ISSN 2147 – 558X

ELİG
GÜRKAYNAK
Attorneys at Law

LEGAL INSIGHTS QUARTERLY

COVID-19 Related Special Issue

LEGAL INSIGHTS

QUARTERLY

COVID-19 Related Special Issue

This collection of essays, provided by ELIG Gürkaynak Attorneys-at-Law, is intended only for informational purposes. It should not be construed as legal advice. We would be pleased to provide additional information or advice if desired.

April / Nisan, Istanbul

Yayın Türü / Type of Publication
Yerel Süreli / Local Periodical

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

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

ISSN 2147 – 558X

Preface to the COVID-19 related Special Issue

As the world is moving through unprecedented times as a result of the COVID-19 pandemic, the contemporary legal debate has also shifted in order to adapt itself to the ongoing crisis. Therefore, in consideration of this ever-changing agenda, within this special April 2020 issue of Legal Insights Quarterly, ELIG Gürkaynak has examined the developments amid the COVID-19 outbreak under the Corporate Law, Competition/Antitrust Law, Employment Law, Litigation, Data Protection, Internet Law, Telecommunications Law, White Collar Irregularities and finally, Healthcare Law chapters.

The Competition/Antitrust Law section highlights the announcements made by the Competition Authority following the start of the pandemic, giving insight on the main sectors the Authority is monitoring closely. Furthermore, the section also aims to shed light on the newly established body, named the Unfair Price Assessment Board, to fight post-pandemic market changes and how this would reflect on the current legislative framework.

The Employment Law section provides a detailed outlook in the face of the employment problems caused as a result of the outbreak and provides an overview of the contemporary legal questions that will be useful for both employers and employees.

One of the most prominent sections, the section on White Collar Irregularities, highlights the importance of the efforts by both private and public sectors and the weight carried by the fight against corruption during these troubling times.

Lastly, the Healthcare Law section draws out the current measures taken in order to respond to and recover with minimum damage from COVID-19.

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.

April 2020

Corporate Law

Recent Corporate Law Measures Taken by the Turkish Ministry of Trade amid COVID-19 Outbreak[1]

I. Amendments Regarding General Assembly Meetings

The General Directorate of Domestic Trade of the Ministry of Trade ("***General Directorate***") has issued an official statement on March 20, 2020 ("***Statement***") in order to adopt certain measures to ease the process of holding general assembly meetings of joint stock and limited liability companies (together, "***Companies***") in the light of ongoing concerns about the novel coronavirus (COVID-19) outbreak across the country.

According to the Statement, the necessity to implement measures have arisen due to the fact that majority of the Companies prefer calendar year as their fiscal period and that they have to hold their ordinary general assembly of shareholders meeting until the end of March 2020, which can result in faster spread of the novel coronavirus (COVID-19).

In this respect, the General Directorate has allowed the Companies to cancel their general assembly meetings without convening the general assembly to resolve on postponing the meeting to a another date. According to the Statement, if the board of directors of the Companies have already invited the shareholders to the general assembly meeting in accordance with the provisions of the Turkish Commercial Code No. 6102 ("***TCC***") and their articles of association, they can cancel the meeting solely with a board of directors' resolution.

The General Directorate has provided a sample announcement template for the Companies, which can be obtained from the official website of the Turkish Trade Registry Gazette ("***TTSG***"). In addition, the TTSG has announced that (i) any announcement document (*e.g.* general assembly meeting cancellation documents) can be submitted to the TTSG Directorate through post offices or cargo companies instead of delivery by hand and (ii) payments can be made online through the official website of the TTSG.

Secondly, the General Directorate advised the Companies to hold their general assembly meetings in an electronic environment in accordance with Article 1527 of the TCC if they do not prefer to cancel the meetings, stating that the general assembly meetings to be held in an electronic environment will minimize the risk of spreading novel coronavirus (COVID-19) to people.

Furthermore, contrary to Article 1527(1) of the TCC which requires articles of association of Companies to contain a certain provision to have electronic general assembly meetings and board of directors meetings, the General Directorate has permitted Companies that do not have any provision in their articles of association to hold such meetings electronically. The General Directorate has stated that Companies can hold meetings through "*Electronic General Assembly Meeting System*" and "*Electronic Board of Directors System*", which are provided by the Central Securities Depository Institution ("***MKK***").

[1] This article is a compilation of two articles which were previously published on Mondaq as two separate articles. *See* https://www.mondaq.com/turkey/export-controls-trade-investment-sanctions/907956/recent-corporate-law-measures-taken-by-the-turkish-ministry-of-trade-amid-covid-19-outbreak ("*Recent Corporate Law Measures Taken By The Turkish Ministry Of Trade Amid Covid-19 Outbreak*" published on March 25, 2020) and https://www.mondaq.com/turkey/operational-impacts-and-strategy/914010/recent-corporate-law-measures-taken-by-the-turkish-ministry-of-trade-amid-covid-19-outbreak-ii ("*Recent Corporate Law Measures Taken By The Turkish Ministry Of Trade Amid Covid-19 Outbreak-II*" published on April 17, 2020).

The General Directorate has also underlined that the Companies should obtain support services from the MKK and should not prevent rightful parties from electronically participating in the meetings.
Finally, the General Directorate has stated that Companies can amend their articles of association to include a provision regarding electronic meetings in the first general assembly of shareholders meeting to be held following the electronic general assembly of shareholders meeting held in accordance with the Statement.

II. Restrictions on Distribution of Profit

Ministry of Trade has sent a letter to Union of Chambers and Commodity Exchanges ("***TOBB***") on March 31, 2020 to underline COVID-19 outbreak and importance of protecting companies' equities due to its extraordinary effects and provided instructions to the companies with respect to distribution of dividends with the general assembly meeting for 2019 fiscal year ("***Letter***"). According to the Letter, all stock companies (*e.g.* joint stock companies, limited liability companies, limited partnerships etc.) other than state-owned enterprises ("***Companies***"):

(i) should not distribute profits arising from previous years,
(ii) distribute a maximum of 25% of the net profit for 2019 fiscal year, if any, and
(iii) should not grant board of directors of the Companies the right to distribute profit shares for the cash profit distributions to be made with the general assembly meeting for 2019 fiscal year.

Following the issuance of the Letter, efforts have been made on the legislative level with respect to profit distribution as well. In this respect, the Grand National Assembly of Turkey has recently discussed a draft law regarding the amendments to be made in certain laws including the Turkish Commercial Code numbered 6102 ("***TCC***").

Accordingly, the Law numbered 7244 on Commuting the Effects of New Coronavirus (COVID-19) Outbreak on Economic and Social Life and Amending Certain Laws ("***Law No. 7244***") has been published on the Official Gazette on April 17, 2020. The Law No. 7244 has introduced "Provisional Article 13" to the TCC regarding distribution of dividends in the Companies, which entered into force on the publication date of the Law No. 7244.

According to Provisional Article 13, until September 30, 2020, general assemblies of the Companies (i) may resolve to distribute only 25% of the net profit gained in the fiscal year 2019, (ii) cannot resolve on to distribute previous years' profits and free reserves and (iii) cannot grant board of directors the right to distribute advance dividend. President of the Republic of Turkey is authorized to extend or shorten the term for 3 (three) months.

Provisional Article 13 also stipulates that if the general assemblies of the Companies have resolved to distribute dividend for the fiscal year 2019, but the payment has not been made yet or partial payment has been made to the shareholders, then, the payments exceeding 25% of the net profit for 2019 have to be postponed until September 30, 2020 or any other date to be determined by the President.

In addition, Provisional Article 13 authorizes the Ministry of Trade, by consulting with the Ministry of Treasury and Finance, to determine the exceptions to be applied to the Companies and the procedures and principles regarding the implementation of this provision. Based on this, we anticipate that the implementation of this new restriction will become clear in the following days with the

secondary legislation to be adopted by the Ministry of Trade.

Competition Law / Antitrust Law

The Turkish Competition Authority Announces Zero Tolerance Policy against Potential Anti-Competitive Conducts in the Food Sector during the COVID-19 Outbreak[2]

The world is clearly going through uncertain times as a result of the COVID-19 outbreak. In Turkey, although at the moment there are significantly fewer confirmed cases of COVID-19 in Turkey as compared to the Western European countries and the UK, the COVID-19 pandemic outbreak has also altered the shopping habits of individuals in Turkey, who now tend to buy food and commodities in bulk.

On March 23, 2020, the Turkish Competition Authority ("***Authority***") has issued a public announcement.[3] In the press release, the Authority emphasized that the Authority has observed various excessive price increases in the food markets, particularly fresh fruits and vegetables market, during the COVID-19 outbreak and ensured that the Authority, with the aim of protecting the consumer welfare, will continue to monitor these price increases and the market players, which have been also contributing to these increases. In this respect, the Authority has indicated that maximum administrative monetary fines will be imposed on the individuals and undertakings (all the players including manufacturers, intermediaries, carriers, final sales points), which engage in anti-competitive behaviours in the food market, especially fresh fruits and vegetables, as per the Law No. 4054 on the Protection of Competition ("***Law No. 4054***").

Additionally, the President of the Turkish Competition Board ("***Board***"), Mr. Birol Küle's press release regarding the fresh fruits and vegetables prices has been published at the Authority's official website on March 25, 2020[4]. The press release indicates that the Authority identified that the public announcement two days prior to this press release regarding the excessive price increases in the food markets has not been taken seriously by certain parties. In this respect, it is underlined that there are no price increases on the part of farms and greenhouses, no decrease in demand, no increase in the costs for fuel, storage, and labour force and thus, the players are leading to "*artificial shortage*" through immoderate price increases. Once again, Mr. Küle warned that the Authority has zero tolerance policy against these practices; these practices will be immediately sanctioned; and the fines and the processes will be in line with the severity of the crisis. Mr. Küle has pointed out to the Board's discretion on the rate of the fine and these practices could be sanctioned at the upper threshold for the fines (i.e. 10% of annual gross revenues of the incumbent undertakings and associations of undertakings or members of such associations). Finally, Mr. Küle emphasized that the Authority will continue to show all its efforts to maintain the competitive landscape and thus, the market order.

[2] "This article has been reproduced in its original format from Concurrences - The Turkish Competition Authority announces zero tolerance policy against excessive price increases in the food sector during the COVID-19 outbreak, 23 March 2020, e-Competitions Bulletin Competition Law & Covid-19, Art. N° 93904. *See* www.concurrences.com.

[3] *See,* Competition Authority's website on https://www.rekabet.gov.tr/tr/Guncel/kamuoyuna-duyuru-3b18d865266dea11811700505694b4c6. (Last accessed on April 20, 2020).

[4] *See*, Competition Authority's website on https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurumu-baskani-birol-kule-nin-ya-19def560896eea11811700505694b4c6 (Last accessed on April 20, 2020).

Accordingly, although at this stage the pandemic is a dynamic agenda and thus, the outcome of the Authority's public announcement and press release remains unknown, it appears that the Authority targets not to allow undertakings to exploit the situation to take advantage of people through excessive pricing practices in this pandemic environment. To that end, the Authority will continue to closely monitor the food market and other markets in Turkey in this rapidly evolving pandemic environment in order to ensure consumer welfare would not be adversely affected from any anti-competitive conduct. In this regard, it could be indicated that potential investigations on that front could be expected in the near future.

A New Watchdog Joins the Ranks of Enforcers in Turkey in the Fight against the COVID-19 Fallout[5]

Turkey adopted a new law on April 17, 2020 to introduce more measures to fight the social and economic disruption of the COVID-19 outbreak. One of the most significant changes the Law No. 7244 on Amendment of Certain Laws ("***COVID-19 Law***")[6] brings about is related to the consumer goods. With an amendment to the Law on Regulation of Retail Trade ("***LRRT***"); this new law prohibits producers, suppliers and retailers from (i) excessively increasing prices and (ii) engaging in any activity that will restrict consumers' access to products and distort competition, in particular through "stocking" products. An Unfair Price Assessment Board ("***UPAB***") will be established to enforce these new prohibitions and impose administrative monetary fines in case of violations, which are also set by the new law.

