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LEGAL INSIGHTS QUARTERLY

March 2020 – May 2020

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Preface to the March 2020 Issue

The March 2020 issue of Legal Insights Quarterly was prepared to provide an extensive look into the upcoming legal requirements as well as the foremost contemporary legal issues in Turkey at the start of the new decade.

At the outset, the Corporate Law section provides insights regarding the intricacies of preparing an annual report. This section sets out the key points to be taken into account when preparing the mandatory annual report, including the ratification and signing processes. As ordinary general assemblies of joint stock companies are required to be held within three months of the end of their fiscal years, both matters will be highly relevant and beneficial for the readers.

This issue also discusses and illuminates four different cases of the Competition Board, demonstrating the Board's and the Administrative Court's most recent approaches toward procedural violations, resale price maintenance, and exclusionary behaviors, amongst others.

The Employment Law section sheds light on the novel proposal on severance payment, guiding employers and employees on what to expect from the new legislation.

The Internet Law section addresses digital service tax, which will come into force in March 2020, and which will affect the future activities of all digital service providers who will be obliged to pay digital service tax.

Finally, the Healthcare Law section summarizes the Ministry of Health's strategic action plan for 2019-2023, giving the reader a full scope of what is targeted and what could be expected in this crucial field.

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.

March 2020

Corporate Law

Key Points to Consider When Preparing an Annual Activity Report

I. Introduction

For companies, the requirement to prepare an annual activity report was first stipulated under the former Turkish Commercial Code No. 6762 ("**Former TCC**"). Even though a general definition was included in the Former TCC, Article 516 of the subsequent Turkish Commercial Code No. 6102 ("**TCC**") broadened the scope of the annual activity report and underlined its importance.

In this respect, Article 516/3 of the TCC granted the Ministry of Trade the authority to determine the minimum required content of the annual activity report. As a result, the Regulation on the Minimum Content of Annual Activity Reports of Companies, prepared by the Ministry of Trade, was published in the Official Gazette No. 28395, dated August 28, 2012 ("**Regulation**").

II. General Principles

Annual activity reports are prepared by the directors of the companies for each fiscal year, in order to describe and explain the past activities of the company in all aspects and to identify any possible risks, as per Article 3/1(g) of the Regulation.

Pursuant to Article 1/2 of the Regulation, managing bodies of joint-stock companies, limited liability companies, limited partnerships divided into shares (*i.e.*, the board of directors or the board of managers), and parent companies of group companies are obliged to prepare annual activity reports. The duty to prepare annual activity report is a non-delegable duty of the managing bodies of joint-stock and limited liability companies, as per Articles 375/1(f) and 625/1(f) of the TCC. Thus, the managing body is not allowed to authorize third parties to prepare the annual activity report. However, it is possible to get assistance from third parties.

When preparing the annual activity report, managing bodies are required to reflect the activities and financial status of the company accurately, fully directly, truthfully and honestly, as per Article 516/1 of the TCC. In addition, Article 4 of the Regulation also emphasizes the importance of avoiding terms or definitions that may be too complex and/or ambiguous, and of providing detailed explanations for ease of understanding of any technical terms used.

III. Preparation of the Annual Activity Report

Pursuant to Article 16 of the Regulation, the annual activity report should be prepared within 2 (two) months following the end of the relevant fiscal year, and it should include the minimum content stipulated under the Regulation.

a. Sections of the Annual Activity Report and the Required Minimum Content

According to Articles 7-14 of the Regulation, the sections and minimum content prescribed for the annual activity report are as follows:

i. General information: This section should identify the relevant fiscal year, set out the company's trade name and trade registry information, organizational, capital and shareholding structures and any changes thereof in the relevant fiscal period, any privileged shares and the related voting rights, the managing body and personnel, among others.

ii. Financial benefits provided to the managing body and executives: This section should include the relevant information regarding remuneration, salary, bonus, dividends, travel and accommodation expenses, insurance, etc., granted to the members of the managing body and to other senior executives.

iii. Research and development activities of the company: This section should include

the research and development activities of the company and the results of such activities.

iv. Activities of the company and important developments: This section should comprise information regarding the investments made in the relevant fiscal year, internal control systems, internal audits and assessments of the company (including comments of the managing body regarding the same), subsidiaries of the company and its shareholding ratio in such companies, audits by public authorities or special auditors, lawsuits filed against the company that could affect its financial status and activities, any administrative or judicial fines imposed on the company or members of its managing body due to any acts in breach of law, any extraordinary general assembly meetings held in the relevant fiscal year, donations and disbursements made with respect to social responsibility projects, and other information pertaining to the transactions between group companies.

v. Financial status of the company: This section should include the managing body's analysis on the financial status of the company, the rate of actualization for the activities that had been planned for the period, the details of the company's sales, efficiency, capacity to generate revenue, profitability, debt-to-equity ratio, in comparison with previous years, a determination as to whether the company is insolvent and any measures to be taken in such case, dividend distribution policy, among others.

vi. Risks and assessment of the management body: This section should contain information on risk management policies of the company for any risks that can be foreseen, work and report of the early identification and management of the risks committee, if any, the prospective risks regarding sales, efficiency, revenue generation capacity, profitability, and the debt-to-equity ratio.

vii. Other issues: This section should set forth any event that occurs after the end of the relevant fiscal year which could materially affect the rights of the shareholders, creditors, other relevant persons and institutions, as well as any information deemed appropriate by the managing body.

In the event that it is a parent company that is preparing the annual activity report, the managing body will include the following additional information in the annual activity report, as per Article 15 of the Regulation:

i. Information regarding the companies, where the parent company directly or indirectly owns shares representing 5%, 10%, 20%, 25%, 33%, 50%, 67% or 100% of the capital, or if its shares fall under such percentages, including explanation regarding the reasons for such decrease,
ii. Information regarding the shares that the enterprises in the group hold in the share capital of the parent company,
iii. Explanation regarding internal audit and risk management systems of the group, with respect to preparation of the consolidated financial tables,
iv. If requested by a board member, final part of the report stipulated under Article 199/4 of the TCC.

b. Signing and presentation of the Annual Activity Report

Following completion of the annual activity report, the chairman of the board of directors and all board members will approve the annual activity report by signing it. Any board members who disagree with the content should include their objections in the annual activity report along with their reasoning, as per Article 16 of the Regulation.

Moreover, if the company is subject to independent audit, the independent auditor is required to review the annual activity report in terms of its consistency with the financial tables, and as to whether it is realistic in accordance with Articles 397/1 and 402/2 of

the TCC. In such cases, if an independent auditor does not review the annual activity report, such report will be deemed non-existent, as if it had never been drafted, as per Article 397/2 of the TCC.

Once the annual activity report has been signed and approved, it should be made available in the headquarters and branches of the company, at least 15 (fifteen) days before the general assembly meeting to be held pursuant to Article 437 of the TCC, in order to enable the shareholders to review the annual activity report. Finally, the annual activity report should be discussed between the shareholders in the general assembly meeting in accordance with Article 409/1 of the TCC.

IV. Conclusion

The annual activity report is a significant source of information for the shareholders of a company, since it provides detailed information regarding its financial status and activities. For this reason, the managing body should exercise the utmost care when preparing the annual activity report and ensure that it properly and accurately reflects the actual status of the company.

Banking and Finance Law

Significant Amendments Introduced to the Turkish Banking Legislation in the Second Half of 2019

I. Introduction

Throughout the second half of 2019, the Turkish government has introduced various changes to the country's banking legislation. In this section, our aim is to focus on the key amendments and provisions brought by these changes.

II. What Has Been Changed?

1. Limitation on the Monetary Transaction Amounts of Swaps, Forwards and Other Derivatives

On December 18, 2019, the Banking Regulation and Supervision Authority ("**BRSA**") announced certain limits regarding monetary amounts of foreign-exchange swaps, forwards and other derivatives, conducted between Turkish banks and transaction counterparts residing outside of Turkey. Accordingly, such swap, forward, option and other derivative transactions in which Turkish Lira is sold and which have a maturity of seven days or less, should not exceed 10% of the banks' equity. This 10% limit will be calculated daily on a solo and consolidated basis. The announcement also specifies that this limitation excludes transactions that are carried out between Turkish banks and their foreign subsidiaries, which are credit or financial institutions, subject to consolidation. By restricting the amounts of such foreign-exchange swaps, forwards and other derivatives, the BRSA aims to reduce the demand for foreign currency and maintain the strength of the Turkish Lira.

2. Writing-Off Non-Performing Loans

With the aim to clear creditors' books in order to boost the credit environment in Turkey, the BRSA has amended the Regulation on the Principles and Procedures Regarding the Classification of Loans and Provisions to be Set Aside ("***Regulation***"). This amendment came into effect with its publication in the Official Gazette No. 30961, dated November 27, 2019, retroactively effective as of July 19, 2019.

Pursuant to the Amendment on the Regulation, if recovery of any part of a loan, which is considered as a loss (with special reserves or credit loss reserves set aside as per the Regulation), cannot be expected due to the debtor's default, such part of the loan can be written off in line with TFRS 9 ("*Turkish Financial Reporting Standards No. 9 on Financial Instruments*") as of the first reporting period following its classification as a loss. In order to protect the interests of the creditors, this amendment explicitly stipulates that the said write-off is merely an accounting procedure, and will not be construed as a

waiver by the creditor from collecting its receivables.

