, a provisional article also came into force on July 12, 2019 with two communiques (*i.e.* the Amendment Communiqué for the Communiqué on the Exportation of Goods which Possess Electronic Identity Information and the Amendment Communiqué for the Communiqué on the Importation of Goods which Possess Electronic Identity Information[15]). The relevant articles state that the articles of Exportation and Importation Communiqué will not be applicable until December 31, 2019 (including this date) in case there is an exportation or importation of the goods by the exporters or importers who have the vehicle type approval certificate and Authorized Operator Certificate for the goods which are at certain Customs Tariff Statistics Position.

The aim of the Communiqués is to regulate the procedures and principles regarding the control of exportation and importation of goods which possess electronic identity information by the Information and Communication Technologies Authority ("**BTK**").

The Communiqués provide nearly the same provisions and they both include the definitions of (i) the Ministry ("**Ministry of Trade**"), (ii) BTK, (iii) GSMA ("**Global System for Mobile Communications Association**"), (iv) IMEI (the number which indicates electronic identity information of mobile devices), and (v) Single Window System.

According to both of the Communiqués, the Single Window System, which is operated by the Ministry of Trade, is a system that enables applications regarding the approvals and documents that need to be obtained from different authorities to be submitted to a single location and/or single entity. The Communiqués also state that this is a system used in customs transactions where documents can be sent in the electronic environment (*i.e.*, as e-documents), which is regulated by the relevant authorities.

According to Article 4 of both Communiqués:

- Before exportation and importation of goods that possess an IMEI number, the declarant should apply to the BTK through the Single Window System for eligibility check of the IMEI number. If BTK's assessment is positive (*i.e.*, affirmative) after the examination is conducted in the electronic environment, a letter of conformity will be provided to the declarant.

- The IMEI number of the declared goods will be submitted to the customs declaration system and during the registry of the declaration, the letter of conformity will be demanded by the customs administration.

According to the Communiqués, the importer/exporter will be responsible for complying with the Communiqués during the importation/exportation of goods which possess an IMEI number. Except for mobile phones, if the IMEI number is not declared, a further investigation as to whether or not the goods in question possess an IMEI number will not be undertaken by the customs administration.

The Communiqués finally establish that a letter of conformity will be prepared by the BTK with respect to (i) the declared IMEI information and (ii) GSMA data, along with (iii) the conformity (*i.e.*, consistency) of the IMEI numbers of the devices with the relevant brand and model information, (iv) the existence of a situation relating to lost, stolen

[15] The Official Gazette dated July 12, 2019 https://www.resmigazete.gov.tr/eskiler/2019/07/20190712-12.htm and https://www.resmigazete.gov.tr/eskiler/2019/07/20190712-11.htm (last accessed on November 5, 2019).

or changed IMEI numbers, and compliance with the Regulation of the Registry of Devices that Possess Electronic Identity Information.

E-Money Law

Legislative Proposal to Amend Law No. 6493 on Payment Services and Electronic Money[16]

The Legislative Proposal on Amending the Law No. 6493 on Payment and Security Systems, Payment Services and Electronic Money Institutions ("**Proposal**") was recently submitted to the Grand National Assembly of Turkey.

The rationale of the Proposal is unifying payment practices and addressing the emerging needs in the field of payments. The Proposal also mentions the amendments in the EU payment services and e-money legislation during the past years (such as PSD2) and the need to align the local legislation with these recent developments.

The most significant amendment introduced in the legislation is the transfer of the authorities of Banking Regulation and Supervision Authority ("**BRSA**") under the Law No. 6493 to Central Bank of the Turkish Republic ("**CBTR**"). If the proposal is accepted as it is, all institutions regarding payment institutions and e-money institutions will be subject to CBTR's supervision. The Legislative Proposal also aims to broaden the supervision authorities of CBTR in a manner to include all parties that are involved in the operation of the payment systems. Accordingly, the CBTR will be authorized to request records, information and documents regarding any transactions that are conducted by institutions under its supervision where it deems necessary. CBTR may also be a shareholder to existing and future system operators in order to enable uninterrupted operation of the systems.

[16] This article was also published on *Mondaq* on 22 October 2019.

The Legislative Proposal grants the CBTR the authority to monitor legal relations where the payment service providers are a party due to their activities, in order to determine issues and fields of development. The Legislative Proposal also grants CBTR the authority to determine the rules and procedures of the legal relations therein and form working committees, if it deems the relevant activities as harmful to the field of payments.