While the COVID-19 Law announces that a secondary law is under way to explain how these new measures will be implemented, a number of questions already come to mind as to its implications for competition law. First and foremost, what happens when certain conduct of producers, suppliers or retailers infringe both LRRT's new clause and the Law No. 4054 on the Protection of Competition (the "***Law No. 4054***")? Which law will prevail? As the Turkish Competition Authority has openly declared war against potential abuses of the current crisis in the detriment of competition and consumers,[7] it appears that investigations by both enforcers in these markets are on the horizon.

This new law could lead to two main areas of overlap between LRRT and the Law No. 4054:

- **Anti-competitive collusions:**

The new clause of the COVID-19 Law introduces in the LRRT prohibits "excessive price increases". There is currently no definition in the new law or other clauses of the LRRT on what "excessive" means. Any price level above competitive prices therefore could arguably fall under the prohibition in the COVID-19 Law.

Price fixing, as well as other anti-competitive agreements, concerted practices or decisions of trade associations on the conditions of purchase or sale are prohibited under Article 4

[5] This article was previously published on Mondaq. (*See* https://www.mondaq.com/turkey/government-measures/920594/a-new-watchdog-joins-the-ranks-of-enforcers-in-turkey-in-the-fight-against-the-covid-19-fallout, published on April 20, 2020).

[6] For the full text of the COVID-19 Law, see https://www.resmigazete.gov.tr/eskiler/2020/04/20200417-2.htm. (Last accessed on April 20, 2020).

[7] *See* the statement from Birol Küle, the president of the Turkish Competition Authority, on the prices of fruits and vegetables on March 25, 2020 (available at https://www.rekabet.gov.tr/tr/Guncel/rekabet-kurumu-baskani-birol-kule-nin-ya-19def560896eea11811700505694b4c6) and the press release of the Turkish Competition Authority on March 23, 2020 on - excessive prices in food markets (available at https://www.rekabet.gov.tr/tr/Guncel/kamuoyuna-duyuru-3b18d865266dea11811700505694b4c6).

of the Law No. 4054. Accordingly, collusions among competitors on price fixing would in most cases result in prices above the competitive level, unless they are aiming to exclude a potential/existing competitor from the market by lowering prices. Accordingly, "excessive" price increases resulting from collusion among competitors can violate both LRRT and the Law No. 4054.

Article 4 of the Law No. 4054 also prohibits collusion aiming to control the amount of supply or demand for goods or services, or to determine these outside the market. Accordingly, if producers, suppliers or retailers increase prices excessively, reduce supply or restrict competition through anticompetitive agreements, concerted practices or decisions of trade agreements, such conduct could be captured by both the LRRT and the Law No. 4054.

- **Abuse of dominant position**:

If such excessive price increases, supply restriction or other anti-competitive practices preventing consumers' access to products or services result from a unilateral conduct, enforcement of these two laws can also overlap in the field of "abuse of dominance". Indeed, excessive pricing [8] that distort competition and harm consumers and refusing to supply[9] by a dominant firm can infringe Article 6 of the Law No. 4054, depending on whether the conditions provided in the law and precedent are met.

As seen above, unlike the Law No. 4054, LRRT does not require an "agreement, concerted practice or decision restricting competition" or "dominance" for the excessive pricing or supply restriction to be prohibited. In that sense, the LRRT appears to have a wider scope of enforcement compared to the competition law.[10] That said, in the scenarios explained above, the relevant conduct can fall under the radar of both the Turkish Competition Authority ("***TCA***") and UPAB.

The concept of infringing multiple laws with a single conduct is not a novel theory for competition law. Indeed, there are cases where the TCA did investigate certain conduct that is simultaneously investigated by other authorities under different laws. [11] The Competition Board in the past took the view that the difference between the laws as to the definition of the illegal conduct and the elements to be proven allows for such simultaneous enforcement.[12] In scope of the

[8] *See e.g.,* Chamber 10 of the Council of State*, BELKO*, 2001/4817 E., 2003/4770 K. (5.12.2003); the Competition Board's *Fuar* (27.10.2016; 16-35/604-269), ASKI-1 (13.3.2001; 01-12/114-29) and ASKI-2 (26.5.2005; 36/484-155) decisions.

[9] Refusing to supply by a dominant firm can infringe Article 6 if this (i) relates to a product or service that is indispensable for competing in the downstream market, (ii) is likely to lead to the elimination of effective competition in the downstream market, and (iii) is likely to lead to consumer harm (*e.g.* the Board's *Maysan Mando* (20.06.2019;19-22/353-159) and *Unilever* (28.08.2012; 12-42/1257-409) decisions).

[10] On a separate note, the COVID-19 Law not only expands the scope of intervention as defined in the Law No. 4054, but also the LRRT itself. Indeed, the new law adds "producers" and "suppliers" to retailers as the subject of the LRRT. The LRRT, in its previous version, aimed to regulate "the activities of retailers among each other and with producers and suppliers" (Article 1 of LRRT) but not directly those of producers or suppliers. Moreover, while the LRRT used to include price-related provisions (*e.g.* Article 9 and 10), these provisions did not directly concern the level of prices but rather aimed at preventing deceptive pricing that could misguide consumers.

[11] *See, e.g. Medical Consumables* (16.03.2007; 07-24/236-76) where the public prosecutor's office provided the TCA with the evidence as to bid rigging in public tenders, which they collected during a criminal investigation of the same conduct. Similar simultaneous enforcements are seen also in other fields, such as GSM operators' obligation to inform customers under both the consumer protection laws enforced by the Ministry of Commerce and the Electronic Communications Law enforced by the Information Technologies and Communications Authority.

[12] *See, e.g. Medical Consumables* (16.03.2007; 07-24/236-76). Similar simultaneous enforcements are seen also in other fields, such as GSM operators' obligation to inform customers under both the consumer protection laws enforced by the Ministry of Commerce and the Electronic Communications Law enforced by the

current case, however, there is another factor added to the complications in practice: the COVID-19 Law states that the fines under this new law will be applicable "*unless there is a higher fine applicable pursuant to another law*".

With the current amendment to LRRT, the UPAB will be able to impose administrative monetary fines to producers, suppliers and retailers varying from:

- 10,000 Turkish Liras (c. 1,447 US Dollars) [13] to 100,000 Turkish Liras (c. 14,470 US Dollars) if they excessively increase prices of products or services,
- 50,000 Turkish Liras (c. 7,235 US Dollars) to 500,000 Turkish Liras (c. 72,350 US Dollars) if they prevent consumers from accessing products by restricting supply or distorting the market balance and free competition.

On the other hand, the TCA can impose administrative fines under the Law No. 4054 starting from 31,903 Turkish Liras (c. 4,616 US Dollars) as a minimum fine up to 10% of the relevant undertaking's turnover in the financial year preceding the date of the Competition Board's decision[14] on the fine. In other words, the Law No. 4054 does not provide a fixed amount of fine unless the relevant company's turnover is too low that even 10% of it is below 31,903 Turkish Liras; in which case this minimum amount would be imposed as the fine for the competition law infringement.

Accordingly, the TCA is technically able to impose a higher fine than UPAB, depending on (i) the turnover of the relevant producer, supplier or retailer; and (ii) the percentage of the fine. Neither of these factors, however, or even whether the TCA will impose any fine for that matter, is clear at the time an allegation raised against such companies. There is certainly a "possibility" for the Law No. 4054 to trigger the exception in the COVID-19 Law, but not necessarily in all cases where the scope of the two laws overlaps. How should then UPAB implement this provision?

At first glance, three potential scenarios could be observed in practice:

I. Deference to the TCA to resolve the potential overlap

When an unfair price claim is brought to UPAB, the first option could be seeking the TCA's opinion on whether the relevant claim is also within the scope of the Law No. 4054 and whether there is already a proceeding pending before the TCA on the same matter.[15] Even if there is not a proceeding underway, the TCA may ex officio take action against such conduct provided that it has jurisdiction over the matter.

If the allegedly illegal conduct falls under the Law No. 4054, this could be treated as a prejudicial matter by UPAB until the Competition Board's decision on the matter. If the TCA confirms that there is no legal basis for the authority to start proceedings, or if at the end of a proceeding, the Competition Board either rejects the allegation (meaning no fine will be imposed) or the fine resulting from these proceedings is below the maximum amount UPAB is able to impose in the relevant case, the exception provision

Information Technologies and Communications Authority.

[13] The USD figures were calculated in accordance to the USD/TRY exchange rate applicable as of April19, 2020.

[14] If this is not available, the Competition Board imposes the fine based on the turnover generated in the most recent financial year for which turnover can be calculated.

[15] A similar provision can be found in Article 7 of the Electronic Communications Law, which states that the Information Technologies and Communications Authority should seek the TCA's opinion on the potential competition violations in the electronic communications sector when required by this law.

introduced by the COVID-19 Law to the LRRT will not be triggered.

While this seems to be the most practical option, there is currently no legal obligation for UPAB to liaise with the TCA. Had the new law allowed the TCA to appoint a representative to UPAB, a de facto cooperation channel could have been established between these authorities. But this is currently not the case. Companies may therefore encounter other scenarios in practice, as explained below.

II. Parallel investigations by TCA and UPAB

Given that UPAB is not bound by a statutory obligation to seek TCA's opinion beforehand, it is possible in practice for both authorities to take action against and decide on the same allegations at the same time. In this scenario, if the TCA's investigation ends with a lower fine than the maximum amounts set by the LRRT or the Competition Board does not impose a fine at all, the result would be multiple authorities' investigating the same conduct. The focus of the matter than turn into how "*excessive price increase*" and "*preventing consumers' access to products by anti-competitive conduct restricting supply or distorting the market balance and free competition*" are defined under the LRRT. One may expect such definition to lead to an overlap between the jurisdiction of LRRT and TCA to a certain extent, although the scope of the LRRT appears to be broader. If there is such an overlap, this will likely trigger *non bis in idem* discussions.

If, however, the Competition Board decides on a higher fine than UPAB, UPAB's fine decision on the same matter will infringe the LRRT provision limiting UPAB's jurisdiction to cases where no other law provides a higher fine. The relevant party will then need to object to or appeal against the UPAB decision.

III. Subsequent decisions by UPAB and TCA

A third scenario could be observed in practice where the alleged excessive price increase or supply restriction is first investigated and fined by UPAB and all the potential appeals against the decision are exhausted. The TCA then starts investigating and/or decides on the same matter and imposes a fine higher than that of the UPAB (or vice versa).

In this scenario, the first decision by UPAB will be final and, given that the statutory conditions under Article 53 of the Code of Administrative Procedure for seeking renewal of the judgement are limited, it will not be possible to appeal for a renewal either. The relevant company would then need to apply to the UPAB for a potential refund on the ground that the Competition Board has imposed a higher fine for the same conduct at a later stage. If UPAB refuses to refund the applicant, the applicant will then be able to challenge the new decision UPAB has taken to reject the applicant's claim, and thus bring the case before the court.

Even if the second decision by either the Competition Board or UPAB does not result in a jurisdictional issue under the fine provision of the COVID-19 Law, this scenario may still lead to multiple fines by two administrative authorities for the same conduct subsequently. The authorities may then again face *non bis in idem* claims. It is therefore of critical importance how the relevant conduct under LRRT will be defined by the implementing regulations or UPAB decisions, and whether these definitions will overlap with the scope of the Law No. 4054.

IV. Conclusion

The COVID-19 Law, despite being most welcome from a consumer protection point of view, has expanded the scope of LRRT enforcement in a way to blur the lines with the

competition law enforcement. Depending on how the illegal practices in this new provision are defined, they may be captured by the jurisdiction of both the TCA and the new watchdog in the game, UPAB. One solution to mitigate these practical issues could have been appointing a TCA representative to UPAB. The new law, however, does not include TCA as one of the government agencies to be represented in this new authority. How the implementing regulations will address these issues and potential implications of the COVID-19 Law therefore remain to be seen.