3. Interest-Free Banking

The BRSA has published the Communiqué on Compliance with the Principles and Standards of Interest-Free Banking ("***Communiqué on Interest-Free Banking***"), which entered into force with its publication in the Official Gazette No. 30888, dated September 14, 2019. The purpose of the Communiqué on Interest-Free Banking is to regulate the principles and procedures of interest-free banking within the "participation banks", as well as development and investment banks. With this Communiqué, the BRSA aims to make Turkey a regional center for interest-free banking, taking into account the increasing demand for such interest-free banking services.

The most significant novelty introduced by the Communiqué on Interest-Free Banking is the establishment of an advisory committee within the banks in order to ensure compliance with the principles and standards of interest-free banking.

As per Article 9 of the Communiqué on Interest-Free Banking, the purpose of interest-free banking compliance activities is to ensure that the banks' current and planned activities, and any new products introduced by such banks, comply with the principles and standards of interest-free banking and the decisions taken by the advisory committee. In this respect, Article 10 of the Communiqué on Interest-Free Banking obliges the banks' internal audit departments to audit compliance with interest-free banking standards, in order to provide assurance to the banks' executives, shareholders and other stakeholders.

III. Conclusion

The Turkish banking sector is highly responsive to economic trends and developments, and thus, Turkey is amending its banking regulations in order to keep abreast of them. The recent major amendments summarized above indicate that Turkey aims to maintain strength of the Turkish Lira, boost its financial environment, secure the trust of investors and stakeholders in the Turkish economy, and make Turkey a regional hub for interest-free banking activities.

Capital Markets Law

Issuance of Capital Market Instruments as per the Turkish Capital Market Law

Article 2 of the Capital Market Law No. 6362 ("**Law**"), which was introduced by the Capital Markets Board of Turkey ("**CMB**") and entered into force on December 30, 2012, sets forth specific transactions, markets, persons and institutions that are subject to the Law. Accordingly, issuance of capital market instruments is one of the transactions that fall within the scope of the Law.

Article 3 of the Law defines "*capital market instruments*" as securities, derivative instruments, including investment contracts, and other capital market instruments as determined by the CMB. The same article also includes distinct and separate definitions for securities and derivative instruments, where the term:

- "*Securities*" has the meaning of shares, other securities similar to shares, depository receipts, debt instruments, debt instruments based on securitized assets and revenues, excluding money, cheques, bills of exchange and promissory notes; and,

- "*Derivative instruments*" has the meaning of those derivative instruments: (i) giving the right to buy, sell, or exchange securities with each other, (ii) values of which are subject to price or return of a security; foreign exchange rate, price of any goods, precious metals or stones, or price variance of these; statistics published by institutions

approved by the CMB and any changes in them; enabling the transfer of credit risk, which have measurement values, such as energy prices and climate variability, and depending on an index level that is determined by these items or changes in this index level; the derivatives of the foregoing instruments and giving the right to exchange the listed underlying assets, and (iii) leveraged transactions on foreign exchange, precious metals, and other assets to be determined by the CMB.

There is, however, no definition for "*investment contracts*" in the Law. Looking abroad, based on the relevant rules of the U.S. Securities and Exchange Commission ("**SEC**") and the precedents of the U.S. Supreme Court,[1] we observe that investment contracts can be generally described as agreements where a person invests money in a joint venture with the expectation of gaining an interest.

In terms of Turkish capital markets law, the lack of a definition for "investment contracts" in the Law should be regarded and interpreted as a deliberate legal lacuna, to be filled by the CMB when necessary. Consequently, the investment contracts which can be regarded as capital market instruments are to be specified and determined by the CMB, on a case-by-case basis.

It is also important to point out that Article 2 of the Law clearly states that issuance of shares by private companies (without offering these shares to the public) would not be subject to the Law. For this type of issuance, only the provisions of the Turkish Commercial Code and its secondary legislation are applicable, unless the relevant company is subject to any other regulations (*e.g.*, banking, energy, insurance, etc.) due to its field of activities.

In light of the above, it can be concluded that:

- If a public company issues any capital market instruments, such issuance will be subject to the Law and the rules of the CMB;

- If a private company issues shares by way of a public offering, such issuance will be subject to the Law and the rules of the CMB;

- If a private company issues any capital market instrument other than "shares", such issuance will be subject to the Law and the rules of the CMB, even if such instrument will not be offered to the public.

It is also worth mentioning that, in the event that a public or private company issues any capital market instrument contrary to the Law, the CMB shall be authorized, as the case may be, to take necessary measures to eliminate the consequences of the illegal issuance, to request return of the funds and other values/assets gathered from the right holders, to file a lawsuit against the company requesting its liquidation, to file a criminal complaint against the relevant persons in the company, to remove board memberships and signature authorities of the relevant signatories, and to appoint new board members to serve until the upcoming general assembly meeting.

Competition Law / Antitrust Law

It Is Not Always "Better Late than Never" When It Comes to Procedural Violations: The Board Imposes Administrative Monetary Fines for Procedural Violations in Two Separate Preliminary Investigations

The Turkish Competition Board ("**Board**") recently published two reasoned decisions in which it imposed administrative monetary

[1] Adıgüzel, Burak, "6362 Sayılı Sermaye Piyasası Kanunu'nda Sermaye Piyasası Aracı Kavramı" (Capital Market Instruments In the Capital Market Law Numbered 6362), Ankara Yıldırım Beyazıt Üniversitesi Ticaret ve Fikri Mülkiyet Hukuku Dergisi (TFM); TFM 2017; 3(1), s. 1-8.

fines on the Turkish Pharmacists' Association ("Türk Eczacıları Birliği" - "**TEB**"), and Unilever Sanayi ve Ticaret Türk A.Ş. ("**Unilever**") in two separate preliminary investigations, due to their actions amounting to violation of Articles 14 and 15 of the Law No. 4054 on the Protection of Competition ("**Law No. 4054**"), respectively.

Article 14 of the Law No. 4054 enables and authorizes the Turkish Competition Authority ("**Authority**") to seek information and documents from the parties to the case at hand as well as from third parties, including state-owned undertakings, by way of explicitly setting forth deadlines. In a similar vein, Article 15 of the Law No. 4054 stipulates that the Board may conduct on-site inspections at the premises of undertakings and association of undertakings, and may examine documents at such premises and take copies if needed.

In the case of TEB,[2] under the preliminary investigation[3] conducted against TEB and Istanbul Chamber of Pharmacists to determine whether they had violated the Law No. 4054, the Authority asked for certain information and documents to be submitted to the Authority with its information request of June 28, 2019, and granted time until the close of business on July 5, 2019, for the parties to comply with its request.

Instead of providing the requested information and documents to the Authority within the specified deadline, TEB submitted a petition on July 5, 2019, stating that the Board's request had been added to the agenda of the next meeting of TEB's Central Committee on July 11, 2019, and that the request would be addressed after its evaluation by the Central Committee of TEB. On July 26, 2019, exactly 20 days after the deadline set by the Authority had expired; TEB provided the requested information and documents to the Authority.

In its reasoned decision, the Board emphasized that TEB had delayed submitting the requested information and documents, which were only provided after the Authority's case team had already submitted its preliminary investigation report to the Board (which must be submitted by the case team within 30 days after the team is assigned to the case, as per Article 40 of the Law No. 4054). Therefore, the Board noted that the relevant information and documents could not be used for assessing the allegations within the scope of the preliminary investigation. The Board also referred to a previous TEB case,[4] in which TEB had been fined for not providing the requested information in due time. TEB had appealed this previous Board decision; however, its request was denied, and the appellate courts approved the Board's decision on the administrative monetary fine.[5]

As a result, the Board unanimously decided to impose (i) a turnover-based administrative monetary fine at the rate of 0.1% of the turnover generated by TEB in 2018,[6] pursuant to Article 16/1(c) of the Law No. 4054, and (ii) a separate turnover-based administrative monetary fine at the rate of 0.05% of the turnover generated by TEB in 2018, as per Article 17 of the Law No. 4054, for each day that passed after the deadline given by the

[2] The Board's decision dated November 7, 2019, and numbered 19-38/582-248.

[3] The preliminary investigation was initiated on June 17, 2019.

[4] The Board's decision dated July 7, 2015, and numbered 15-28/336-108.

[5] Ankara 14. Administrative Court's decision, dated April 26, 2017, and numbered E: 2016/236 and K: 2017/1323, and Ankara Regional Administrative Court's (7. Administrative Trial Chamber) decision, dated December 6, 2017, and numbered E: 2017/331 and K: 2017/609.

[6] Given that the turnover-based administrative monetary fine at the rate of 0.1% remained below the minimum administrative fine amount at the time of the fining decision, the administrative fine was increased to the minimum amount applicable until December 31, 2019 (*i.e.*, TRY 26,027).

Board for the submission of the requested information and documents until the actual date of submission by TEB (which, in this particular case, amounted to 20 days in total). In the case of Unilever,[7] a preliminary investigation had been conducted against the company to determine whether it had violated Articles 4 and 6 of the Law No. 4054 by preventing the sale of competing products at sales points to the end-consumers, whereby the Authority had conducted an on-site inspection at Unilever's premises.