Another significant development proposed is the establishment of the Turkish Payment and Electronic Money Institutions Association, which will require mandatory membership by the institutions. Accordingly, this Association will aim to relieve common needs of payment and e-money institutions, making professional activities easier, developing the profession in line with general activities, enabling mutual honesty and trust between the members of the profession and the payment service users, and protecting the professional discipline and morals.

The Legislative Proposal excludes payment institutions and e-money institutions from entities that can obtain contribution margin from BRSA, as CBTR will be the authorized institution in terms of the field of payments.

The Legislative Proposal which is signed by various deputies of Justice and Development Party is submitted to and currently pending before the Commission of the Grand National Assembly of Turkey. Therefore, it is not final yet.

Anti-Dumping Law

Anti-Dumping Measures to Expire Within the First Half of 2020

Within the scope of its authority to initiate dumping or subsidy examinations, the Ministry of Economy ("**Ministry**") has announced, through the Communiqué on the Prevention of Unfair Competition in Imports No. 2019/27, dated August 28, 2019, that two anti-dumping measures, which had been put into effect in 2014, have expired in 2019, and that several ongoing anti-dumping measures, which had been put into effect in 2015, will expire as of the first half of 2020, unless an expiry review investigation is initiated.

Below is a bullet-point summary of the anti-dumping measures that have expired as of 2019:

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

With the Communiqué No. 2014/9, the Ministry had announced its decision upon completion of the expiry review investigation in relation to current dumping measures on imports of textured yarns of nylon or other polyamides with maximum 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 still threatening to cause injury to the domestic industry, and consequently, decided that an anti-dumping duty of 37,40% of the CIF cost would be applied.

- Communiqué No. 2014/24, dated August 9, 2014, concerning lead pencils and lead crayons, originating from the People's Republic of China:

With the Communiqué No. 2014/24, the Ministry had announced its decision upon completion of the expiry review investigation in relation to current dumping measures on imports of lead pencils and lead crayons classified under the CN code 9609.10, originating from the People's Republic of China. In this respect, the Ministry had decided that imports of these products were still threatening to cause injury to the domestic industry, and consequently decided that an anti-dumping duty of USD 3,16 per 144 items would be applied.

Below is a bullet-point summary of the anti-dumping cases and measures that will expire as of the first half of 2020:

- Communiqué No. 2015/3, dated January 21, 2015, concerning non-woven fabrics of synthetic filament yarn (for clothing), originating from the People's Republic of China, Taiwan, South Korea, Malaysia and Thailand:

The Ministry had announced its decision upon completion of the anti-dumping investigation on non-woven fabrics of synthetic filament yarn (for clothing), classified under the CN codes laid out under the Communiqué on the Prevention of Unfair Competition in Imports No. 2015/3, originating from the People's Republic of China, Taiwan, South Korea, Malaysia and Thailand. Accordingly, the Ministry decided to apply anti-dumping duties (i) at a rate of 70,44% of the CIF cost for products weighing more than 110 gr/m^2, and at a rate of 21,13% of the CIF cost for products weighing 110 gr/m^2 or under, originating from the People's Republic of China, (ii) at rates of 13,91% of the CIF cost for a Taiwanese company and 30,84% of the CIF cost for others, for products weighing more than 110 gr/m^2, and at rates of 4,17% of the CIF cost for the same Taiwanese company, and 9,25% of the CIF cost for others, for products weighing 110 gr/m^2 and under, originating from Taiwan, (iii) at rates ranging between 14,64% and 40% for products weighing more than 110 gr/m^2, and at rates ranging between 4,39% and 12% for products weighing 110 gr/m^2 and under, originating from South Korea, (iv) at rates of 7,76% of the CIF cost for a Malaysian company, and 15,93% of the CIF cost for others, for products weighing more than 110 gr/m^2, and at rates of 2,33% of the CIF cost for the same Malaysian company, and 4,78% of the CIF cost for others, for products weighing 110 gr/m^2 and under, originating from Malaysia, and (v) at rates ranging between 8,67% and 30,93% for products weighing more than 110 gr/m^2, and at rates ranging between 2,60% and 9,28% for products weighing 110 gr/m^2 and under, originating from Thailand.

- Communiqué No. 2015/9, dated April 12, 2015, concerning certain products 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 non-woven fabrics of only weavable artificial and synthetic fibers covered, plastered or laminated in polyurethane, weighing more than 150 gr/m^2, classified under the CN code 5603.14, 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 of 1,9 USD/kg.