Employment Law

Recent Measures and Amendments Introduced in Employment Law due to COVID-19[16]

The novel COVID-19 pandemic continues to have substantial impacts on our lives in various ways. In order to fight against the adverse effects of this pandemic, Grand National Assembly of Turkey has recently adopted an omnibus law: Law No. 7244 on Reducing the Effects of the Novel Coronavirus (COVID-19) Pandemic on Economic and Social Life and the Law on the Amendment of Certain Laws ("***Omnibus Law***"). This Omnibus Law is published in the Official Gazette No. 31102 and dated April 17, 2020 and brought significant changes pertaining to employment relationships.

This Omnibus Law is legislated with a view to maintain continuity of employment and to protect both the employers and the employees from the brunt of COVID-19 pandemic. Accordingly, the below amendments have entered into force with the Omnibus Law.

I. Prohibition of Termination of Employment Agreements and Entitlement for Unilateral Decision for Unpaid Leave

Prohibition of Termination of Employment Agreements: One of the most significant amendments made with the Omnibus Law is regulated under Article 9, which incorporates Provisional Article 10 into the Turkish Labour Law No. 4857 ("***TLL***"). Provisional Article 10 prohibits employer from terminating any kind of employment or service agreement for a period of three months starting from April 17, 2020 (*the President is entitled to extend this period up to a total of six months*), regardless of whether or not that agreement is in the scope of TLL. So employees who are subject to, *inter alia*, Turkish Code of Obligations No. 6098, Press Labour Law No. 5953 and Maritime Labour Law No. 854 are also included in the scope of prohibition of termination.

Only exception provided for this prohibition is the employer's right to execute immediate termination with just cause connected to employee's behaviour breaching moral and good faith principles or due to similar cases, as per Article 25/II of TLL or other applicable laws.

So this prohibition prevents termination of employment agreements by employers, based on valid reasons (*for instance, business requirements or underperformance or incompetency of the employee*), health reasons or compelling reasons, which are the most common grounds that employers resort to in face of COVID-19. This prohibition does not cover mutual termination of employment agreement though. In addition, if the term of a fixed-term employment agreement expires

[16] An earlier version of this article was previously published on Mondaq.
See https://www.mondaq.com/turkey/employment-and-workforce-wellbeing/920592/recent-measures-and-amendments-introduced-in-employment-law-due-to-covid-19 ("Recent Measures And Amendments Introduced In Employment Law Due To COVID-19" published on April 20, 2020)

during the prohibition, this would not be regarded to be against the prohibition as well.

Furthermore, if employer or employer representative terminates an employment agreement and thereby breaches the Provisional Article 10 of TLL, an administrative fine will be imposed in the amount of minimum monthly gross salary valid on the termination date (*which is 2,943 Turkish Liras in 2020*) for each terminated employee. On top of this administrative fine, the employer will be subject to legal repercussions attached to invalidity of termination, such as reinstitution of the employment and compensation connected to this invalid termination.

Unpaid Leave Right of the Employer: Provisional Article 10 of TLL further provides that, after April 17, 2020, employer can unilaterally put employee on unpaid leave for a maximum period of three months (*the President is entitled to extend this period up to a total of six months*), either partially or completely. This regulation changes the fundamental rule for the concept of unpaid leave. The rule was that the employees' written consent to unpaid leave is a must for initiation of unpaid leave, i.e. employer cannot impose unpaid leave on employees. This has changed with the amendment.

Provisional Article 10 explicitly states that being put on unpaid leave by employer does not give employee the right to terminate employment agreement based on just reason (*putting employee on unpaid leave without employee's consent was just cause for termination of employment by employee*). In that sense if employee acts contrary to this provision and terminates employment agreement, this termination will be deemed as unlawful and the employee will liable for notice payment against the employer, along with damages incurred by the employer due to termination, if any of course.

It should be noted that there is no provision preventing employer to put only a part of the employees on unpaid leave, *per se*. That said Article 5 of TLL, regulating "the principle of equal treatment" will still be applicable in such cases. As per this principle, employer cannot engage in any differential treatment between the employees unless there are objective and reasonable grounds for this. Therefore, if an employer chooses to put not all but only certain employees on unpaid leave, this must be based on objective and reasonable grounds. For instance employer might choose to put on unpaid leave the employees who are not deemed critical and/or essential for performance of the limited scope of work that is being done in the workplace under the current epidemic.

Unless there is such an objective and reasonable grounds for differential treatment, the employees who are put on unpaid leave will have the right to request compensation amounting up to their 4-month-salary, along with other rights that they have been deprived of due to this differential treatment. Also these employees may terminate their employment agreements based on just cause and this termination will not be considered as a termination done due to being out on unpaid leave, as it is rather due to unjust differential treatment. So there is no prohibition for such termination.

On that front, the status of fixed-term employment agreements must be examined as well. As per Article 11 of TLL, fixed-term employment agreements can only be concluded based on objective conditions, such as fixed-term work, or completion of a certain work, or emergence of a fact. In light of that, if a fixed-term employee is put on unpaid leave, this would mean that this employee

would not be able to perform the duties arising from the employment agreement and in such a case the objective conditions, based on which that this fixed-term employment agreement was formed, could not be satisfied. In other words, the definition of fixed-term employment agreement suggests that such agreement cannot be concluded in the absence of objective conditions; and if the employment relationship gets suspended through unpaid leave, the objective conditions prompting this agreement would remain unfulfilled. Therefore, the period during which the purpose of the fixed-term employment agreement is not realized, should be added on top of the pre-determined fixed-term. To wit it is reasonable to conclude that the term of fixed-term employment agreements will be extended for the duration of unpaid leave. Accepting otherwise would be contrary to principles surrounding fixed-term employment agreements.

Unpaid Leave Payment: Article 7 of the Omnibus Law adds Provisional Article 24 to the Unemployment Insurance Law numbered 4447 ("***UIL***"). Pursuant to Provisional Article 24 of UIL, the following employees will receive a daily salary support of 39,24 Turkish Liras from the Unemployment Insurance Fund, for the duration of their unpaid leave or unemployment:

(i) Employees who are put on unpaid leave in accordance with the Provisional Article 10 of TLL and who are not eligible for short-time working allowance.
(ii) Employees whose employment agreements are terminated by the employer within the scope of Article 51 of UIL after March 15, 2020 (*so the employment agreement must not be terminated due to employee's breach of moral and good faith principles and other similar circumstances*) and who cannot benefit from for unemployment benefits.

On the other hand, the employees who receive retirement pension from a social security organization cannot benefit from this support payment. This salary support will not be subject to any deduction, excluding stamp tax. Lastly, term of this payment shall not exceed the 3-month-period regulated under Provisional Article 10 of TLC pertaining to prohibition of termination of employment agreements.

If it is determined that the employee who is on unpaid leave and therefore benefiting from the salary support is being put to work by the employer, an administrative fine will be imposed on the employer, in the amount of the minimum monthly gross salary valid on the violation date (which is 2,943 Turkish Liras for 2020) per employee and for each month the employee was put to work. In such a case, the salary support that was already paid to the respective employee(s) will be collected from the employer along with legal interest accrued from the payment date of the salary support.

Moreover, those who benefit from salary support as per Provisional Article 24 of UIL and are not included in the scope of "*general health insurance holder*" or "*dependent of a general health insurance holder*" in terms of the Social Insurances and General Health Insurance Law No. 5510 will be considered as a general health insurance holder pursuant to Article 60/1-g of the same law and their premiums pertaining to general health insurance will be covered by the Unemployment Insurance Fund.

II. Short-Time Working Allowance

Another noteworthy amendment brought by the Omnibus Law is regulated under Article 8, which incorporates Provisional Article 25 into UIL. This article aims at facilitating and shortening the process of providing short-time working allowances. Prior to this amendment, grant of short-time working allowance was

possible only after completion of eligibility assessment by Turkish Labour Authority. Upon entry into force of Provisional Article 25 of UIL, the short-time working allowances will be granted upon the employers' statement without waiting for completion of the eligibility assessment, in terms of short-time working applications made by the employers due to compelling reasons based on COVID-19.

Additionally, if there is any overpayment or undue payment that is made to the employees as short-time working allowance due to incorrect information or documents provided by the employer, these payments will be collected from the employer, along with legal interest.

The effective date of Provisional Article 25 of UIL is regulated as February 29, 2020. Therefore, short-time working allowances will be granted based on the employers' statement for all short-time working applications made after February 29, 2020.

In relation to short-time working application, Article 6 of the Omnibus Law adds the phrase of "*excluding eligibility assessment*" to Provisional Article 23 of UIL and amends the respective article as such: "*The applications made within the scope of this article shall be concluded within 60 days as of application date, excluding eligibility assessments*." Thus, this article is altered in a way that is compatible with Provisional Article 25 into UIL; in other words, with a view to ensure that there is nothing that could prevent Turkish Labour Authority from granting allowance without waiting for the eligibility assessment.

III. Extension of the Periods Regulated in the Trade Unions and Collective Labour Agreement Law No. 6356 ("*Law No. 6356*")

In accordance with Article 2(1)(ı) of the Omnibus Law, the periods within the scope of Law No. 6456, pertaining to granting competence, executing collective labour agreements, resolution of collective labour disputes and strike and lockout have been extended for three months as of the effective that of the respective article, i.e. April 17, 2020. The President is entitled to extend this three-month period up a total of six months.

This provision does not preclude the parties from conducting collective bargaining and concluding collective labour agreements. This extension is regulated to avert any forfeiture of the parties.

Litigation

The Criteria for Due Assessment of the Effects of COVID-19 on Contractual Obligations

Coronavirus ("***COVID-19***") has reached the status of a global pandemic with a risk level of "very high" by the World Health Organization, having its effects on almost 1 million people in almost every country in the world. Besides being an extraordinary health issue for everyone, COVID-19 is expected to have its more crucial effects on economics due to the health concerns making establishments stop or cut-down their operations at best.

Accordingly, these establishments take certain measures against their financial and commercial commitments and thereby endeavour to keep their business afloat in the long run, as it seems the economic ripple effects of this epidemic will linger for quite some time. The notion of "force majeure" is seen as the first legal remedy that comes to

mind while contemplating on the ways to be rid of challenging contractual commitments, but the general acknowledgement of COVID-19 as a force majeure event does not suffice on its own to be allowed to step out of contractual commitments. The issue of whether an event constitutes a force majeure event must be assessed in each concrete case. The below elaborates on that.

Under Turkish Law, the concept of "*force majeure*" is neither defined nor regulated comprehensively; only the "legal consequences" of a force majeure event is regulated in the law. Force majeure refers to an unpredictable and unavoidable occurrence, which renders it impossible for the debtor to perform its obligations arising from a contract. Legal consequences of a force majeure event are regulated under Article 136 of the Turkish Code of Obligations ("***TCO***") titled "*impossibility of performance*". As per Article 136 of the TCO, in case of an event that is not caused by the debtor and that makes it impossible for the debtor to fulfil its debts, the debt ends, and the debtor cannot be held liable for non-performance (*unless otherwise agreed in the contact*). So in such a case the debtor would be relieved of his debt.

The key point that must be derived from this is that it is not possible to make a blanket statement about an event being a force majeure for each contractual relationship. The event in question must make it impossible to the debt in question to be performed. The High Court of Appeals ("***High Court***") adopts a high threshold for accepting an event to be making fulfilment of debt impossible. Below we elaborate on a precedent that could give an idea about this threshold.

An event that is similar to COVID-19 epidemic but not as severe, bird flu, has been the subject of many litigations where the debtors have requested to be rid of their contractual obligations. In one of these cases, the High Court held a decision[17] that gives a hint about the high threshold mentioned above. In this case the plaintiff, who is an egg wholesaler, requests for payment of the amount stipulated under the penalty clause that is contingent on the defendant failing to place the amount of order committed under the agreement. The defendant argues that the bird influenza has affected the chicken and egg market and this constitutes an impossibility of honouring the order commitment. In this dispute the High Court focuses on the issue of whether the bird influenza makes it impossible for a merchant operating in the chicken and egg sector to fulfil the order commitment.