During the on-site inspection, the case team had requested access to Unilever's e-mail system, in order to conduct a keyword-based review for specific time periods by way of using the "eDiscovery" software. The relevant permission for such access was only granted by Unilever after approximately eight hours from the start of the on-site inspection. The reasoned decision sets forth various explanations that were provided by Unilever for the delay at this front, including (but not limited to) the global nature of the authorization to be granted for such access, the jurisdiction of the case team to review global data, and the burdensome process of separating Turkey-specific data from global data.

The Board, referring to the decision of the 13th Chamber of the Council of State,[8] which had found that delaying an on-site inspection for even 40 minutes could be deemed sufficient for the risk of spoliation with respect to evidence that could be useful in a preliminary investigation, concluded that Unilever had hindered the on-site inspection from 10:10 to 17:45 by way of not granting access to the information system, and unanimously decided to impose a turnover-based administrative monetary fine at the rate of 0.5% of the turnover generated by Unilever in 2018, as per Article 16/1(d) of the Law No. 4054. The Board did not choose to impose a separate turnover-based administrative monetary fine within the scope of Article 17 of the Law No. 4054, which is calculated on a daily basis, since the relevant conditions for such fine had not been met, considering that the authorization for access had been granted within the course of the same day.

The Board Examined Exclusionary Behaviors of the Undertakings in the DNA Sequence Analysis Devices Sector

On March 28, 2019, the Board published its reasoned decision[9] on the investigation launched against Medsantek Laboratuar Malzemeleri Sanayi ve Ticaret Limited Şirketi (**"Medsantek"**) and Genomed Sağlık Hizmetleri Anonim Şirketi (**"Genomed"**). The Authority investigated a complaint received from Intron Sağlık Ürünleri İthalat İhracat Ticaret Limited Şti. (**"Intron"**), alleging that Medsantek and Genomed had violated Article 6 of the Law No. 4054 by excluding their competitors from the market for kits used in the DNA sequence analysis devices,[10] by virtue of their dominance in the sales, service and maintenance of the DNA sequence analysis devices market.

The complainant, Intron, stated that Thermo Fisher Scientific (**"Thermo"**) is dominant in the DNA sequence analysis devices market both globally and in Turkey, where it has two authorized distributors, namely Medsantek and Genomed. Furthermore, Intron indicated that it is active in the sales activities of kits used in the DNA sequence analysis devices, and that it has been working with Genomed and Medsantek; however, after Medsantek started to operate in the kits market (where

[7] The Board's decision dated November 7, 2019, and numbered 19-38/584-250.

[8] The decision of the 13th Chamber of the Council of State, dated March 22, 2016, and numbered E: 2011/2660, K: 2016/775.

[9] The Board's decision dated March 28, 2019, and numbered 19-13/182-80.

[10] DNA sequence analysis devices are essentially used for diagnosing genetic disorders.

Intron is active), Medsantek had ceased to provide authorization certificates, which are necessary for the tenders in this industry. Intron further stated that, since it is not possible to bid in the tenders without the authorization certificate, it was forced to start buying the relevant devices from abroad at higher prices. Intron also declared that, since neither the manufacturers nor the authorized distributors would provide authorization certificates, it was not possible for Intron to participate in public tenders and to operate in the market for kits used in the DNA sequence analysis devices, which requires the authorization certificates from Medsantek.

In terms of the relevant product market definition, the Board emphasized that the medical devices market is considered as the *primary* market, since the devices need complementary products or services in usage and , the market for complementary products and services, such as spare parts and maintenance services, that are used with or required after purchasing the primary products, is defined as the *secondary* market. Accordingly, the Board explained that, in order to define the relevant product markets for primary and secondary markets, two conditions should be evaluated: (i) whether the relevant devices and services are included in the same market, and (ii) if it is not possible, whether the market can be defined as brand-specific. The Board stated that there was no need to make a precise market definition for the secondary market due to dynamics of the present case, and consequently, it defined the relevant market as the "*Thermo-branded new generation sequence analysis devices market*" and the "*Thermo-branded sanger sequence analysis devices*" for the purposes of its analysis. In its relevant product market analysis, the Board highlighted that the Sanger sequence analysis devices market differs from the new generation sequence analysis devices market both technically and also from the users' perspective, in line with its previous decision[11] concerning the same relevant market. In its analysis of the merits of the complaint, the Board examined the market where the abuse of dominance had allegedly occurred, and accordingly, assessed whether the relevant undertakings had abused their dominance in the kits market, namely, the market for the sale of services in return for kits.

In its substantive analysis, the Board assessed that public tenders comprised a significant part of the market for the sale of diagnosis kits. The successful tenderer fulfills all the stages from the setup to the output. Therefore, in order for the bidding company to compete in the kits market, they should also provide the devices (in which the kits will be used) to the hospitals. In addition, the hospitals request and require the authorization certificates for the devices to be submitted among their tender specifications. To that end, the Board found that the undertakings that are not provided with the authorization certificates could not compete in public tenders in the kits markets as effective competitors. Accordingly, the Board concluded that authorization certificates constituted a significant entry barrier in the relevant market.

The Board also found that, since the authorization certificates could only be obtained from the distributors, this requirement negatively affected the purchasing power of the undertakings that purchased the DNA sequence analysis devices from Genomed and Medsantek. Accordingly, the Board concluded that, once Genomed and Medsantek sell their Sanger or new generation sequence devices to the distributors or undertakings that are active in the kits market, each undertaking becomes dominant at the stage of issuing the authorization certificates for the devices it sells. Consequently, the Board found that both

[11] The Board's decision dated August 9, 2017, and numbered 17-26/397-176.

Medsantek and Genomed had the power to block the use of the devices they sell in a manner that would compete with their own products in the downstream kits market.

In its analysis of the abuse of dominance allegations against Genomed, the Board stated that, according to its review of the information and documents obtained during the investigation, Genomed had not rejected any requests for authorization certificates from any undertakings active in the kits market, including Intron. Furthermore, Intron also confirmed that it had not requested an authorization certificate from Genomed. As for Medsantek, the Board first examined whether Medsantek had rejected Intron's request for an authorization certificate for public tenders. One of the documents collected during the on-site inspection showed that Medsantek had rejected such a request from Intron by indicating that it could not provide an authorization certificate for a tender in which it would also participate. Regarding the Authority's question as to whether any existing legislation prevented the company from providing authorization certificates to third parties that participate in the same tenders as Medsantek, Medsantek stated that they issue authorization certificates to third parties only for the tenders in which they do not participate, in accordance with Article 17 of the Public Procurement Law No. 4734 (**"Law No. 4734"**), and the decision of the 13th Chamber of the Council of State.[12]

Article 17 of the Law No. 4734 stipulates that an undertaking's representative cannot bid in a tender while simultaneously bidding on behalf of another company that it also represents. However, the Board found that the authorization certificate required for the devices and the kits within the scope of the case at hand was a document that provided a guarantee for the successful tenderer to repair the device and to supply consumables in case the hospitals were faced with problems with the device beforehand. Accordingly, the authorized company participates in the tender on its own behalf without engaging in a representation relationship. Accordingly, the Board emphasized that the relevant relationship did not constitute a representation relationship within the meaning of the Law No. 4734, and found that Medsantek's practices did not arise from a legal obligation. The Board concluded that the relevant practices led to the exclusion of the competitors from the public tenders and hindered the competitors from selling kits. Furthermore, the Board stated that certain documents collected during the on-site inspection also indicated that Medsantek had been pursuing an exclusionary strategy.

In terms of the effect-based analysis of the alleged exclusionary behavior, by way of comparing the turnovers of the undertakings that were active in the DNA sequence analysis devices market for a time period between 2013 and 2018, the Board concluded that Intron was the only undertaking that could not increase its sales in 2018 (compared to the previous year), and also noted that Intron had experienced a serious decline in its sales following the refusal by Medsantek to provide an authorization certificate in July 2017.

The Board determined that Medsantek's failure to provide the authorization certificate required to participate in the tender after selling the DNA sequence analysis devices had a negative effect on the competition in the kits market. Therefore, the Board indicated that Medsantek's failure to provide the authorization certificate for the devices that were sold to its competitors had led to market foreclosure and violated Article 6 of the Law No. 4054. In light of the foregoing considerations, the Board decided unanimously to impose an administrative monetary fine on Medsantek at the rate of 1%

[12] The decision of the 13th Chamber of the Council of State, dated December 14, 2010, and numbered E. 2009/6170 and K. 2010/8505.

of its turnover in 2018, which amounted to TRY 504,534.02. On the other hand, the Board also unanimously resolved that Genomed had not violated the Law No. 4054, and therefore, should not be subject to any administrative monetary fines.

The Regional Administrative Court Accepted the Legal Standing of a Consumer to Appeal the No-Go Decision of the Board in a Resale Price Maintenance Case

The Ankara Regional Administrative Court's 8th Administrative Chamber ("**Regional Court**") annulled the decision of the 13th Administrative Court of Ankara ("**Administrative Court**"),[13] where the Administrative Court had dismissed a lawsuit against the Board's *Duru* decision,[14] due to a lack of legal standing on the part of the plaintiff (*i.e.*, a citizen filing a lawsuit in his capacity as a consumer).[15]

The Board had rendered its *Duru* decision following an ex *officio* preliminary investigation, which had been initiated due to the allegations that Duru Bulgur Gıda Sanayi ve Ticaret A.Ş. ("**Duru**") had violated Article 4 of the Law No. 4054 by way of intervening in the resale prices of the retail chains, by determining their shelf prices and limiting their discount rates.