- Communiqué No. 2015/6, dated April 17, 2015, concerning products classified as "other hoeing machines," originating from the People's Republic of China:

The Ministry had announced its decision upon completion of the anti-dumping investigation on products classified as "other hoeing machines" under the CN code 8432.29.90.00.19, originating from the People's Republic of China. Accordingly, the Ministry decided to apply an anti-dumping duty at a rate of 92,25% of the CIF cost for products originating from People's Republic of China, excluding seven companies for which the Ministry decided to apply anti-dumping duties at rates ranging between 49,49% and 83,12% of the CIF cost.

- Communiqué No. 2015/11, dated May 10, 2015, concerning products classified as "supported ringed chains" and "others (welded, ringed)," originating from the People's Republic of China:

The Ministry had announced its decision upon completion of the expiry review investigation in relation to current anti-dumping measures on imports of products classified as "supported ringed chains" under the CN code 7315.81, and as "others (welded, ringed)," under the CN code 7315.82, 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 1.069 USD/ton for each product.

- Communiqué No. 2015/12, dated May 23, 2015, concerning cutting, chopping, grinding and mixing edges used in the grinding and mixing of food items listed under the CN code 8509.40, originating from the People's Republic of China:

The Ministry had announced its decision upon completion of the expiry review investigation in relation to current anti-dumping measures on imports of cutting, chopping, grinding and mixing edges used in the grinding and mixing of food items listed under the CN code 8509.40, classified under the CN code 8208.30.00.00.00, 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 20,85 USD/kg.

- Communiqué No. 2015/22, dated June 13, 2015, concerning vulcanized rubber yarns and threads originating from Malaysia:

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 vulcanized rubber yarns and threads classified under the CN code 4007.00, originating from Malaysia.

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 16,9% of the CIF cost, excluding five companies for which the Ministry decided to apply anti-dumping duties at rates ranging between 11,6% and 14,8% of the CIF cost.

- Communiqué No. 2015/23, dated June 27, 2015, concerning products classified as "others," originating from Israel:

The Ministry had announced its decision upon completion of the anti-dumping investigation on products classified as "others" under the CN code 7005.29, originating from Israel. Accordingly, the Ministry decided to apply an anti-dumping duty at a rate of 20% of the CIF cost for an Israeli company, and at a rate of 37,57% for others, for products originating from Israel.

White Collar Irregularities

2019 FCPA Enforcement Actions and Highlights

So far, 2019 has seen less activity in terms of enforcement actions under the Foreign Corrupt Practices Act ("**FCPA**"), compared to 2018. In 2019, the United States Department of Justice ("**DOJ**") took a total of 22 enforcement actions,[17] and the Securities and Exchange Commission[18] ("**SEC**") took a total of 11 enforcement actions.[19]

DOJ Declination Decisions

The DOJ had been investigating violations of the FCPA by Quad/Graphics Inc. ("**Quad**"), due to the fact that it had uncovered evidence relating to Quad's Peruvian subsidiary paying or promising to pay over USD 1 million to third-party intermediaries, which were partly used to pay bribes to Peruvian government officials for securing printing contracts with government agencies, minimizing penalty payments related to delayed execution of contracts with government agencies and owed tax payments. In September 2019, the DOJ announced that it would decline to proceed with the prosecution of Quad, on the grounds that Quad had voluntarily self-disclosed and fully cooperated with the investigation, and because it did not have any prior criminal history, and had agreed to disgorge to the SEC for the full amount of its ill-gotten gains.

In February 2019, the DOJ announced its declination decision pertaining to Cognizant Technology Solutions Corporation ("**Cognizant**"). Per the announcement, the DOJ had found that Cognizant had authorized its agents to pay around USD 2 million in bribes to government officials in India, in exchange for securing and obtaining a statutorily required planning permit in connection with the development of an office park in India, in addition to other projects that were also located in India. The DOJ declined Cognizant's prosecution on the grounds that Cognizant had voluntarily self-disclosed and fully cooperated with the investigation, and because it did not have any prior criminal history, operated an existing and effective compliance program, had fully remedied the situation, and had agreed to disgorge the amount that had been saved by the company by paying bribes.

DOJ Enforcement Actions - Highlights

In March 2019, the DOJ closed its investigation with regard to Fresenius Medical Care AG & Co. KGaA ("**Fresenius**"), a German-based provider of medical products

---

[17] *See* https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2019 (last accessed on October 1, 2019).