The High Court concluded that decrease in the demand to or the price of a product in the market does not mean there is a force majeure event that presents impossibility for fulfilling the order commitment and does not regard the issue of whether the commercial transaction in question will be profitable for the debtor. The High Court, while acknowledging that the bird influenza indeed had a negative effect on chicken and its secondary products and accordingly the price of these has dropped down drastically, also takes into account that the purchases made under the agreement is based on the "current market price", not "*fixed*" prices, and concludes that the market conditions are already reflected onto the order commitment. In any case the High Court's conviction is that the altered market conditions could at best constitute hardship, under Article 138 of TCO, and might call for adaptation of the order commitment.

So in light of the above, it is crucial to first assess whether the COVID-19 epidemic

[17] The decision of 13th Civil Chamber of Court of Appeals dated 15.02.2010 numbered 2009/9255 E., 2010/1706 K.

indeed creates impossibility for fulfilment of debt. Only then the COVID-19 epidemic might allow the debtor to be rid of contractual obligations based on "force majeure". The precedent explained above show that financial hardship of payer or low demand in market is not sufficient to rely on COVID-19 epidemic for being relieved out of contractual obligations.

Evaluation of Impacts of COVID-19 on Lease Agreements[18]

I. Introduction

The novel COVID-19 pandemic continues to have severe effects upon pace and quality of lives of many. Globally, businesses suspended or considerably decreased manufacturing; governments decided to close certain businesses during designated time periods, countries sealed their borders and millions of people are advised to stay in their houses. All these measures have led to unprecedented occupational repercussions and economical flux, along with serious sense of ambiguousness in terms of commercial relationships. In Turkey, the Ministry of the Interior decided to ("***Governmental Decision***") close all public gathering places such as cafes, restaurants –except restaurants not offering music–, gyms, internet cafés, SPA centres, funfairs and movie theatres ("***Closed Venues***").[19] This measure inevitably brought forward the "*force majeure*" concept and lessors and lessees are looking for an answer to one particular question: Do I still have to perform my obligations under a lease contract concluded for leasing a Closed Venue?

Although *force majeure* is one of the enunciated legal concept during COVID-19 pandemic, especially due to the unpredictability element attached to this major epidemic and due to the existence of a governmental decision prohibiting the provision of certain services, each lease agreement should always be evaluated on a case-by-case basis considering the unique specialties of the business and provisions of each particular lease agreement.

II. COVID-19 and Lease Agreements

Analysing force majeure concept and impossibility of performance

The term "*force majeure*" is not explicitly defined under Turkish legislation. However, the concept of *force majeure* is recognized in Turkish legal doctrine, case law and legal provisions, mainly under Article 136 of the Turkish Code of Obligations ("***TCO***") titled "*impossibility of performance*". Indeed, *force majeure* events are considered as one of the instances that might trigger the issue of "*impossibility of performance*". The mentioned article sets forth that if it becomes impossible to perform the obligations due to reasons that are not attributable to the obligor, the obligor shall be released from performing the related obligations.

The High Court of Appeals has a very high threshold when considering an event as a *force majeure* event. The event must objectively make the performance of the obligation *impossible* for the party in order to be considered as a *force majeure* event. If alternative means of performance are available, although financially more burdensome, the obligor's failure to perform would not be evaluated within the scope of *force majeure*.

---

[18] An earlier version of this article was previously published on Mondaq.
See https://www.mondaq.com/turkey/litigation-contracts-and-force-majeure/914722/evaluation-of-impacts-of-covid-19-on-lease-agreements *("Evaluation Of Impacts of Covid-19 On Lease Agreements"* published on April 9, 2020)

[19] *See* Ministry of Interior Affairs, Additional Circular https://www.icisleri.gov.tr/81-il-valiligine-koronavirus-tedbirleri-konulu-ek-genelge-gonderildi (Last accessed on April 4, 2020)

Turkish Courts would generally consider an incident as a *force majeure* event if the following requisites are met:

(i) Performance of the contract must become impossible due to events outside the obligor's business/control.
(ii) The event must occur after the conclusion of the contract.
(iii) The event and/or its consequences must be unforeseeable at the time of entering into the contract.
(iv) The event and/or its consequences must be unavoidable despite exercising due diligence.
(v) There must be a causal link between the event and the obligor's impossibility of performance.
(vi) If the contract entails an exclusive *force majeure* clause, the event must be listed therein; if the contract entails an inclusive (non-restrictive) *force majeure* clause, it must be possible to consider the event in the scope regulated therein.
(vii) There must be no alternative means of performance.

If performance of contract becomes permanently impossible for the obligor, the obligor shall be released from its obligations. In synallagmatic contracts, both parties shall be released from their obligations. If one of the parties has performed its obligation, the counterparty shall return the acquisitions that it has obtained with this performance, on the grounds of unjustified enrichment (*condictio ob causam finitam*).[20]

If performance of contract becomes temporarily impossible for the obligor, i.e. *temporary impossibility*, the counterparty's right to require performance and compensation shall be suspended during the *force majeure* event. Although the consequences of a temporary impossibility is highly controversial in the legal doctrine, it is a fact that this issue varies depending on the characteristics of each agreement: whether there is an obligation of continuous performance, or instantaneous performance; whether the performance of the agreement has started or not; whether the agreement is a long-term or a short-term one, *et cetera*.[21]

Under particular circumstances, a temporary impossibility may turn into a permanent impossibility. In such a case, obligor's obligation shall be released. This may especially occur when delay in performance negates contractual purpose. Although temporary impossibility is not defined in Turkish legislation, this consequence is accepted by the legal doctrine through the application of Article 137 of the TCO titled "partial impossibility" by analogy. This article regulates that if it becomes clear that the parties would not have concluded such contract if they were to have foreseen the partial impossibility, they shall be fully released from their obligations.

(i) Impossibility in terms of lease agreements

In order to apply the provision regulating "impossibility", the first step is to determine whether the performance of lease agreement concluded for a Closed Venues has become impossible for either party. First of all, the lessee's main obligation arising from a lease agreement is payment of the rent, thus the lessee's obligations is a pecuniary debt. Since impossibility of performance for pecuniary debts are not acceptable, under no circumstances the lessee's performance could become impossible. Therefore, it is of great importance to determine the lessor's exact

[20] M. Kemal Oğuzman, M. Turgut Öz, "*Borçlar Hukuku Genel Hükümler*", Vol. 1 (12th edn, Vedat Publishing, İstanbul 2014), p. 572.

[21] H. Kübra Ercoşkun Şenol, "*Borçlar Hukukunda Kısmi İmkânsızlık*" (On İki Levha Publishing İstanbul, 2016), p. 96-100.

obligation and whether or not its performance of that obligation has become impossible due to the Governmental Decision.

As per Article 301 of the TCO, the lessor's main obligation arising from a lease agreement is delivering the leased property on the agreed date and in a condition convenient for the use of the property in accordance with the contractual purpose, and to keep it as such throughout the duration of the agreement. In this regard, in assessment of whether it is possible for the lessor to perform its obligation, it must be evaluated whether the Governmental Decision makes it impossible for the lessor to duly deliver the leased property and keep it available for the contractual purpose. The crucial point here is that ensuring the lessee's use of the leased property is *not* the lessor's obligation. The lessor's obligation pertains to the leased property itself. In that sense, it might be argued that the lessor is no longer in a position to fulfil its obligations due to the fact that the Governmental Decision does not hinder the lessor's capacity to deliver the leased property or ensure that the leased property is convenient for the contractual purpose. In other words, the Governmental Decision does not aim at the leased property itself, but pertains to certain activities and services; thus the issue regarding the Closed Venues does not actually have a link with availability of the leased property, it rather concerns the specific activity-area of the lessee.

It might also be argued that there is a fine line in determination of the lessor's exact obligation. The following instance might be helpful to demonstrate that as long as the leased property is in a convenient condition for contractual purpose, the lessor does not have an obligation to ensure that the lessee is able to use the leased property. For instance, the Ministry of Interior announced a curfew for those who are over the age 65 or have a chronic illness, effective from March 22, 2020. If a 66-year-old person is the lessee of a property wherein he/she runs a restaurant that does not offer music, that person would not be able to, continue operating the restaurant during this restriction. Nonetheless, it is possible to argue that the lessor is still keeping the leased property available for the contractual purpose and the existing situation has nothing to do with the unavailability of the leased property.

Another instance might be based on a cafe in a mall. Currently, Turkish government has not made an announcement as to the closure of the malls. But if the government later on decides to issue a decision to close the malls, in terms of the café within the mall the restriction then will be linked to the characteristic of the leased property itself. In such case, it might be argued that the lessor is no longer in a position to keep the leased property available for the contractual purpose, thus performance of its obligations is temporarily, i.e. for the duration when the malls are closed, impossible.

(ii) Analysing the event of change in circumstances surrounding an agreement and adaption of contracts

In light of the above, the Governmental Decision does not make the lessor's performance of the agreement impossible *per se*. However, this does mean that the parties of a lease agreement remain without any legal remedy against the consequences of this Governmental Decision. It is a fact that under Turkish law, the parties are obliged to fulfil their contractual obligations ("*pacta sunt servanda*"), but if circumstances surrounding a contract changes significantly and this substantially alters the equilibrium of the contract in a way that renders the performance of the contract excessively burdensome for one party, such change of circumstances might be considered as a ground for adaption

or revocation or termination of the contract[22] ("*clausula rebus sic stantibus*" principle). This principle is based on the general principles of fairness and good faith under Turkish law and explained with the "*collapse of the foundation of the transaction theory*".[23] Moreover, it is regulated under Article 138 of the TCO.

Pursuant to Article 138 of the TCO titled "hardship", an obligor has the right to request adaptation of the contract to the new conditions from the court; and if adaptation of the contract is not possible, it has the right to revoke the contract, without being liable for compensation. At this point it must be emphasized that unless the parties mutually agree on revocation, adaption of contract overrides revocation, i.e. a contract may be revoked only if adaption of the contract is not possible.

In order to implement the hardship provision, as specified by Article 138 of the TCO and established in case law [24], the following conditions must be met:

- An extraordinary event, which is neither foreseen nor expected to be foreseen by the parties at the time of entering into the contract, must occur.
- This event must not be attributed to the obligor.
- This event must change the circumstances to the detriment of the obligor in such a way that renders requesting the obligor to perform its obligations contrary to good faith.
- The obligor must have not be fulfilled its obligations arising from the contract or it must have fulfilled its obligations by reserving its rights arising from the hardship.

The High Court of Appeals applies *clausula rebus sic stantibus* principle in a rather restrictive manner. This is mainly because it has a very high threshold of "unpredictability". For instance, it has well-established precedents concluding that the change in economic conditions, increases in exchange rate, high devaluation, and monetary depreciation are the realities of Turkey, therefore they do not entail amendment or termination of the agreement.[25] Indeed, in one of its decision the High Court of Appeals states that "*devaluation is not an event that cannot be predicted as far as our country is concerned, therefore it is a fact that exchange rate policies can always change. Persons agreeing to be loaned with foreign currency, instead of Turkish Lira that keeps devaluated before foreign currency are supposed to foresee, in face of previous high inflation and economic crisis in the country, that such increases may occur in loan with foreign currency. For that reason the lawsuit must be rejected.*"[26]

(iii) Adaption in terms of lease agreements

A case-by-case analysis is required for due assessment of the necessity and availability of adaptation of an agreement. Then again it is likely that the High Court of Appeals will regard the situation created by the

[22] The applicability of right to revocation and right to termination depends on the nature of contract. The right to termination is applicable for the contracts of continuous performance, while the right to revocation comes into play for the contracts of instantaneous performance.

[23] Oğuzman, Öz (n 2), p. 580, 581.