While it was found that Duru had interfered with the retailers' shelf prices based on the documents seized during the on-site inspection, which mainly consist of the communications between Duru and the retailers, the Board unanimously decided not to launch a full-fledged investigation against Duru by taking into consideration the following factors: (i) intra-brand competition in the market, (ii) competitive pressure in the retail market from discount stores and retailer chains, (iii) Duru's low market share in the grains and legumes market, (iv) low concentration level in the market, (v) the fact that retailers often priced their products below the recommended prices, and (vi) lack of evidence regarding any enforcement or monitoring mechanism for the implementation of the recommended prices set by Duru. Having said that, the Board also issued an opinion letter stating that Duru should terminate its practices that could be considered as resale price maintenance, such as determining shelf prices and discount rates or fixing resale prices by any other means.

Subsequent to the Board's *Duru* decision, the plaintiff filed for an annulment lawsuit against the Board. The Administrative Court, through its interim decision, requested explanations about the plaintiff's legal standing within the scope of the Board's relevant decision, along with any information and documents that may prove his legal interest and benefit in this case.

The plaintiff contended in his reply petition that his interest as a consumer of Duru products had been violated by Duru's actions, which were intended to increase consumer prices in various cities in Turkey, including Ankara, where the plaintiff resided.

The Administrative Court examined whether a citizen, merely by being a consumer, could have legal standing as a plaintiff in an administrative lawsuit for the judicial review of a Board decision. The Administrative Court stated that, although a Board decision is an administrative action which has an outweighing public nature, the plaintiff should

[13] The 13th Administrative Court of Ankara's decision dated December 20, 2018, and numbered E:2018/1875 K:2018/2595.

[14] The Board's decision dated March 8, 2018, and numbered 18-07/112-59, see "*A Closer Look at Resale Price Maintenance and Restrictions on Internet Sales: The JOTUN and Duru Cases*," ELIG Gürkaynak Attorneys at Law, Legal Insights Quarterly September 2018 – November 2018, p. 6-9.

[15] The Ankara Regional Administrative Court's 8th Administrative Chamber's decision dated November 20, 2019, and numbered E: 2019/1829, K: 2019/2624.

nevertheless have a legitimate, personal, actual and concrete interest in the relevant administrative action to be able to file a lawsuit; otherwise, every citizen would be able to file a lawsuit regarding any matter that is considered in the interest of the public. With this understanding, the Administrative Court ruled that the plaintiff lacked legal standing to file a lawsuit against the Board's decision, and dismissed the lawsuit pursuant to Article 15/1-b of the Law No. 2577 on Administrative Adjudication Procedures.[16]

The plaintiff appealed the Administrative Court's decision before the Regional Court. The Regional Court indicated that the dispute had arisen from the determination of the retail prices of the products that were released directly to the market for consumers, by notifying the retailers about the sales prices or discount rates which were intended to determine the sales prices by way of preventing resale prices from being set within the market conditions on their own terms. In this regard, the Regional Court highlighted the Board's decision to issue an opinion letter to Duru stating that the company should terminate its practices that could be considered as resale price maintenance based upon the evaluation of the correspondence and meetings between the parties and the documents collected in evidence within the scope of the preliminary investigation. To that end, the Regional Court assessed that, even though the Board had decided not to launch a full-fledged investigation against Duru, the Board's decision to issue such an opinion letter established the existence of practices that could amount to resale price maintenance.

Therefore, the Regional Court concluded that the Board's decision not to launch a full-fledged investigation following the preliminary investigation could be subject to a lawsuit brought by the consumers whose interests had been affected. It is evident from the Regional Court's decision that consumers who buy Duru products do, in fact, have legal standing to bring legal action, considering the effects of resale price maintenance by Duru regarding the prices of dry food products in light of the relevant competition law principles. In this respect, the Regional Court decided to grant the plaintiff's request of appeal and rescinded the Administrative Court's decision.

The Board Fined the Customs Brokers Association for its Decision Allegedly Taken in Order to Prevent Unfair Competition

The Board published its reasoned decision[17] on the investigation initiated upon a complaint filed by Ünsped Gümrük Müşavirliği ve Lojistik Hizmetleri A.Ş ("**Ünsped**") (a customs brokerage and logistics company) against the Customs Brokers Association of Istanbul ("**Association**"). Ünsped alleged that the Association had violated Article 4 of the Law No. 4054 through its proposed protocol for the purpose of preventing unfair competition. The Association's protocol involved prohibitions for customs broker companies on (i) providing offers and contacting customers without a written request, (ii) advertising activities, (iii) undertaking to finance the costs arising from the customs brokerage activities by offering a payment plan, and (iv) collaborating with non-registered persons for such activities.

In its assessment of the relevant market, noting that the relevant product market may be defined as the market for "customs brokerage services," the Board nevertheless chose to leave the relevant product market definition open. The Board further held that geographic scope of the relevant market may be Turkey, since brokerage services are offered nationwide, and the competition conditions

[16] The 13th Administrative Court of Ankara's decision dated December 20, 2018, and numbered E:2018/1875, K:2018/2595.

[17] The Board's decision dated June 20, 2019, and numbered 19-22/352-158.

for such services would not differ among different regions of Turkey; however, the Board left the geographic market definition open as well.

With respect to the first prohibition, which stipulates that none of the members/customs broker companies would have any contact with potential customers, advertise its businesses, or provide them with potential offers without a written request, the Board noted that the objective of the Association's decision was to restrict competition among members in terms of gaining customers, which is indeed against the nature of competition. Given that the undertakings mainly compete to gain customers, the Board evaluated that this decision would aim to eliminate such competition.

Furthermore, the Board also considered that the Association's decision would pose a significant barrier to entry into the relevant market, given that new entrants would lack customer portfolios at the outset, and accordingly, would not be able to provide offers to customers in their competitors' portfolios by any possible means. The Board additionally stated that the undertakings would have no motivation to enhance the quality of their services, prices and other terms of trade, due to lack of competitive offers from competitors to the customers in their portfolios. In line with this reasoning, the Board ultimately held that the Association's decision amounted to a restriction of competition by object, as it aimed to eliminate competition and remove the motivation among undertakings to gain more customers.

With respect to the second prohibition, the Board considered that the first aspect of the prohibition related to the restriction of advertising activities. As customer-oriented information and marketing activities cannot be separately evaluated from competition, in light of the fact that the primary elements of competition are commercial terms, fundamentally including price and quality, the Board indicated that a prohibition on advertising may disrupt supply of better services (*i.e.*, more convenient prices with a better quality). It also noted that such a prohibition would cause asymmetric information, which could hinder the customers' access to better services. The Board also added that this prohibition would adversely affect new entrants' ability to effectively compete against incumbent undertakings.

The Board evaluated the other aspect of the second prohibition as a ban on using commercial titles, which eliminates the ability of members of the Association to use their commercial titles, which were registered in accordance with the applicable laws and commercial practices. The Board held that this prohibition would lead to a monotype/standardization in the relevant market and that it would create a risk of lowering the benefits from competition, which the Board deemed to fall outside the main purpose of the prohibition.

In terms of the third prohibition, the Board held that prohibiting members from undertaking certain financing activities for costs arising from their services through payment plans would amount to a determination of sale conditions, which would be a violation of Article 4 of the Law No. 4054 by object.

As for the genesis of the Association's decision that entailed all these various prohibitions, the Board examined the evidence collected during the on-site inspections, and observed that the Association had been enforcing the same rules since 2006. Indeed, the Association had imposed sanctions in 2017 on a member who had failed to comply with the Association's decision.

Consequently, the Board examined whether the Association's decision could be granted

an individual exemption under Article 5 of the Law No. 4054. As a result of this evaluation, the Board reiterated the negative consequences of the decision, and found that the Association's decision restricted the members' activities that might benefit their customers and prevented new entries to the market. To that end, the Board declared that the Association's decision could not be granted an individual exemption.

In light of the above, the Board decided unanimously that the Association had violated Article 4 of the Law No. 4054 through its decisions concerning the prohibitions regarding competitors' offers and advertising activities. Accordingly, the Board decided (by a majority) to impose an administrative monetary fine on the Association in the amount of TRY 31,076.89. For the sake of completeness, Prof. Dr. Ömer Torlak (the President of the Board at the time of the decision), issued a dissenting opinion in terms of the calculation of the administrative monetary fine based on the duration of the violation. To that end, the dissenting opinion stated that there was no evidence that could demonstrate that the decision of the Association had been enforced uninterruptedly between 2006 and 2018, given that all of the findings obtained within the scope of the investigation related to 2017 and 2018 and no other years prior to that.

Employment Law

The Newly Proposed Severance Payment Model in Turkey

Severance payment disputes comprise almost half of the employment law disputes in Turkey. Severance payment is generally a compensation that employers are required to provide to their employees whose employment contract is terminated due to listed reasons under the Turkish Labor Law No. 4857, for their past commitment and loyalty to the employer. Since severance payment disputes make up a significant part of the cases before the labor courts, the system of severance payments and the relevant legal proceedings on such claims need to be restructured. To that end, the Turkish government has recently announced the new amendment package that will enter into force regarding the severance payment model.