[18] *See* https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml#targetText=SEC%20Enforcement%20Actions%3A%20FCPA%20Cases&targetText=In%202010%2C%20the%20SEC's%20Enforcement,government%20contracts%20and%20other%20business (last accessed on October 1, 2019).

[19] These figures reflect the statistics as of the date on which Legal Insights Quarterly (December 2019) went to press.

and services. Fresenius admitted to knowingly and wilfully failing to implement reasonable internal accounting controls over its financial transactions and to maintain books and records that accurately and fairly reflected their transactions in Angola, Saudi Arabia, Spain, Turkey, Morocco and other countries in West Africa. Fresenius had also been involved in bribery schemes relating to bribing public health and government officials in order to win business in Angola and Saudi Arabia from 2007 to 2016. Fresenius agreed to pay a total of USD 231 million for criminal penalties and disgorgement in order to resolve both SEC and DOJ investigations.

In March 2019, the DOJ closed its investigation with regard to Mobile TeleSystems PJSC ("**MTS**"), a Russian-based telecommunications provider. According to the DOJ's report, MTS's wholly owned Uzbek subsidiary, Kolorit Dizayn Ink LLC ("**Kolorit**"), paid USD 420 million in bribes to an Uzbeki government official through equity transactions with the government official, sham contracts, and in the form of charitable contributions or sponsorships at the direction of the government official, in exchange for a telecommunications license and other government benefits in Uzbekistan, which generated more than USD 2.4 billion in revenues. MTS and Kolorit agreed to pay a combined penalty of USD 850 million to the DOJ to resolve the charges, in addition to the USD 100 million to be paid to the SEC to resolve the charges regarding MTS's violations of anti-bribery, books and records, and internal accounting control provisions.

In June 2019, the DOJ closed its investigation with regard to the wholly owned Hungarian subsidiary of Microsoft Corporation, Microsoft Magyarország Számítástechnikai Szolgáltató és Kereskedelmi Kft ("**Microsoft**"). According to the report, from 2013 to June 2015, one senior executive and also other employees of Microsoft falsely represented that they had to apply steep discounts in order to sell software licenses and related products to resellers who were bidding to sell the licenses to the Hungarian government. However, the lower prices were not passed on to the government customers, and were instead retained in the Microsoft records and subsequently used to fund corrupt payments to government officials. Microsoft agreed to pay a criminal penalty of more than USD 8.7 million to resolve the FCPA violations.

In June 2019, the DOJ closed its investigation with regard to Walmart Inc. ("**Walmart**") and WMT Brasilia S.a.r.l. ("**Walmart Brazil**"), Walmart's subsidiary based in Brazil, on the grounds that they had failed to operate an adequate anti-corruption compliance program for more than a decade. Accordingly, Walmart personnel who were responsible for implementing and maintaining the company's internal accounting controls were aware of certain compliance failures, including those relating to potentially improper payments to government officials. The internal controls failures allowed Walmart's foreign subsidiaries in Mexico, India, China and Walmart Brazil to hire third-party intermediaries without establishing sufficient controls to prevent those third-party intermediaries from making improper payments to government officials. Walmart Brazil, despite repeated findings in internal audit reports that such controls had been lacking, continued to retain and renew contracts with third-party intermediaries without conducting the required due diligence. Walmart Inc. and its Brazil-based subsidiary agreed to pay approximately USD 137 million to the DOJ and more than USD 144 million to the SEC, to resolve their violations of the FCPA.

SEC Enforcement Actions - Highlights

In May 2019, a Brazil-based telecommunications company, namely Telefônica Brasil S.A. ("**TB**"), paid a civil penalty of USD 4,125,000 to settle the SEC's charges for violating the FCPA's provisions on books and records and internal accounting controls, arising from the company's failure to devise and maintain sufficient internal accounting controls over a hospitality program that the company had hosted in connection with the 2014 World Cup and the 2013 Confederations Cup. According to the SEC, TB provided tickets and hospitality to government officials who were directly involved with, or in a position to influence, legislative actions, regulatory approvals, and business dealings involving TB.

In August 2019, Deutsche Bank AG ("**Deutsche Bank**") agreed to pay a civil penalty of more than USD 16 million to settle the SEC's civil charges for violating the FCPA by hiring relatives of foreign government officials upon foreign officials' request, in order to improperly influence them in connection with its investment banking business.