[24] 13th Civil Chamber of the High Court of Appeals, decision dated 13.06.2014 and numbered 2013/16898 E., 2014/18895 K; 6th Civil Chamber of the High Court of Appeals, decision dated 22.10.2015 and numbered 2014/11928 E., 2015/8860 K.; 6th Civil Chamber of the High Court of Appeals, decision dated 18.11.2015 and numbered 2014/12999 E., 2015/10017 K.

[25] 13th Civil Chamber of the High Court of Appeals, decision dated 16.12.2015 and numbered 2015/33476 E., 2015/36982 K.; 13th Civil Chamber of the High Court of Appeals, decision dated 16.04.2015 and 2015/3758 E., 2015/12548 K.;

[26] The High Court of Appeals Assembly of Civil Chambers dated 12.11.2014 and numbered 2014/1614 E., 2014/900 K.

Governmental Decision –which is adapted as a measure against COVID-19 outbreak– as a change of the circumstances to the detriment of the obligor, which would make it contrary to good faith and unreasonable to request the obligor to perform its obligations under these circumstances. This would give the obligor the right to request adaptation of the lease agreement in accordance with the change of circumstances (Article 138 of TCO). Accordingly it might be argued that it would be unreasonable to expect from the lessee to pay the lease in full while it is not possible to utilise the leased property at all. In such a case, the judge might be inclined to modify the terms of the agreement, considering the specifics of each case, such as the duration of the contract, lease amount, and contractual purpose.

In this regard, adaption of the contract might not always be possible or feasible, or it might be unfair to settle for adapting the contract instead of freeing the parties from their contractual bind if this temporary unavailability for using the leased property in fact negates the contractual purpose. For instance, if a lessee has concluded a lease agreement for a property in Sapanca, effective between March and June, in order to operate a SPA centre therein; the Governmental Decision will severely impact the contractual purpose. In such a case, the reasonable solution might be mutual release of the parties from their obligations and terminating the contract as per Article 138 of TCO, since it might not be possible to adapt contract in a way that does not unreasonably burden either parties. There are views in the legal doctrine suggesting that in such case, performance of obligation would be pointless; therefore, Article 137 of TCO shall be applied by analogy and the obligations of the parties shall end, together with the commercial relationship between them, without being required to resort to a judge and request for adaption before being able to terminate the agreement.

III. Conclusion

In a considerably short time, COVID-19 pandemic has turned into a global crisis and affected millions of people in different ways. In this fight against this virus, Turkey has taken various precautions and one of them is closure of certain venues. This inevitably paved the way for questions regarding the performance of the lease agreements concerning the temporarily prohibited services.

This work has sought to evaluate the legal remedies that exist in Turkish law in the event of the occurrence of an unpredictable incident. In any case each contract must be examined in line with its own terms and conditions, also in consideration of the specific circumstances surrounding that contract, but adaptation of lease agreement on the account of change of circumstances seems to be the primary solution, and revocation or termination of contract might be of question only in certain specific circumstances.

Internet Law

Online Contents Regarding COVID-19: Internet Law Perspective[27]

The unprecedented COVID-19 pandemic has been the main topic of discussion for people across the globe in the first months of 2020 and there are no signs of the pandemic disappearing anytime soon. Millions of people, locked in their houses due to the public health emergency, are turning to the internet both as a source of information and as

[27] An earlier version of this article was previously published on Mondaq.
See https://www.mondaq.com/turkey/new-technology/912190/online-contents-re-covid-19-internet-law-perspective *("Online Contents Re. COVID-19: Internet Law Perspective"* published on April 2, 2020).

a means of a social expression. As a result, the internet is filling up with more and more posts, articles and content relating to this illness.

Coronavirus has been the biggest internet search topic in a great number of countries and worldwide [28]. Technology giants like Google [29] and Facebook [30] are setting up information centres to equip users worldwide with useful knowledge on the pandemic. Individuals with millions of followers on social media platforms are using their voices to raise awareness about the pandemic.

COVID-19 is posing challenges not only in terms of the public health systems but also with respect contents published online. In the face of the global crisis, social media networks are updating their safety policies to prohibit contents that "*could place people at a higher risk of transmitting COVID-19*" [31]. Twitter recently announced that they "*will require people to remove Tweets that include content that increases the chance that someone contracts or transmits the virus, including: (i) denial of expert guidance, (ii) encouragement to use fake or ineffective treatments, preventions, and diagnostic techniques and (iii) misleading content purporting to be from experts or authorities*"[32].

All of the foregoing brings very fundamental questions into light, once again. *What are the limits of freedom of expression?* During these difficult times, how can we, *as individuals being restricted from the public sphere in ways that we have never experienced before*, express ourselves on the internet? On the other hand, how can our personal rights and right to information be protected with more people than ever talking about the Coronavirus online?

I. Online Content Regulation

According to the Turkish Constitution, "*everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom contains the freedom of receiving or giving news or opinions without the intervention of the public authorities*". Freedom of expression is not merely protected by domestic laws but is also guaranteed by the International Covenant on Civil and Political Rights and the European Convention on Human Rights, both of which were ratified by Turkey. Moreover, Turkey is subject to the jurisdiction of the European Court of Human Rights ("***ECHR***"). Although everyone has the right to express his/her thoughts, this freedom is not *absolute*.

Law No. 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through such Broadcasts ("***Law No. 5651***") is the main legislation regulating online environment in Turkey.

[28] *See* Google Trends https://trends.google.com/trends/explore?q=%2Fm%2F0866r,%2Fm%2F05jhg,%2Fm%2F01cpyy (Last accessed on April 22, 2020)
See "Google launches COVID-19 page and search portal with safety tips, official stats and more, US-only for now" https://techcrunch.com/2020/03/21/google-launches-covid-19-page-and-search-portal-with-safety-tips-official-stats-and-more-us-only-for-now/ (Last accessed on April 22, 2020).

[29] *See* Google COVID-19 Related Information and Sources https://www.google.com/covid19/ (Last accessed on April 22, 2020)

[30] *See* "*Facebook Begins Rolling Out a Coronavirus Information Center"* https://www.adweek.com/digital/facebook-begins-rolling-out-a-coronavirus-information-center/ (Last accessed on April 22, 2020).

[31] Twitter announcement from @TwitterSafety account https://twitter.com/TwitterSafety/status/1240418439870607361 (Last accessed on April 22, 2020).

[32] Twitter announcement from @TwitterSafety account https://twitter.com/TwitterSafety/status/1240418440982040579 (Last accessed on April 22, 2020).

a. Violation of Personal Rights

Per Article 9 of Law No. 5651, anyone who claims that his/her personal rights are violated due to a content broadcasted on the internet medium may apply to the content provider, or in certain cases to the hosting provider and request removal of content by the notice method or may directly apply to a criminal judgeship of peace, and request access ban to the content. Alternatively, individuals may also apply to the Turkish Data Protection Authority if the relevant content violates their right to protection of their personal data.

By way of an example, if there is an online content about the Coronavirus which violates a person's privacy of personal rights, such content could be removed/access banned. However, it is important to note that the authorities will have to strike a balance between the freedom of expression, information and the relevant individual's personal rights.

b. Protection of Public Health

The contents about COVID-19 might also be subject to certain restrictions which may be put in place to uphold the right to life, protection of national security and public order or protection of public health (Article 8(A) of Law No. 5651). Pursuant to the procedure set out under the relevant provision, removal of content and/or access ban may be decided by the judge or the Information and Communication Technologies Authority ("***ICTA***"), if failure to do so might result in delay and cause irreparable damages, upon the request of relevant ministers due to protection of public health.

c. Medical Products and Health Claims

A recent article published by Europol revealed that "*the pandemic has opened up a business opportunity for predatory criminals*" [33] . According to the relevant article, nearly 34,000 counterfeit surgical masks were sold online and authorities around the world seized these products. Meanwhile, law enforcement officers identified more than 2,000 links to products related to COVID-19. Turkish authorities recently initiated an investigation against celebrities who have been promoting and advertising a supplementary medical product with the claims that the product protects against the Coronavirus disease[34].

Article 18 of the Law on Pharmaceuticals and Medical Preparations entitles access ban decisions if the advertisement or sale of a health product made through the internet and such product is against the law. The Ministry of Health is entitled to render access ban decision and send its decision to ICTA for execution. Certain contents related to the pandemic might be deemed in violation of the foregoing provision.

II. Freedom of Expression

It is clear that COVID-19 has its impact on the online contents as well and certain online contents might be doing more harm than good. These contents might require regulation and/or removal from the internet medium. However, freedom of expression is still extremely important at these times in which (i) people are in need of expressing themselves more than ever as they strictly removed from the public sphere all around the world and (ii) information is key in protecting ourselves from the new Coronavirus and tackling this global emergency.

[33] *See* Europol's "*Rise of Fake 'Corona Cures' Revealed in Global Counterfeit Medicine Operation* https://www.europol.europa.eu/newsroom/news/rise-of-fake-%E2%80%98corona-cures%E2%80%99-revealed-in-global-counterfeit-medicine-operation (Last accessed on April 22, 2020)

[34] *See* NTV's article on counterfeit medicine https://www.ntv.com.tr/yasam/sahte-coronailaci-reklami-yapan-unlulere-sorusturma,qYiaTVnQgUCk4ghiIWw0YQ (Last accessed on April 22, 2020)

Especially during these times in which *information* might be the humankind's greatest tool in the fight against this unknown and unprecedented emergency, the right to information and public benefit should not be disregarded. Public benefit might simply be defined as "*the interest of the public in accessing the content*". The precedents under Turkish laws and the international treaties that Turkey has duly approved and enacted indicate that public benefit prevails over personal/individual benefit in the assessment of "freedom of expression" claims.

Turkish Constitutional Court stated that freedom of expression does not only include freedom of "*having thoughts and opinions*", but the freedom of "*expressing and disseminating thoughts and opinions*", and accordingly, "*freedom of receiving and imparting information*"[35].

Freedom of expression in this context, means the individuals to be able to access news and information, opinions of others, not to be condemned for his/her thoughts and opinions and to be able to express, tell, defend, relay and disseminate them by themselves or with others in various ways.

As the Turkish Constitutional Court states *"internet has an essential value for using fundamental rights and freedoms, especially the freedom of expression in modern democracies. The social media is a media platform which provides opportunity for individual participation in ways of creating, broadcasting and interpreting the media content providing a transparent communication platform. Internet provides an essential social media platform for people to express, share and disseminate their information and thoughts. Therefore, it is clear that the states and administrative authorities must be extremely sensitive in the regulation and practice for internet and social media instruments, which became one of the most effective and widespread methods to express thoughts"*[36].

As ECHR frequently mentions in its decisions on freedom of expression; for the freedom of expression to satisfy its social and individual function, the news and thoughts that disturb the state or one part of the society or that are deemed negative or wrong by them must be freely expressed and not just the "news" and "thoughts" the society and the state deems positive, right or harmless, and the individuals must be certain that they will not be sanctioned due to these expressions. Freedom of expression is the basis of pluralism, tolerance and open-mindedness, there cannot be any "*democratic society*" without this freedom[37].

III. Conclusion

Individuals, entities, organizations and states all around the world are facing the challenge posed by the Coronavirus disease. With the public spaces emptying, our lives are being transferred to the online environment. Internet has always been, but now more than ever is, becoming our primary source of information and the most prominent mean to express ourselves. Naturally, this is bringing questions about regulation of online contents and freedom of expression to light. While regulating the online environment in order to keep it safe and healthy for all of us, the authorities must keep in mind the principles on protection of freedom of expression and right to information.