The proposed severance payment model is generally similar to an insurance premium model, which will provide employees with a certain amount of severance payment even in the event of resignation, in addition to the termination of their contracts by their employers. In the current regulation, it is not possible for employees to request severance payment when they resign from their positions. This aspect is the most criticized part of the current severance payment model because it forces employees to retain their positions merely due to not being able to collect their well-earned severance payments, which they may have accrued over a long period of time. To remedy this problem, a brand-new severance payment funding structure is introduced by the proposed new model.

According to the proposed new model, each employee will have a severance payment fund, established by the government, into which employers will be obliged to deposit a monthly severance amount. The new severance payment method is planned to be integrated with the individual pension fund system. The severance payment deductions to be made from employers will be collected in the severance payment fund, which will be integrated with the individual pension system, and will be ready and available to be paid in cash. Employees will not be allowed to withdraw the deposited amounts unless their total number of years of service reaches a certain level. The most significant aspect of the new model is that the fund will be paid to the employees regardless of the reason for termination of employment, provided that

certain conditions are met. Furthermore, when an employee changes jobs, the severance fund of the employee will be transferred to the new employer.

The most advantageous part of the proposed model is that payments under the model will be guaranteed by the government. Even if an employee resigns from her/his position, their severance payment rights will be preserved, since the funds will have already been paid into her/his severance payment account. In the event that an employer goes bankrupt or falls into financial hardship, the employees will still receive their severance payments from the severance payment fund. As per the new model, the employees will be entitled to severance payments even if they work less than one year, which is not the case under the current system. Accordingly, employees will no longer be deprived of any earned remunerations for their work. Particularly in certain sectors, such as cleaning services or security services, where employees change employers frequently due to the nature of the industry, the entitlement to severance payments will continue to benefit the employees.

With this new system, employers and employees will no longer have to litigate or mediate extensively for severance payment claims. However, even though the proposed changes are aimed at diminishing or eliminating a vast amount of the claims that arise from severance payment disputes, the new system may have unintended consequences and create new legal issues. Under Turkish employment law, one of the most significant motivations that deter both employees and employers from unilaterally terminating the employment agreement is the existence of the severance payment. Employees often steer away from terminating their employment agreements because they do not want to be deprived of their severance payments, and they seek to ensure that they will be able to collect the amount that has accumulated throughout the years when they quit their jobs. On the other hand, the employers, too, may refrain from terminating employment agreements to avoid the financial burden of making lump-sum severance payments. With this new severance payment model, neither side will have such concerns or incentives any longer, and accordingly, resignation and termination rates might rise, leading to a more unstable national job market.

Nevertheless, details of the transition from the current model to the new severance payment model, as well as the minimum requirements for entitlement to severance payments, are still controversial and hotly debated. Aside from the advantages and disadvantages of the new model, it is clearly evident that the new model will create a new era for Turkish employment law. However, it should be noted that since the new severance payment amendments (which were expected to be put in place by the end of 2019) have not been officially announced, the new severance payment model might be further amended before coming into effect as well.

Litigation

The High Court of Appeals Revived the Cancellation Actions on the Grounds of Non-Use After the Annulment Decision of the Turkish Constitutional Court

The Turkish Constitutional Court had annulled Article 14 of the Decree Law No. 556 pertaining to the Protection of Trademarks (**"Decree-Law"**), which provided cancellation actions on the basis of non-use of a trademark, on December 14, 2016. The Constitutional Court had reasoned that no property right could be legislated through a decree-law. The annulment decision of the Turkish Constitutional Court was published in the Official Gazette on January 6, 2017. At that time, there were no other regulations on this issue other than the Decree-Law, and the only grounds for cancellation had thereby been removed.

Only 4 days after the annulment decision of the Turkish Constitutional Court, on January 10, 2017, the Industrial Property Law No. 6769 ("**IPL**"), which contained a legal stipulation for cancellation actions on the basis of non-use of a trademark, was published in the Official Gazette and entered into force. Nevertheless, that four-day period (during which there was a legal lacuna for cancellation actions on the grounds of non-use of a trademark) was sufficient to create legal chaos in Turkey with respect to both pending and potential cancellation actions on the grounds of non-use of a trademark.

The relevant doctrine and legal practitioners were split on the correct implementation of the ruling regarding the cancellation actions on the basis of non-use of a trademark. The High Court of Appeals, in the meantime, has reversed all of the appeals regarding such cancellation actions for re-assessment.

The first opinion, which defended the position that the motion of cancellation action on the grounds of non-use should be maintained, argued that the legal lacuna should be filled by the judicial authorities, and that, accordingly, judges should allow cancellation actions on the grounds of non-use to proceed, since such motions had been allowed before the annulment action, and would still be allowed going forward as well; and thus, it was evident that the actual will of the legislator was not to remove such cancellation actions from Turkish IP Law. On the other hand, other commentators put forth arguments from a technical point of view, suggesting that an annulment makes it as though the annulled provision had never existed, and if the same provision is brought forth with another legislation, then this new provision should be considered and treated as if it was introduced into the legal realm for the first time; therefore, any cancellation action could only be filed starting from 5 years after the enforcement date of the IPL, *i.e.*, on January 10, 2022.

While the legal gap on this issue has been dealt with in different and inconsistent ways by the legal doctrine and the courts, the High Court of Appeals ended the divergence between the courts with its decision in 2019,[18] favoring and implementing the first opinion explained above. Accordingly, the High Court stated that, although the IPL had entered into force on January 10, 2017, the actual enactment date of the IPL was December 22, 2016, which is earlier than the publication date of the annulment decision of Turkish Commercial Court, *i.e.*, January 6, 2017. The High Court further stated that the will of the legislator regarding the IPL was shaped before the annulment of Article 14 of the Decree-Law and therefore, the legal lacuna could be filled through retrospective implementation of the IPL for cancellation actions on the grounds of non-use.

Consequently, the High Court of Appeals has clarified that there is no need to wait until the 5th anniversary of the IPL to be able to file a cancellation action on the grounds of non-use of a trademark. Cancellation actions on the grounds of non-use can be filed in accordance with the provisions of the IPL without further doubt, now that the discussion on the legal lacuna for cancellation actions, as well as inconsistent implementation of the courts in this regard, has mercifully been brought to a close.

Data Protection Law

The Turkish Data Protection Authority's Decision on the Registration Obligation of Foreign Legal Entities

The Turkish Data Protection Authority ("**DPA**") recently published its decision regarding registration obligations of the branches and liaison offices of foreign entities in Turkey in the Data Controllers' Registry ("**VERBIS**"). The decision was issued by the

[18] The 11th Civil Chamber of High Court of Appeals, decision numbered 2019/1765 E. 2019/4421 K.

DPA on July 23, 2019, with number 2019/225, in response to an opinion request from the authority.

The DPA divides its decision into three sections and evaluates the registration obligation separately in terms of (i) legal entities residing abroad, (ii) the branches of such foreign legal entities located in Turkey, and (iii) the liaison offices of such foreign legal entities located in Turkey.

(i) Registration Obligations of Legal Entities Residing Abroad

The DPA refers to Article 3 of the Law No. 6698 on the Protection of Personal Data (“**Law No 6698**”) and defines a data controller as *“[t]he natural or legal person who determines the purposes and means of the processing of personal data, and who is responsible for the establishment and management of the filing system.”* Thus, data controllers can be real persons or legal entities, such as companies, associations or foundations.

According to the DPA, in order to identify a data controller, the following factors must be examined: Whether the natural or legal person is,

i. Identifying the purposes and means of processing personal data,

ii. Responsible for the establishment and management of the data registration system,

iii. Deciding on the legal basis for obtaining personal data, which personal data will be processed for which purposes, methods of obtaining personal data, types of personal data to be processed, whose personal data will be processed, whether the right to access and other rights of data subjects are used, whether personal data will be shared/transferred and, if so, to/with whom personal data will be transferred/shared, and the retention period of personal data.

In addition to the foregoing, the DPA states that any legal obligations imposed on the relevant entity separately from the headquarters/main office of the said entity, and existence of any terms and conditions of their own imposed on the data subjects, are also crucial for determining the data controller. The DPA declares that the scope of activities should be evaluated carefully when determining the establishment of a branch or liaison office.

(ii) Registration Obligations of the Branches of Legal Entities Located Abroad

As for the branches of the legal entities located abroad, the DPA refers to several legislations under Turkish Law (*i.e.*, the Turkish Commercial Code, the Law on Chambers and Commodity Exchanges, the Banking Law) for “branch” definition and concludes that, for an entity to be considered as a branch, it is necessary to consider the following criteria:

i. Being dependent on the headquarters: The branch and headquarters/main office must be owned by the same real person or legal entity. The branch cannot have a separate management policy; thus, the profit and loss of the branch should belong to the headquarters. According to the DPA, the rights and obligations arising from the activities of the branch should belong to the headquarters as well.

ii. Independence in external relations: According to the DPA, independence in external relations means that the branch has the authority to conduct transactions with third parties on its own.

iii. Separation of place and management: Separation of management means that the branch should have a separate management, which has the authority to conduct commercial transactions on its own.