In August 2019, Juniper Networks, Inc. ("**Juniper**"), a California-based networking and cyber security solutions company, paid the SEC a penalty of USD 11,700,000 to settle the SEC's charges for violating the FCPA's provisions on books and records and internal accounting controls. According to the SEC, certain sales employees of Juniper's Russian subsidiary secretly agreed with third-party distributors to fund leisure trips for customers, including government officials through the use of off-book accounts.

Healthcare Law

Guidelines on the Protection of Personal Data in Pharmacovigilance Activities

On August 1, 2019, the Turkish Medicines and Medical Devices Agency ("**Agency**") published the Guidelines on the Protection of Personal Data in Pharmacovigilance Activities ("**Guidelines**"). The Guidelines focus on the principles and obligations pertaining to real persons or legal entities who routinely collect personal data while conducting pharmacovigilance activities of detecting, evaluating, understanding and preventing adverse reactions and other issues in medicines, for preventive medicine purposes and securing public health. The data collected by the relevant parties can often include personal health data as well. The scope of the Guidelines relates to all pharmacovigilance activities that do not require the data owner's explicit consent, and is in parallel with (and based on) the Personal Data Protection Law No. 6698 ("**Law No. 6698**").

By way of background, pharmacovigilance legislation requires data controllers to ensure that the individual cases (to be escalated in terms of adverse reactions) to include a minimum set of information, which can only be done through the collection of all information and personal data required for that adverse reaction notice to be filled in line with the legislation. For this reason, the data owner's explicit consent will not be required in terms of the personal data that does not qualify as sensitive personal data, as there are "*legitimate interest and the fulfilment of a legal requirement*" criteria, which are among the exceptions to the requirement to obtain consent, as per the Law No. 6698. Having said that, personal health data is a more sensitive form of personal data and is subject to more stringent measures and protections, compared to other types of personal data. Health data can be collected without the explicit consent of the data subject only if the data is being collected for specific reasons, such as securing public health, and by authorized institutions (such as the Ministry of Health).

The Guidelines make a distinction between the administrative and technical measures in this regard. Data collectors who are engaged in pharmacovigilance activities are required to (i) prepare data processing inventory, (ii) make a risk assessment, (iii) have the necessary policies and procedures in place, and (iv) have their employees trained in this regard, in addition to implementing technical measures, such as ensuring and monitoring cyber security. The Guidelines, in line with the Law No. 6698, initially prohibit data collectors from transferring personal data out of Turkey without the data owner's explicit consent, unless they provide their written undertaking to ensure sufficient protection, and also acquire the permission of the Personal Data Protection Board.

The Guidelines also set out rules and procedures pertaining to the data owner's access to their personal data, and the data owner's identification, deletion, destruction and anonymization of personal data, which appear to be in parallel with the Law No. 6698. The only exceptions to these procedures are (i) the obligation to store the source documentation of pharmacovigilance, as per the Guidelines, and (ii) the requirement to store documentation until the drug's license expires, and for a period of 10 years thereafter, as per Article 28 of the Regulation on Drug Safety.

The Guidelines also note that personal data should not be stored for a period that is longer than is necessary and should not include redundant personal data, while also providing a list of the personal data that the Ministry of Health recommends to be stored for an efficient pharmacovigilance evaluation, as well as the data that it does not deem necessary for that purpose. In this regard, the recommended data includes: Initials of the patient's name and surname or a case reference number, gender, date of birth, specific age or the relevant age bracket and the adverse event, symptoms, results, duration, hazardous drug, medical history, and concomitant medications. Accordingly, unnecessary data includes: Patient name, contact details (address, phone number, e-mail address), and file number. Therefore, data controllers who are engaged in pharmacovigilance activities will be able to use these recommendations as a guideline while determining which personal data to store to fulfil their pharmacovigilance obligations.

ELİG
GÜRKAYNAK
Attorneys at Law

ELIG Gürkaynak Attorneys-at-Law is an eminent, independent Turkish law firm based in Istanbul. The firm was founded in 2005.

ELIG Gürkaynak is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations.

Our legal team consists of 90 lawyers. We take pride in being able to assist our clients in all fields of law. Our areas of expertise particularly include competition law, corporate law, M&A, contracts law, white collar irregularities and compliance, data protection and cybersecurity law, litigation and dispute resolution, Internet law, technology, media and telecommunications law, intellectual property law, administrative law, real estate law, anti-dumping law, pharma and healthcare regulatory, employment law, and banking and finance law.

As an independent Turkish law firm, ELIG Gürkaynak collaborates with many international law firms on various projects.

For further information, please visit www.elig.com

ELİG
GÜRKAYNAK
Attorneys at Law

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