[35] Turkish Constitutional Court, Application No: 2014/4705

[36] Turkish Constitutional Court, Application No: 2014/4705

[37] Handyside v. United Kingdom, Application No: 5493/72

Recently Proposed Amendments to Turkish Internet Law: Obligations Imposed on Social Network Providers[38]

On April 9, 2020, online newspapers and other unofficial sources on the internet spread the news that a Draft Law on the Amendment of Certain Laws ("***Draft Amendment Law***") had been prepared and sent to certain non-governmental organizations ("***NGOs***") for their opinion and these sources published the proposed amendments. As per the preamble of the Draft Amendment Law, the main purpose is presented to be to prevent the potential negative consequences of the ongoing coronavirus (COVID-19) pandemic. An official text of the Draft Amendment Law is not yet publicly available. That said, the draft is in wide circulation through multiple NGO and stakeholder channels for meaningful participation concerning its contents.

The unofficial text of the Draft Amendment Law introduces certain important changes to the Law on the Regulation of Broadcasts via the Internet and the Prevention of Crimes Committed through Such Broadcasts ("***Law No. 5651***"). Most significantly, the Draft Amendment Law introduces a brand new internet actor, namely the "social network provider," into the realm of the Law No. 5651 and sets out significant obligations and procedures relating to this new specific actor.

I. "*Social Network Providers*": Definition and Scope

Article 53 of the Draft Amendment Law adds the new term "social network provider" under Article 2(1) Subsection (r) of the Law No. 5651. The term is defined as "[those] *real or legal entities that enable users to create, share or view content, information or data such as text, images, sound, location on the Internet medium, for the purpose of social interaction.*"

According to the reasoning indicated under the preamble of the relevant provision, with this definition, the lawmakers aim to distinguish and include those social interaction channels that are popular with users and widely used for communication purposes. Based on the foregoing, social media networks, content-creating and -sharing platforms, and services enabling interactions between internet users might be considered to fall within the scope of the definition. The definition of social network providers has been broadly drafted, and the scope will become clearer with the issuance of regulations on the implementation of these new provisions.

II. Obligations of Social Network Providers

Article 56 of the Draft Amendment Law sets out the obligations for Social Network Providers; These obligations will be regulated under Additional Article 4 and its subparagraphs to be inserted into the Law No. 5651, as detailed below.

(i) Obligation to Appoint a Representative

According to Additional Article 4(1), those foreign social network providers with more than one (1) million daily accesses from Turkey will be obliged to appoint at least one (1) representative in Turkey, who will be authorized to receive notifications, notices and requests from public authorities and/or private individuals, and to comply with and respond to such notifications, notices and requests. Moreover, said foreign social network providers will be required to notify the representative's identity and contact information to the Information and

[38] An earlier version of this article was previously published on Mondaq.
See https://www.mondaq.com/turkey/data-protection/916910/recently-proposed-amendments-to-turkish-internet-law-obligations-imposed-on-social-network-providers *("Online Contents Re. COVID-19: Internet Law Perspective*" published on April 2, 2020).

Communication Technologies Authority ("***ICTA***") and also display the representative's contact information on their websites in an easily accessible manner.

The criteria that will be considered for this representative to be appointed have not been clearly specified under the Draft Amendment Law. Therefore, the ICTA is expected to shed light into the procedure for the appointment of this representative by issuing guidance on this matter soon after the Draft Amendment Law comes into effect, as per the Additional Article 4(9). Given the current wording of the of the article, which indicates that the social network provider should appoint a representative "authorized" to meet the requirements of the notices and requests from the ICTA and authorities and to respond to the individual requests; the ICTA might be seeking for more than a contact, but an actual real person representative of the social network provider that has the authority to decide on the outcome of the requests, to fulfil the incoming requests from the ICTA, the relevant authorities and the individual requests from users, and who could be held liable under Turkish laws, both under civil and criminal terms.

In cases of non-compliance, according to Additional Article 4(2), the ICTA will send a notice to those who fail to comply with the obligation to appoint a representative and duly notify the ICTA. If they fail to fulfil the obligation within thirty (30) days as of the receipt of the notice, the ICTA may apply to a criminal justice of peace in order to reduce the social network provider's internet traffic bandwidth by 50% and thus implement throttling measures.

If the social network providers still fail to fulfil their obligations with respect to appointing and notifying a representative within thirty (30) days as of the execution of the throttling decision, the ICTA might then apply to the criminal justice of peace to request the internet traffic bandwidth of such social network providers to be narrowed down by 95%. These decisions would be executed by the access providers immediately and within four (4) hours at the latest.

The decisions would automatically become void once the relevant social network operator complies with the obligation to appoint a representative and notify the ICTA.

According to the reasoning indicated in the preamble for Article 56 of the Draft Amendment Law, the provisions regulating the "representative" were introduced to address the difficulties that the public authorities face in practice, with respect to identifying an authorized addressee regarding the removal or access ban of illegal content broadcast on social media platforms. Furthermore, the preamble indicates that there are certain challenges regarding the service of official notifications or requests of Turkish institutions and organizations to various internet actors (such as hosting providers, content providers, or access providers) located abroad.

(ii) Obligation to Respond to Individual Requests within 72 Hours

In addition to the above, paragraph 3 of Additional Article 4 stipulates that local and foreign social network providers with more than one (1) million daily accesses from Turkey will be obliged to respond to requests received from individuals based on Articles 9 and 9/A of the Law No. 5651 within seventy two (72) hours. (Article 9 refers to content removal and access bans due to the violation of personal rights, whereas Article 9(A) focuses on access bans for the purpose of protecting an individual's right to privacy, as detailed below.) However, the Draft Amendment Law does not provide any details

regarding the scope of the response that the social network provider is required to give. With regard to similar obligations in other jurisdictions, we observe that Germany's Network Enforcement Law (NetzDG) and the Hate Speech Bill (Draft French Law) provide that social media platforms should acknowledge the receipt of the complaint with immediate notification, and inform the complainant and the user responsible for publishing the content of the consequences of the notification as well as the reasons for their decisions (i) within twenty-four (24) hours when they remove or ban access to the content, or (ii) within seven (7) days of receipt of the notification, in other cases. In this respect, it is worth noting that the ICTA might also introduce similar obligations regarding the content of the responses very soon.

Those social network providers who fail to respond to such requests within seventy-two (72) hours will be subject to an administrative fine ranging from 100,000 to 1,000,000 Turkish Liras (approximately from US Dollars 15,000 to US Dollars 150,000 and 14,000 Euros to 140,000 Euros based on the currency rates of April 13, 2020).

To elaborate on the current provisions under the Law No. 5651 with respect to content removal and access bans: Pursuant to Article 9, any real person or legal entity or authority or institution, who claims that his/her personal rights have been violated due to a content broadcast on the internet may apply to the content provider, or, if the content provider may not be reached, to the hosting provider, and request the removal of said content by the notice method. Alternatively, the claimant may also apply directly to a criminal justice of peace and request an access ban to the content in question.

Under the relevant provision, the criminal justice of peace's decision on the access ban of such content would be sent to the access provider via the Access Providers Union ("***APU***"), and the access provider would implement the decision immediately, and within four hours at the latest (Article 9(8) of the Law No. 5651). Moreover, per Article 9(10) of the Law No. 5651, in case the person responsible fails to comply with the decision of the criminal justice of peace in a timely manner and in accordance with the requirements of the Law No. 5651, they shall be penalized with a judicial fine ranging from five hundred (500) days up to three thousand (3000) days.

Any person, who claims that his/her right to privacy has been violated due to a piece of content broadcast on the internet medium, may apply directly to the ICTA and request them to undertake appropriate measures and enforce an access ban to the relevant content. The ICTA would then send this request to the APU for enforcement, and the access providers are required to enforce such requests immediately, and within four hours at the latest (Article 9(A)(1)). The person(s) requesting an access ban on privacy grounds are also required to submit their request to the criminal justice of peace within 24 hours as of their request for an access ban from the ICTA. The judge will evaluate and determine whether the broadcast on the internet is indeed violating the applicant's right to privacy and announce his/her decision within forty-eight (48) hours at the latest, as well as sending it directly to the ICTA; otherwise, the access ban is deemed to be automatically void (Article 9(A)(5)).

In addition to the sanctions regulated under the relevant provisions, Article 5(6) of the Law No. 5651 states that hosting providers who do not fulfil their obligations set under this law shall be penalized with an administrative fine of 10,000-100,000 Turkish Liras by the ICTA.

In other words, the Draft Amendment Law imposes a new obligation on entities which are categorized as social network providers under the Law No. 5651 with respect to requests under Articles 9 and 9(A), in addition to their existing obligations under the current online content regulations as hosting or content providers.

(iii) Reporting Obligation

Additional Article 4(4), as introduced by Article 56 of the Draft Amendment Law, also requires that local and foreign social network providers with more than one (1) million daily accesses from Turkey shall provide the ICTA with reports that include statistical and categorical data regarding content removals, execution of access ban decisions and individual requests, in 3-month periods.

As for the content of such reports, since the wording of the relevant paragraph merely refers to the provision of statistical and categorical information, we believe that the data to be provided may consist of anonymized data, without reference to any personal information, although this is not explicitly stated in the relevant Article. As per Article 3 of the Data Protection Law ("***Law No. 6698***"), "anonymized data" refers to data that cannot be related to an identified or identifiable real person even through being linked to another piece of data.

Having said that, even if the reporting obligation would require the disclosure or transfer of any personal data to the ICTA, such disclosure/transfer might be deemed to fall within the scope of Articles 5(2)(a) and 5(2)(ç) of the Law No. 6698. These specific provisions stipulate that it is possible to process personal data without the explicit consent of the data subject where it has been explicitly anticipated under the laws and/or where said data processing is necessary for complying with a legal obligation that the data controller is subject to. In such cases, the data controller should still inform data subjects of (i) the identity of the data controller and of its representative, if any, (ii) the purposes of the processing, (iii) to whom and with what purpose the processed personal data can be transferred, (iv) the method and legal reason of the data collection, and (v) other rights of the data subject referred to in Article 11 of the Law No. 6698, in accordance with Article 10 of the Law No. 6698.

In light of the fact that the social network providers' main business would be closely related to user-generated online contents and information regarding the users, this reporting obligation might, at first glance, be deemed to potentially harm the confidentiality of information pertaining to the social network providers' business as well as their trade secrets. However, social network providers might refrain from disclosing certain data (to the extent that they indeed constitute trade secrets), as the reporting obligation only requires the disclosure of statistical and categorical data.

Social network providers who fail to comply with this reporting obligation shall be subject to an administrative fine ranging from 1,000,000 to 5,000,000 Turkish Liras.

(iv) Obligation to Host User Data in Turkey

Paragraph 5 of Additional Article 4, as introduced by Article 56 of the Draft Amendment Law, requires local and foreign social network providers with more than one (1) million daily accesses from Turkey, to host the data of Turkey-based users within Turkey. According to the preamble of the relevant provision, the aim of the data localization requirement is based on the purposes indicated under Article 22 of the Turkish Constitution, *i.e.*, to ensure national security, public order, prevention of crime,

protection of public health and morals, and the rights and freedoms of others.

Despite the data localization requirement, the Draft Amendment Law and the Law No. 5651 do not explain the criteria regarding how and when such data will be deemed to be hosted in Turkey. Generally, such data localization requirements prohibit certain data (including metadata and backups) from residing in or transiting into or out of certain areas or jurisdictions, or require that prior approval be obtained from a competent state authority for these purposes.[39] Indeed, when the Turkish authorities' data localization approaches are considered (*e.g.*, in the existing financial, telecommunications, insurance and data privacy legislations), hosting data in Turkey might entail either (i) hosting the relevant data in a physical server located in Turkey, or (ii) hosting the relevant data in a cloud-computing system that is based in a centre located in Turkey.

With regard to the scope of this obligation, the Draft Amendment Law does not specify the particular data categories to be hosted in Turkey, and rather comprehensively targets all Turkey-based user data. Therefore, any data belonging to a user and/or identifies a user, including but not limited to identity, contact, account, or payment data for Turkey-based users might be deemed to fall within the scope of this data localization obligation.

When this data localization requirement is evaluated with the representative appointment requirement of social network providers, it is more likely for the authorities to prefer directly contacting local representatives of the social network provider instead of the principal (social network provider) and request data from them, as the assumption would be that the requested data should have been hosted in Turkey in any case (and the representative should have the *authority* to comply with such request).