The DPA further provides the relevant articles of the European Union’s General Data Protection Regulation (“**GDPR**”) regarding branches. The DPA states that, according to Article 3(1) of the GDPR, it does not matter

whether the branch or liaison office located in the EU itself handles the personal data; a foreign entity is subject to the provisions of the GDPR, if its branch or liaison office in the EU processes personal data within the framework of its activities. The DPA also refers to Article 4 of the GDPR, which defines the data controller as "*the natural or legal person, public authority, agency or other bodies which, alone or jointly with others, determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law.*"

The DPA further indicates that, although it is necessary to be a legal entity or real person for the purposes of the registration obligation, and even if the Turkish branches of legal entities located abroad do not have a separate legal personality, they can be evaluated as data controllers, since they are independent from the headquarters in terms of processing personal data. This is based on Article 40 of the Turkish Commercial Code, which states that branches are registered as legal entities, and Article 4 of the GDPR, which does not require data controllers to be legal entities.

(iii) Registration Obligations of Liaison Offices of Legal Entities Residing Abroad
In this section, the DPA refers to the Foreign Direct Investment Law No. 4875, which allows entities residing abroad to establish liaison offices in Turkey, provided that such liaison offices do not carry out commercial activities in Turkey.

In light of the foregoing, the DPA concluded that:
- Those legal entities residing abroad which process personal data directly or through their branches in Turkey are obliged to be registered in VERBIS,
- The Turkish branches of foreign legal entities are also considered as data controllers, if (i) they identify the purposes and means of processing the personal data, (ii) they are responsible for the establishment and management of the data registration system, and (iii) they decide on the legal basis for obtaining personal data. In this regard, the decision on whether the branches are obliged to register in VERBIS will be evaluated with respect to the criteria of "annual number of employees" and "total balance of their annual financial statements," which are determined under the DPA's decisions numbered 2018/88[19] and 2019/265.[20]
- Liaison offices of foreign legal entities residing abroad are not subject to the registration obligation, since they do not conduct commercial activities in Turkey, and since they are established only for the purposes of communication, feasibility research, conducting social and cultural studies, making preparations for mergers and acquisitions between companies, and for promotional purposes.

Internet Law
Turkey Introduces Digital Service Tax

Digital Service Tax Law ("**DST Law**"), which introduces a special tax for digital services, was published in the Official Gazette of December 7, 2019.

The DST Law imposes a new and specific tax on the revenues generated from the provision of digital services (such as advertisements, sales, intermediary activities, content usage and etc.), and also provides an access ban measure for digital service providers' failure to duly comply with the digital service tax requirements.

[19] See https://www.kvkk.gov.tr/Icerik/5272/2018-88 (last access date: February 2, 2020)
[20] See https://www.kvkk.gov.tr/Icerik/5525/2019-265 (last access date: February 2, 2020)

The DST Law will enter into force within three months as of its publication date (*i.e.*, on March 1, 2020).

- *Subject Matter of the Tax Obligation*
The DST Law states that the revenue generated from the following activities and services provided in Turkey will be subject to digital service tax, and also defines what "providing services in Turkey" means for the purposes of this law:

(i) All digital advertisement services (including advertisement supervision and performance measurement services, data transmission and management services relating to users, including technical services for viewing advertisements),
(ii) Sales of any audible, visual or digital content (including computer software, applications, audio, video, games, in-game applications and similar contents) and services provided on digital media for listening, watching and playing said content, or recording or using them in electronic devices,
(iii) Services provided for creating and operating digital media in which users may interact with each other (including services which allow or facilitate selling products or services between users), (iv) Intermediary services provided on digital media, with regard to services listed in paragraph (i) above, are also subject to the digital service tax.

- *Meaning of "Providing Services in Turkey"*
According to the new legislation, providing services in Turkey is defined as follows: (i) the service is provided in Turkey, (ii) the service benefit is enjoyed in Turkey, (iii) the service targets individuals located in Turkey, and (iv) the service is used in Turkey (where "using" means that the service fee is paid in Turkey or, if the fee is paid abroad, it is transferred to the accounts of the payer in Turkey or to the accounts of the person for whom the payment is made, or deducted from the profits of the same persons. In so far as the digital advertisement service is provided to those who are not in Turkey, the service is not deemed to be used in Turkey).

- *Scope of Application*
Per the DST Law, digital service providers are obliged to pay the digital service tax. Whether these providers are full taxpayers as per the Income Tax Law No. 193 and the Corporate Tax Law No. 5520, or, in the case of limited taxpayers, whether the said services are carried out through workplaces or permanent representatives in Turkey, shall have no impact or effect on their digital service tax liability.

Taxpayers residing abroad also fall within the scope of the DST Law. According to the DST Law, if the taxpayers do not have any residence, workplace, legal or business address in Turkey, and if deemed necessary in other cases, the Ministry of Treasury and Finance may hold those who are party to the transactions subject to taxation under the DST law, and those who act as intermediary during the transaction and payment liable to pay tax in order to secure payment.

- *Exemption*
The DST Law provides an exemption from the digital service tax by taking into account global revenues and the revenues earned in Turkey by the relevant parties. In this regard, digital service providers with revenues below 20 million Turkish Liras earned in Turkey or revenues under EUR 750 million (or the Turkish Lira equivalent thereof) earned globally during the previous fiscal period will be exempt from digital service tax. In case the taxpayer is a member of a consolidated group of companies in terms of its financial accounting, the total revenue of the group for those services subject to tax shall be taken into account in the application of these terms.

If both of the exemption amounts mentioned above are subsequently exceeded, the tax exemption is terminated and the digital service tax liability starts from the fourth taxation

period following the tax period in which the limit is exceeded. In determining whether the said amounts have been exceeded, the cumulative revenue obtained in the relevant accounting period as of the end of the quarterly periods of the respective accounting period shall be taken into consideration.

- *Taxation Period and Tax Declaration*
Taxation period for the digital service tax is monthly periods of a calendar year. However, the Ministry of Treasury and Finance is authorized to specify the taxation period as three months, instead of the monthly periods, according to the operation volume of taxpayers. Taxpayers and those responsible for withholding the tax are obliged to submit the digital service tax returns until the end of the month following the taxation period.

- *Measures for Securing Payment of DST and Access Ban Procedure*
The DST Law also introduces a significant sanction for the digital service providers who fail to fulfill their taxpayer duties, which may result in the access ban of the digital services provided.

Accordingly, if digital service providers or their authorized representatives in Turkey who fall within the scope of the DST Law fail to submit tax declarations and fulfill their payment obligations with regard to taxes in the scope of Tax Procedural Law, the Tax Office that is authorized to levy the DST may send notices via official service, electronic mail or any other communication media, using the information obtained from communication tools on websites, field names, IP addresses and similar sources, to the digital service providers or their authorized representatives in Turkey, and such cases shall be announced through the website of the Revenue Administration.

In case the tax obligations are not fulfilled within thirty (30) days after the announcement, the Ministry of Treasury and Finance shall decide for implementation of an access ban on the services provided by these digital service providers until the tax obligations are satisfied, and the said decision will be sent to the Information Technologies and Communication Authority for notification to the access providers. The necessary actions shall be taken by the access providers within twenty-four (24) hours after the notification of the access ban decision.

It is important to note that the DST Law provides that the authority may send (i.e., an option rather than a requirement) a prior notice to the taxpayer, followed by an access ban in case of failure to comply with the related digital service tax requirements. Accordingly, it would be reasonable to expect that digital service providers would be warned for non-compliance with the digital service tax requirements before implementation of an access ban decision. Such notifications will be announced on the website of the Revenue Administration. In case of failure to comply with the requirements within thirty (30) days as of the date of the announcement, the services provided by the digital service providers could be access banned upon the request of the Ministry of Treasury and Finance.

In conclusion, digital service providers should evaluate whether they fall within the scope of the DST Law in light of the monetary thresholds and the scope of its application. Digital service providers that do not fall under the exemption should fulfil their tax obligations to prevent the access ban of their services, as of the effective date of the DST Law.

Telecommunications Law

ICTA Requested Public Consultation on the Amendments to the Authorization Regime in the Electronic Communications Sector

The Information and Communication Technologies Authority (**"ICTA"**) announced draft amendments to the authorization regime in the electronic communications sector on

December 5, 2019, and published it for public consultation.[21] The draft documents published by ICTA are as follows: (i) Draft Regulation Amending the Regulation on Authorization in the Electronic Communications Sector ("**Draft Amendment**"),[22] (ii) Draft Notification Form, (iii) Draft Application Form for the Right of Use, and (iv) Draft Regulation on Authorization Periods and Competency Controls ("**Draft Regulation on Authorization Controls**"). The draft documents were published on ICTA's official website for 30 (thirty) days, and ICTA requested all stakeholders to submit their opinions on the draft documents by January 6, 2020.

ICTA's proposed amendments to the legislation focus, in particular, on the following issues: (i) requirements for authorization applications, (ii) review of applications regarding the right of use, (iii) administrative fees that each operator pays annually, and (iv) the operators' rights and obligations. The Draft Amendment includes the following requirements for the authorization applications:

- The applicants should not have been convicted of any criminal offenses regarding cybercrimes, crimes against national security, or the constitutional order and functions,
- Except for offenses of negligence, the applicants should not have been convicted of any of the crimes specified in Article 2 of the Draft Amendment and sentenced to a term exceeding five years.[23] (Furthermore, there should be no pending investigations or criminal proceedings against the managers of the operator regarding establishment, operation and management of electronic communication facilities in violation of the provisions of Article 9 of the Law on Electronic Communications No. 5809),[24]

- The applicants should submit the information and documents requested in the relevant notification and/or required by the right of use application form. These may include: a) information on the premises of the headquarters of the company, additional premises and facilities for providing services, b) number, qualifications, professional, technical and physical competence of the personnel or executives of the relevant company.

Furthermore, according to the Draft Amendment, if an operator does not provide services for two (2) years, which shall be determined based on the number of its subscribers, traffic information, net sales and other similar criteria, ICTA will cancel the operator's authorization. This article will be effective as of two years following publication of the Draft Amendment, if published as is.

The Draft Amendment also provides a transitional article for meeting the application requirements introduced by the Draft Amendment, known as Provisional Article 11 of the Draft Amendment. Accordingly, all operators with an authorization or the right of use must apply to ICTA by December 31,

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[21] *See* https://www.btk.gov.tr/kamuoyu-gorusleri/elektronik-haberlesme-sektorune-iliskin-yetkilendirme-mevzuatinda-yapilmasi-planlanan-degisikliklere-iliskin-kamuoyu-goruslerinin-alinmasi (last accessed on December 30, 2019).

[22] *See* https://www.btk.gov.tr/uploads/pages/elektronik-haberlesme-sektorunde-bazi-duzenlemelere-yonelik-kamuoyu-gorusu-alinmasi/elektronik-haberlesme-sektorune-iliskin-yetkilendirme-yonetmeligi-nde-degisiklik-yapilmasina-dair-yonetmelik-taslagi.pdf (last accessed on December 30, 2019).

[23] Offenses committed against privacy and the sphere of private life, summary and aggravated embezzlement, corruption, bribery, theft, fraud, forgery, misconduct in public office, abuse of confidence, fraudulent bankruptcy and concordat, smuggling crimes, conspiracy to rig public tenders and procurements, usury, money laundering, tax evasion or participation in tax evasion.

[24] *See* https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5809.pdf (last accessed on December 30, 2019).

2022, with the requested information and documents indicated above. If the relevant operators do not apply to ICTA within the said period, ICTA may cancel the relevant operators' authorizations.

According to Article 4 of the Draft Amendment, ICTA's notification to the applicants with incomplete documents no longer has to be provided in writing. Moreover, if an operator's notification form has any non-conformity or deficiency, they will not directly be subject to administrative fines or other sanctions (Article 3 of the Draft Amendment). The Regulation also sets forth certain changes to the deadlines for examination of the applications regarding the right of use (Article 4 of the Draft Amendment).

Furthermore, there are significant changes with respect to the annual administrative fees that the operators pay, based on their net sales in the income statement for the previous year. Accordingly, ICTA initially sets a base limit for the annual administrative fee in the amount of 10,000 Turkish Liras. The base limit is calculated by increasing the revaluation rate each year in accordance with the Tax Procedure Law No. 213. This procedure will be applicable for the net sales gained after January 1, 2018, according to Article 5 of the Draft Amendment.

As for the rights and obligations of the operators, all operators with an authorization should seek and receive permission from ICTA prior to any transfer of shares that leads to a change of control. Additionally, if an operator does not renew its authorization, the provisions as to cancellation may become applicable and ICTA is empowered to cancel their authorization, according to Article 7 of the Draft Amendment.

On the other hand, the Draft Regulation on Authorization Controls revokes the authorization periods that are already defined in the regulation on the definition and scope of electronic communication services, networks and substructures. ICTA determines new periods for authorization and competency controls. If a company has an authorization through notification, it will be subject to competency controls after three (3) years of the said authorization, under Article 2(3) of the Draft Regulation on Authorization Controls. Moreover, the renewal periods for the operators whose authorization has expired could be designated as up to fifteen (15) years. The Draft Regulation on Authorization Controls also provides a timetable regarding authorization renewal periods and competency controls. Finally, concerning the operators that already possess an active authorization, if the beginning of the renewal period or the period for calculating the average number of employees with an undergraduate degree is before June 6, 2020, the periods provided under the regulation should be calculated based on June 6, 2020. On the other hand, the Draft Regulation on Authorization Controls sets the last date for competency controls and the renewal period of the authorizations as December 31, 2022, for all operators with an authorization.

Real Estate Law

Compliance with the Regulation on Real Estate Trade

The Regulation on Real Estate Trade (**"Regulation"**), establishing significant standards for real estate transactions, has been in force since June 5, 2018. The Regulation includes many provisions including principles and procedures regarding issuance, renewal, suspension and cancellation of the certificate of authorization, as well as real-estate-related consultancy and management services provided by real or legal person merchants, tradesmen and craftsmen.[25] The most

[25] *See* https://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=7.5.24645&MevzuatIliski=0&sourceXmlSearch=ta%C5%9F%C4%B1nmaz%20ticareti (last accessed on February 2, 2020)

noteworthy matters introduced by the Regulation were the certificate of authorization and license, as they have a substantial amount of impact on real estate agents, and thus, on today's real estate environment.

In most countries, real estate agents and brokers are required to be licensed in order to conduct real estate activities. Some countries have specific requirements for becoming a real estate agent or broker, such as age limits, background checks, continuing education requirements, pre-licensing courses and exams. To streamline the operation and supervision of the real estate industry in accordance with international standards, the Regulation has imposed certain requirements for issuing authorization certificates and licenses.

Requirements for Granting Authorization Certificate

As per Article 6(ç) of the Regulation, in order to issue an authorization certificate to real person merchants, tradesmen and craftsmen, or representatives authorized by the commercial real estate companies and other legal entities to carry out real estate activities, or to the managers of such company branches, certain conditions are required, such as: (i) having reached the legal age of majority (18), (ii) having obtained a high-school degree at minimum, (iii) not having a record of bankruptcy or, if such a record exists, having been acquitted and discharged from bankruptcy pursuant to the Execution and Bankruptcy Code No. 2004, (iv) not having declared concordat in the past, and (v) not having been convicted of or prohibited from performing their trade or craft due to any criminal offences listed in the same article.

In addition to these requirements, Article 10(1) of the Regulation states that real estate agents, representatives and authorized agents of a real estate company or legal entity that is engaged in real estate trade, as well as branch managers of such entities, must obtain a "Professional Proficiency Certificate", which is based on national qualification standards for authorized real estate consultants (Level 5) and real estate agents (Level 4).

All these requirements are essential to protect the public and to increase the quality of services provided by a real estate agent. Similar to the certification and licensing rules in the U.S. and in European countries, the Professional Proficiency Certificate is mandatory and those who fail to receive this certificatewithin the required period will no longer be able to practice real estate activities pursuant to the Regulation.

Amendment to the Regulation

Amendment to the Regulation on Real Estate Trade ("**Amendment**") was published in the Official Gazette on December 11, 2019, extending the deadline for complying with the requirements set under Article 6 of the Regulation.[26]

Provisional Clause 1-(1) of the Regulation provides the following:

"Merchants, tradesmen and craftsmen who are not within the scope of Article 3 of the Regulation and who engage in real estate trade as of the effective date of this Regulation, must obtain a certificate of license within eighteen (18) months ("compliance period") from the date of entry into force of this Regulation in accordance with the provisions of the first paragraph of Article 6 of the Regulation."

Given that the effective date of the Regulation is June 5, 2018, the proposed eighteen-month (18) period ended on December 5, 2019. Accordingly, those who have failed to comply with the Regulation by this date would have been excluded from practicing real estate activities. However, the mass number of

[26] The Official Gazette dated December 11, 2019, available at https://www.resmigazete.gov.tr/eskiler/2019/12/20191211-12.htm (last accessed on December 23, 2019).

applications received by the Provincial Directorates of Commerce through the Real Estate Trade Information Systems, and significant delays in processing applications for various requirements (such as being registered in the professional chamber of the enterprises and possessing a professional qualification certificate) required extension of the compliance period. As a consequence, the Ministry of Trade has extended the compliance period to August 31, 2020, through the Amendment and granted merchants and real estate agents who carry out real estate trade activities additional time to obtain their certificates of license and professional proficiency in order to create an effective real estate environment.

Anti-Dumping Law

Turkey-Morocco Dispute over Anti-Dumping Duties Imposed on Hot-Rolled Steel Imports from Turkey Resolved

On October 3, 2016, Turkey had challenged a permanent anti-dumping duty of 11% on certain hot-rolled steel imports from Turkey, requesting consultations with Morocco regarding imposition of the definitive anti-dumping measure. In essence, Turkey argued that the duties imposed were inconsistent with the World Trade Organization's ("**WTO**") rules since (i) the related investigation did not comply with the 18-month deadline rule, (ii) the Moroccan authorities did not provide the Turkish exporters the opportunity to explain the alleged discrepancies and disregarded evidence, and (iii) the Moroccan authorities did not disclose essential facts with respect to its decision to use the facts available. Turkey also claimed that the measures were inconsistent with Articles I:1, X:1, X:2, X:3(a) and XI:1 of the General Agreement on Tariffs and Trade ("**GATT**") and Articles 3.2 and 3.3 of the Import Licensing Agreement. Accordingly, consultations were held on November 18 and 28, 2016, but the parties failed to resolve the dispute.

On January 12, 2017, Turkey requested the establishment of a panel, while Morocco remained willing to move forward with the consultations and requested the continuation of the consultations. Following the Dispute Settlement Body's ("**DSB**") deferral of establishment of a panel on January 25, 2017, Turkey requested for the second time establishment of a panel to examine its complaint. On May 17, 2017, the Director-General composed the panel. China, Egypt, the European Union, India, Japan, Kazakhstan, Korea, the Russian Federation, Singapore and the United States reserved their third-party rights to participate in the panel proceedings.