If a social network provider fails to comply with this data localization obligation, such a provider could be subject to an administrative fine ranging from 1,000,000 to 5,000,000 Turkish Liras.

(v) Obligation to Enforce Court Orders within 24 Hours

In Paragraph 7 of Additional Article 4, it is also stipulated that social network providers will be liable for damages arising out of their failure to remove or block access within twenty-four (24) hours, to content that has been deemed unlawful by a judge or court order. Accordingly, social network providers will be required to remove or block access to unlawful content within twenty-four (24) hours of being notified of the relevant judgment or court order, or face claims of damages due to their failure to do so.

As explained above, those social network providers that also qualify as hosting providers under the Law No. 5651 already have existing responsibilities and obligations under Articles 9 and 9(A) regarding the removal of content, which also stipulate fines for failing to comply with these obligations.

Hosting providers have further obligations under Articles 8 and Article 8(A) of the Law No. 5651. Under Article 8, an access ban decision may be rendered if there is sufficient suspicion that the content in question constitutes or amounts to: (a) encouragement of suicide, (b) sexual harassment of children, (c) facilitation of drug use, (d) supply of substances which are dangerous to health, (e)

[39] United Nations Commission on International Trade Law "*DRAFT Notes on the Main Issues of Cloud Computing Contracts (prepared by the UNCITRAL secretariat, 2019): Glossary*" https://uncitral.un.org/node/2583/#localization (Last accessed on April 12, 2020).

obscenity, (f) prostitution, (g) provision of venue or opportunity for gambling, (f) defamation of the memory of Atatürk, founder of the Turkish Republic, or (g) crimes related to online betting, as per the Law No. 7258. Access blocking decisions should be granted on these grounds by the competent judicial authority, and such decisions should be immediately implemented by the access provider (*i.e.*, within 4 hours at the latest, as of the notification of the decision).

Article 8(A) of the Law No. 5651 states that a decision for the removal of content and/or an access ban may be taken by the President (of the ICTA) in urgent cases, due to one or more of the following reasons: right to life, protection of life and property, protection of national security and the public order, prevention of crimes or protection of public health. Such decisions must be approved by the criminal justice of peace. Access providers, as well as relevant content and hosting providers, who fail to comply with the removal of content and/or access ban decisions granted within the scope of Article 8(A), shall face an administrative fine of TRY 50,000 up to TRY 500,000 by the ICTA.

Accordingly, social network providers might already have internal procedures in place to comply with access ban decisions under the Law No. 5651. However, the Draft Amendment Law imposes an additional liability on social network providers for the damages arising out of a failure to remove or ban access to content deemed unlawful by a judge or court order, within twenty-four (24) hours of notification.

III. Impact of the Draft Amendment Law on the Existing Obligations under the Law No. 5651

The Law No. 5651 defines "content provider" as "*the real persons or legal entities that create, alter and provide all kinds of information or data presented to users on the Internet*" and "hosting provider" as "*the real persons or legal entities that provide or run the systems that host the services and content*."

As per Article 4 of the Law No. 5651, the content provider is responsible for any kind of content it makes available on the internet. Generally, content providers should not be held responsible for content belonging to a third-party to which it links. However, the same article also states that, if it is clear from the content provider's way of presenting such third-party content (to which the link leads) that it adopts the third-party content and aims to provide users with access to that specific content, and then it may be held liable pursuant to the general provisions.

Article 5 of the Law No. 5651 regulates the responsibilities of the hosting providers. Accordingly, hosting providers are not responsible for checking the hosted content or researching whether such content constitutes an unlawful activity. However, they are obliged to remove the illegal content, provided that they have been duly informed of it, pursuant to Articles 8 and 9 of the Law No. 5651.

Hosting providers are also obliged to retain the traffic information regarding their hosting services. Per the Regulation on the Procedures and Principles of Regulating Broadcasts via Internet, hosting providers should keep traffic information for six (6) months.

Pursuant to Law No. 5651, hosting providers must also maintain the accuracy, integrity and confidentiality of such information.

Additional Article 4(8) expressly states that the new provisions shall not remove the social network providers' obligations and responsibilities arising from their roles as

content providers or hosting providers under the Law No. 5651. In other words, content and hosting providers will have to ensure that they continue to comply with their existing obligations under the Law No. 5651, while also fulfilling their new obligations as social network providers, if that is the case.

IV. Secondary Legislation on the Implementation of the New Provisions

As the new provisions added to the Law No. 5651 bring about significant practical changes, it will be necessary to regulate the procedures and principles for the implementation of these new obligations. According to the Draft Amendment Law, the procedures and principles regarding the implementation of the new provisions will be regulated by the ICTA.

In this respect, the ICTA might issue secondary legislation and/or guidance on these matters, such as the procedures for appointing a representative, the acceptable methods for individuals to send their requests to social network providers, and the statistical reporting obligations.

V. ICTA's Supervision/Audit Authority

The Article 55 of the Draft Amendment Law, which inserts an additional subsection under Article 5(5) of the Law No. 5651, authorizes the ICTA to carry out audits directly or through third parties in order to assess whether or not *hosting providers* fulfil their obligations under the Law No. 5651. Under such audit authority, the ICTA might carry out on-site examinations and inspections and/or might assign third parties to conduct such examinations on its behalf.

The ICTA's relevant supervision and inspection authority applies to all hosting providers regardless of their status as social network providers. In other words, hosting providers that are not considered social network providers would also be subject to this authority, as well as social networks providers that are also deemed to be hosting providers.

This amendment might have implications for the representatives of the social network providers as well. Although the details of the representatives are yet to be determined, in cases where a social network provider is also considered to be a hosting provider, the ICTA might wish to conduct on-site examinations and inspections in the representative's facilities.

VI. Notification of Administrative Fine Decisions

The Draft Amendment Law sets forth a special notification procedure for instances where the addressee of the administrative fines is located abroad under Article 54, by inserting a new paragraph under Article 3 of the Law No. 5651. The purpose of this new procedure under Article 3(5) is stated as providing a solution to the difficulties that arise with respect to the service of notifications. With the amendment, the notification of administrative fines will be served on the addressee directly or via its representative in Turkey. The amendment indicates that notifications (regarding administrative monetary fines) can be made through e-mail or through other communication channels (as per paragraph 3 of Article 3), and that this will be deemed to have been made in accordance with the Notification Law No. 7201.

Per Article 3(3) of the Law No. 5651, notifications to entities carrying out activities in Turkey or abroad that fall within the context of this law may be served through e-mail messages or other communication means that are obtained or discovered based on information gathered from the sources, such as the communication tools on their

webpages, their domain names, IP addresses, and similar sources.

The new amendment paves the way for Turkish authorities to formally serve administrative fine notices on internet actors regulated under the Law No. 5651 (*i.e.*, hosting providers, social network providers, etc.) by service of the relevant notice on their representatives in Turkey through e-mail communications or other channels.

VII. Conclusion

The Draft Amendment Law and the changes it brings to the Law No. 5651 are creating new internet actors from scratch. Therefore, these new amendments will highly concern the daily practices of a great number of local and foreign players who are active on the internet. It is without doubt that these new amendments will be the main topic of discussion in terms of online content regulations in the near future.

With the anticipated economic package being featured in the Draft Amendment Law alongside the above-discussed changes to the Law No. 5651, internet actors might expect the Turkish Parliament to rapidly discuss and review this matter. Therefore, the new statutory regulations might enter into force shortly.

In light of the foregoing, internet actors might consider prioritizing the study of these amendments and rapidly undertake the necessary changes to their daily handlings of removal requests and user data to ensure compliance with the new obligations. In that respect, firstly, each internet actor should determine whether their services would be considered to fall within the scope of the definition of social networks, and therefore, whether they would be deemed to be social network providers. Internet actors who are subject to these amendments would then have to assess and review their current processes, and engage in structural and risk-related analysis, as the amendments introduce multiple actions and measures to be taken, particularly on the part of social network providers.

Data Protection Law

Data Privacy Perspectives of COVID-19

I. COVID-19 Realities

Getting ready to claim its spot in the history books, COVID-19 has been spreading all around the globe at a drastic pace and highlighting the need for the international community to develop a system of emergent healthcare support to cope with disease outbreaks. Change in the settings, and work conditions emerged as a result of these implemented measures may lead to compliance issues and data breaches as these measures are likely to involve processing of personal data particularly health data.

II. Data Concerning COVID-19 under Turkish Legislation

As any information that relates to an identified or identifiable individual, data concerning COVID-19 is likely to include personal data of people who have symptoms or who have possibly contracted the virus and have tested either negative or positive as well as data of employees who were encouraged to work from home for isolation. In addition to this, travel information or visitors may also be within the scope of personal data. However out of all these personal data, data concerning health is likely to be most sensitive type of data to be dealt with under COVID-19 outbreaks.

Data concerning health refers to the physical or psychological health of a real person, or the health service provided to such person, including data which reveals information about health status and as similar to the GDPR

rules, falls under the special categories of personal data under Law No. 6698 on Personal Data Protection Law ("***DPL***").

III. Health Data under the DPL and Health Data Regulation

Pursuant to Article 6 of DPL data concerning health or sex life, are *special categories of personal data*. Although there is no specific set of rules enacted regarding pandemics such as COVID-19, general rules set out in the DPL and the Regulation on Personal Health Data ("***Health Data Regulation***") will also be applicable to date retained due to COVID-19 outbreak. Pursuant to Article 6 of the Health Data Regulation, authorized personnel may access personal data, provided that the relevant access is within the scope of the health services offered to patient.

Furthermore, in order to foster and encourage research, scientific knowledge and innovation, Health Data Regulation allows scientific studies on health data, and this might be applicable to COVID-19 patients.

IV. Processing Conditions

Per DPL, health data may be processed without the explicit consent of the data subject, if the data is processed by authorized entities and institutions or by persons who are under the confidentiality obligation for the purposes of protection of public health, preventive medicine, medical diagnosis, planning, managing and financing of treatment and maintenance services (Article 6/3 of DPL). Accordingly, data controller (e.g. *the employer*) may process data subject's (e.g. *the employee*) health data (e.g. *whether an employee has been tested positive*) through the authorized persons under the confidentiality obligation (e.g. *workplace doctor*) to combat the Corona virus within the scope of public health, without his/her explicit consent.

Furthermore, due to their nature, processing health data would also require adequate data security measures to be taken, as determined by Turkish Data Protection Authority ("***DPA***") in its decision with number 2018/10[40].

V. General Exemption Rule: Article 28 of DPL

Article 28 of the DPL provides general exemptions for certain and limited cases and states that DPL is not applicable if personal data is processed for public order by public institutions and organizations which are authorized by law within the scope of their preventive, protective and intelligence activities (Article 28/1(ç) of DPL). The public order can be defined as ensuring the safety, health and wellness of individuals' daily lives and extends to the public health as well.

Another exemption from the DPL is processing personal data for scientific purposes provided that national defence, national security, public safety, public order,

[40] DPA's decision (with number 2018/10) on the adequate measures was published in the Official Gazette on March 7, 2018. DPA indicated in its decision that data controllers should determine a separate, systematic, and manageable procedure with definite rules for the protection of special categories of personal data. The decision also requires data controllers (i) to take certain measures regarding its personnel who deal with special categories of personal data, such as providing them with periodic trainings on the legislation, requiring them to sign non-disclosure agreements and determining the scope and limits of their authorizations, checking their authorizations periodically, ensuring the return of inventory that was furnished to authorized personnel after a change of their position/duty or at the end of their employment, and (ii) to adopt certain security measures for safeguarding such data in physical and electronic environments. The decision also provides specific procedures that must be followed by data controllers for the transfer of special categories of personal data (For more detailed information, see our Mondaq article Personal Data Protection Board's Decision On Adequate Measures To Be Taken By Data Controllers Regarding Special Categories Of Personal Data).

economic safety, privacy or personal rights are not violated and that the data processing does not constitute a crime (Article 28(1)(c) of DPL). Arguably, this provision may be interpreted as targeting health or research institutions' processing activities to gather detailed findings and knowledge on COVID-19.