On October 31, 2018, the WTO circulated the panel report on the case brought by Turkey. The panel ("**Panel**") found that the delay in conclusion of the investigation by the Moroccan authorities violated the relevant provisions of GATT, since the investigation had been launched on January 21, 2013, and concluded on August 12, 2014, while disagreeing with Morocco's argument that the delay was intended to allow the Turkish producers to prepare their responses. The Panel also found that the relevant measures were inconsistent with WTO rules. Lastly, the Panel stated in its report that the Moroccan authorities had failed to disclose the data used to calculate the dumping rate, concluding that Morocco had, in fact, acted inconsistently with GATT, and recommending the measures to be brought into line with the relevant agreements. On October 31, 2018, the Panel report was circulated to WTO members.

On November 20, 2018, Morocco appealed the DSB's decision to the Appellate Body with regard to certain legal interpretation issues concerning the Panel report. However on January 15, 2019, the Appellate Body informed the DSB that it would not be able to conform to the time periods specified in Article 17.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("**DSU**") (including the 90-day

period that should not be exceeded) in its review. The stated reasons included the fact (i) that the appealed issues were fairly complex, and (ii) that the Appellate Body had a heavy workload in terms of pending appeals. The consequences of the Appellate Body's non-conformity with the 90-day period remained unresolved, although certain solutions have been suggested by various members in the past.

Following these developments, on December 4, 2019, Morocco withdrew its appeal indicating that the anti-dumping measure which gave rise to the dispute between Morocco and Turkey had expired on September 26, 2019, by also noting that Morocco still believes the Panel's findings to be flawed, and requested the Appellate Body to include the reason of its withdrawal decision if the Appellate Body eventually issues a report. Working Procedures for Appellate Review does not clearly specify whether the Appellate Body is required to draft and circulate a report in cases where it has not provided any legal opinion on the case. Nonetheless, Turkey advised on December 4, 2019, that the Appellate Body should issue an Appellate Body Report, in line with its past practices in similar cases. Subsequently, the Appellate Body circulated its report to members on December 10, 2019, without addressing the legal issues regarding the Panel's decision raised by Morocco in its appeal, but rather summarizing the history of the dispute and Morocco's reasons for withdrawing its appeal.

White Collar Irregularities

Benefits of Whistleblowing and its Reflections Under Turkish Laws

Recently, following the changes in its government, Ukraine has gone through significant reforms in its laws relating to prevention of corruption, establishing anti-corruption agencies and an anti-corruption court. As part of this process, Ukraine also enacted a new amendment related to whistleblowers to enter into force on January 1, 2020. The amendment provides monetary rewards, as well as a number of guarantees and legal protections for whistleblowers. The amendments require all government agencies, state-owned enterprises, and private companies that participate in public procurements (above a certain contract amount) to (i) implement secure communication channels, such as anonymous hotlines, electronic mailboxes and online communication channels, for reporting corruption-related violations, (ii) assist and consult employees on whistleblowing, and (iii) implement internal procedures for reviewing complaints. Perhaps one of the most important developments is that the law amends Ukraine's Criminal Code, revoking the criminal liability that could arise out of publicizing and circulating information on a criminal or other offense through various media, made in compliance with the requirements of the law.

Reflecting on these recent changes in Ukraine for Turkey and Turkish corporate environment taking into account the long-known positive effect of whistleblowing, it is clear that its benefits outweigh its disadvantages, although it may have its setbacks as well.

The primary benefit of whistleblowing is that it provides companies access to direct, intact and unfiltered information, and a source to root out previously unexposed non-compliant or illegal practices, where employees are not bound by the limits of formal language or possible pressure from their managers or colleagues. The practice also educates employees and promotes honesty, compliance and clear communication within the workplace. As the practice reinforces the company's compliance policies, which is generally in line with the local regulations, when an employee is required to use a hotline dedicated to whistleblowing, he/she is also forced to maintain a better knowledge of such practices, both in terms of company policies

and the local legislation. It clearly helps establishing a healthy compliance culture, since the system is usually also compliant with all applicable laws, such as data protection and privacy regulations. On top of that, the presence of a whistleblowing mechanism can have a preventive impact in discouraging employees before they engage in potential corrupt acts.

As such, whistleblowing is vital in preventing or minimizing damages that a company could incur as a result of corrupt practices. Companies can also learn from past occurrences and take constructive steps in fixing the areas of risk and vulnerability, preventing substantial losses of reputation, as well as protecting its customers.

To add to its overall positive effect for companies, whistleblowing plays a highly important role in helping governments in their fight against corruption. It saves both companies and governments huge amounts of money and resources.

In Turkey, acts of corruption are regulated under the Turkish Criminal Code ("**Code**"). The Code and the Turkish criminal law system does not regulate corporate criminal liability, and follow the principle of personality, which regulates that a person can only be penalized for his/her own actions. In parallel with this, it is only possible for a company's actions or business conduct to become subject to a criminal investigation, where the company's organs or representatives who committed the related crimes are prosecuted, and for which certain security measures can be imposed.

By extension, one might also expect Turkey to accelerate its efforts in implementing laws and regulations similar to those recently enacted in Ukraine, as a corporate compliance culture, supported by whistleblowing procedures disseminated within companies, would greatly contribute to the countrywide adoption of such a culture. Moreover, regulations that encourage companies to implement and maintain whistleblowing policies and mechanisms would provide a significant amount of help in ensuring Turkey's national laws to be in compliance with the relevant international standards.

It is also of significance that within this context, companies in Turkey assume the responsibility of forming and implementing their own procedures and tools for preventing corruption, especially in terms of self-policing. In certain cases, internal rules and practices of companies may even come off stricter than those set forth by the local legislation. Particularly, Turkish subsidiaries of multinational companies implement and maintain these controls in order to comply with the detailed anti-corruption regulations of the country in which their parent company operates. In terms of whistleblowing, one could argue that control mechanisms such as whistleblowing and ethics hotlines are still either not known or not used effectively within the Turkish corporate culture. For this reason, multinational companies in Turkey are advised to focus on two important factors: (i) adapting general global compliance programs to the cultural and legislative characteristics of Turkey (as it is critical to understand that the culture in addressing and preventing corrupt practices) and (ii) proper employee training, again, by taking into account the characteristics of the local climate. Otherwise, together with the lack of clear statutory obligations, efforts in enforcing these self-policing and control mechanisms might provide fruitless.

Healthcare Law

The Ministry of Health Publishes its Strategic Plan for 2019-2023

On December 20, 2019, the Ministry of Health ("**Ministry**") published its Strategic Plan for the 2019-2023 period ("**Plan**"). The Plan sets out the aims and purposes of the strategy in order to achieve the goals determined for the healthcare sector until 2023, specifies key

performance indicators, details the preparation process, and provides an analysis of the status quo.

Key performance indicators are laid out in a table that demonstrates an array of data retrieved from the studies, researches and reports of several accredited bodies, such as the Turkish Statistical Institute. The table includes various data in terms of percentages relating to life expectancy, use of tobacco products, low level of physical activity among citizens, customer satisfaction in the healthcare sector, and expenditures made by customers in the healthcare sector outside of the social security system.

In its evaluation of the strategic plan for the term between 2013 and 2017, the Plan indicates that 25% of 117 key performance indicators have been achieved, while the target approach of the indicators has been 46%. The Plan also explains that 29% of the indicators have not been followed, for the reason that the works and projects to be co-executed with Turkey's external stakeholders have not been completed in a timely manner. Within this context, the Ministry also expresses that collaborations with external stakeholders have been re-evaluated and mutually agreed upon in the Plan, having considered the reasons leading to underachievement of the former strategic period's key performance indicators.

The Ministry's legal obligations have been determined within the scope of the legislation analysis that was part of the analysis of the status quo. The Ministry lists all relevant and applicable regulations, beginning at the top of the hierarchy of norms with Article 56 of the Turkish Constitution, then referring to the Ministry's duties, responsibilities and organizational structure re-determined through the Presidential Decree on Presidential Organization No. 1 and No. 4, as a result of the recent change in Turkey's governmental system. Subsequently, the Ministry breaks down its targets, obligations, evaluations and observations thereof as follows:

- A new set of regulations should be adopted, and some sections of the existing regulations should be aligned with the Presidential Government System.
- Legislation should be updated to meet the current needs.
- Duties and authorities of the Ministry should be clarified in order to strengthen collaborative work culture.
- Regulations that cover the same topics and issues should be identified and merged.
- Areas of responsibilities in collaborations with stakeholders should be determined clearly and separately.

Lastly, the two main goals of the Plan are specified as follows: (i) ensuring and improving public health, and (ii) ensuring equal public access to quality medical and healthcare services. The Plan sets out the following six strategies in order to achieve these goals:
- Promoting and popularizing healthy living,
- Strengthening of primary healthcare services and increasing their efficiency within the healthcare system,
- Ensuring the accessibility, efficiency and quality of healthcare services,
- Implementing an integrated healthcare services model,
- Enhancing customer and healthcare personnel satisfaction and sustainability, and
- Contributing to the socio-economic development of Turkey and to global health, as well as improving national technology and domestic production in medical sectors.

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