VI. Other Points to Note

Other than the points explained above, data controllers should also take into consideration other steps to ensure their compliance with their data privacy obligations. In that regard, we recommend that data controllers should pay attention to the following aspects:

- ***Seeking alternative methods instead of processing health data***: Data controllers should always ask the question "*whether is it strictly necessary to process health data?*" If the answer is no, then they should proceed with the alternative method, to be on the safe side.
- ***Privacy notices:*** Data controllers should maintain their obligation to inform data subjects and explain the reasons and purposes of such collection and inform data subjects clearly about their rights, as required under DPL.
- ***Always remember general principles:*** For all types of personal data, data controllers should always bear in mind the general principles of the DPL (e.g. lawfulness, fairness, accuracy, purpose limitation, storage limitation etc.)
- ***Erase, destroy or anonymize data:*** In the event that the personal data collected are no longer required, data controllers should erase, destroy or anonymize the personal data.
- ***Adopt authorization and control matrix:*** Access to the systems that contain personal data should also be restricted, as these systems may also include sensitive data about individuals and may be open to threat while working remotely through the COVID-19 threat and a number of supplementary measures such as a well-structured firewall and gateway, encouraging employees to lock screens when away, secure home routers and remote access systems, should be implemented to ensure security of personal data.

VII. Conclusion

As the entire globe has been facing with a common challenge of COVID-19, a sudden shift has taken place with regard to health and data dynamics. Majority of sectors will be affected by measures taken in response to the outbreak of the coronavirus disease. Ultimately this global siege will come to an end, but adopting rapid rules and measures around data protection would allow avoiding or mitigating potential legal issues and cyber security risks in the aftermath of this crisis.

White Collar Irregularities

Connection between the Fight against Corruption and Fight against COVID-19

At the moment, almost all countries face a global health crisis with the rapid spread of the coronavirus pandemic. Unfortunately, also during times of social and economic stress and low public trust like these, is when opportunities for corruption arise and when corruption manifests itself the most. These uncertain times provide the environment from which corrupt actors can benefit.

Healthcare sector is one where corruption exposure could cause a significant deal of damage even under ordinary circumstances. Being under the spotlight as a result of the pandemic, the sector itself and the relevant supply chains in particular, become even more susceptible and vulnerable to potential risks of corruption that could result in deprivation of people of the necessary health care, by

affecting the availability and quality of health services and goods. Not only in the healthcare sector, more and more stories and news of fraudulent activities of entities and real persons in the private sector come to light every day. For this reason, identifying and having open discussions about these risks in advance can contribute to our response to this crisis and provide healthcare to those who need it most, as the fight against corruption is closely connected to fight against coronavirus.

In this regard, both governments and the private sector have a great part in combatting the potential risks and possible corrupt acts in order to respond to this crisis and prevent major losses best as they can. They must work towards preventing unethical profiteering, and the private sector should act more prudently in its business activities rather than putting profit before public health.

To begin with, governments should act with great transparency to avoid giving way to corrupt acts during the procurement of medical supplies and promote open and transparent contracting, prevent price gouging of medical supplies, and share information about all relevant processes. At a time where a highly increased number of patients are seeking medical care, many countries are expected to face (or already are facing) shortages in testing and treatment options. With this natural increase in demand for medicines and other equipment, the procurement of medicines, equipment and supplies such as face masks, rooms, ventilators and even medical staff, becomes a highly vulnerable area for corruption. Governments should look out for suppliers who might engage in corrupt acts such as signalling benefits or demanding higher prices knowing that governments are in dire need of supplies. In this regard, the governments' first priority should be having a high level of openness and transparency in the associated contracting processes. Particularly, governments should avoid any use of anonymous companies to ensure that medical and financial resources are used without giving way to any corrupt acts. Second, governments should have strong anti-corruption policies and include anti-corruption clauses in their contracts. With these safeguards, actors would not be able to engage in corrupt acts such as charging governments unreasonable prices.

Another vulnerable area is the investment in research and development of drugs and vaccination against coronavirus by governments, which should also consist of transparent and collaborative processes. In order to achieve this transparency, the funds provided by the government should be monitored and tracked closely, and clinical study results could be disclosed or published more often.

In terms of the private sector, the crisis of COVID-19 has already impacted the private sector and almost all business operations, both in procurement lines and staffing resources. In times like these, companies should also take precautions and operate in line with an effective plan, in order to avoid getting caught up in corrupt practices. In parallel with the level of transparency the governments are required to possess, misinformation and false news can also result in corrupt actors to benefit from panic and fear, in addition to rendering the precautions taken against the pandemic ineffective. To provide examples, there is an increased amount of news circulating about people being scammed into buying protective equipment or other products and supplies with inflated or gauged prices. In an era where online shopping has become one of the most frequent used methods of shopping, e-commerce websites should actively look out for these scams and take action for inflated listings.

For this reason, to protect themselves against these opportunistic third parties, companies should closely monitor and assess any updates, orders and regulations issued by the government and act accordingly, by double checking their sources. Moreover, companies should make their research and work diligently with the available information at hand in order to evaluate the possible implications that COVID-19 may have on their business operations, as such foresight can help identify and mitigate business risks including those related to corruption the company may face in the future, leading to a more successful and less damaging outcome.

Another important issue is to control and monitor company employees, since, at a time where they could be required to make quick decisions and face many more obstacles and difficulties, panic and incoordination, on top of remote working environment, could result in higher risks of unwanted consequences. In order to prevent or mitigate these risks, the first step for companies would be to refresh and revise their existing plans and policies relating to corruption as necessary, for their employees engaging with vendors, customers and especially regulators and other governmental authorities. Thereafter, companies should communicate these plans and policies to their employees by repeating their warnings relating to sensitive operations and business activities and openly addressing corruption risks. Most importantly, companies should build trust by promising open communication lines, for instance by informing their employees that they should notify senior management or the relevant business line when they are required to complete a task they are uncomfortable with. By keeping the relevant plans and policies updated and continuous communication with their employees throughout the pandemic, companies could significantly lower the amount of potential risks that could arise in connection with corrupt acts.

In consequence, both the public sector and private sector must do their share in their fight against corruption, for many reasons all of which result in a significant amount of contribution in the fight against coronavirus.

Healthcare Law

Current Situation and Latest Updates Regarding COVID-19 in Turkey in terms of Healthcare Regulations

As a result of the pandemic of Coronavirus (COVID-19), taking into consideration the rate of contagion and cases in countries all around the world, governments are taking new measures almost every day in order to respond to the crisis as rapidly as possible. Similarly, since the first detected case of Turkey on March 11, 2020, Turkish government has been doing more tests, taking the necessary precautions and measures to prevent further spread of coronavirus and to protect its citizens.

In the interim, several governmental institutions, including the Ministry of Health, have taken various measures in order to prevent further spread of coronavirus, To name a few, all international flights have been suspended, in addition to domestic flights being limited to certain cities and procedures, Turkey's borders has been closed to passenger entry and exits, venues and public places such as cafés, bars, gyms, hairdressers have been closed, grocery stores have been ordered to operate between 9 AM and 9 PM, and all kinds of activities such as picnics, jogging, fishing and fitness have been banned.

Below is the summary of the specific measures taken particularly by the Presidency and the Ministry of Health and its affiliated institutions with regard to COVID-19.

- All government officials, including healthcare personnel, are prohibited from going abroad for both work related and personal reasons, and are now required to obtain permission from the relevant authorities for urgent situations.
- The Ministry of Health stopped receiving visitors to its buildings as of March 20, 2020.
- Turkish Medicine and Medical Devices Agency ("***Agency***") issued amendments to the procedures of clinical trials and measures to be taken during clinical trials in relation to COVID-19. These measures include, (i) suspension and early termination of clinical trials if and when necessary, (ii) emergency safety measures to ensure volunteer protection without the ethics committee's approval or Agency's authorization, (iii) changes (postponing or rescheduling) in monitoring activities during clinical trials, and (vi) stocks of investigational products and clinical trial supplies in larger quantities in case of scenarios such as quarantine and import restrictions.
- The Ministry of Health issued a new circular consisting of 12 articles of measures for healthcare staff and hospitals. The circular requires both public and private hospitals to follow the necessary procedures to accept and treat patients until their COVID-19 diagnosis becomes certain. All hospitals that have at least two specialists of inflectional diseases, clinical microbiology, thoracic diseases or internal medicines, and level 3 intensive care beds are now considered "pandemic hospitals".
- The Ministry of Health issued a new regulation providing free of charge transportation and accommodation to all healthcare personnel. Accordingly, all healthcare and medical personnel will be allowed to use public transportation and public social facilities free of charge.
- The Agency announced that activities of product promotion representatives that are being done through visiting health institutions, doctors, dentists and pharmacies are suspended until further notice. According to the announcement, representatives may carry out their promotional activities through electronic means (e-mails, video conferences).
- Exports of (i) protective masks filtered against gas, dust and radioactive dust, protective bodysuits, liquid tight aprons used for protection against chemicals, protective glasses (for personal protective gear) and (ii) medical and surgical masks and medical sterilized or non-sterilized gloves (put into market through Medical Device Regulation), are now subject to pre-authorization of the Agency.
- Exports of (i) ethyl alcohol, (ii) cologne, (iii) disinfectant, (iv) hydrogen peroxide and (v) melt blown fabric are now subject to pre-authorization of the Agency.
- The Agency announced the guidance measures to be taken by pharmacies with regard to their personnel, pharmacy environment and patients in relation to COVID-19. The Agency also ordered through its related letter sent to governorships dated March 26, 2020 that, (i) pharmacies should frequently check and follow the Ministry of Health's regularly updated "COVID-19 Guide", (ii) the relevant governorship should be immediately notified in the event a pharmacy owner or personnel gets infected, (iii) the pharmacy should be disinfected and a responsible manager should be assigned, if necessary, in the event the pharmacy owner or its responsible manager gets infected, and (iv) a supervisor or responsible manager should be assigned if requested by pharmacy owners who are 65 years of age or older, or who have a chronic disease.

- The Agency announced that as of March 26, unit dosage of pharmaceuticals used in treatment of COVID-19 will be tracked through Pharmaceuticals Track & Trace System. The list of pharmaceuticals used in treatment has also been provided together with the announcement.

It appears the measures in the healthcare sector will continuously increase in the days to come, and all of these measures should be conformed with, in order to respond to and recover with minimum damage from COVID-19.

Telecommunications Law

Data Disclosure Obligation for Emergency Calls, Disasters and Emergency Situations

Turkey introduced certain COVID-19 pandemic related measures through the Law on Amendment of Certain Laws ("***Amendment Law***") which has been published in the Official Gazette of March 26, 2020[41]. The main purpose of the Amendment Law is to prevent adverse consequences of coronavirus (COVID-19) pandemic in Turkey.

The Amendment Law introduces various significant changes and measures regarding legal periods in the judicial proceedings, rental debts, tax debts and tax procedure terms, insurance funds, energy consumption. In addition to such changes, the Amendment Law introduces data disclosure obligation in telecommunication sector, for emergency cases.

I. Changes Introduced

Article 1 of the Amendment Law amends the Law on Provincial Administration[42] ("***Law***") and adds an article (Additional Article 2) into the Law. As per such article, Information and Communication Technologies Authority ("***ICTA***") will provide the required information on subscribers and location data without delay for the following cases:

(i) For disaster and emergency situations, the data will be provided to be used within the scope of search, rescue and intervention operations and being limited to the people who are affected from the disaster or emergency situations, if Disaster and Emergency Management Presidency (AFAD) or relevant governorship needs.
(ii) For 112 emergency call centre calls, the data will be provided to be used to reach the callers and being limited to the call period, if 112 emergency call centres or the relevant governorship needs.

Besides, Article 1 also provides that access systems might be established within the scope of the procedures and principles to be determined by ICTA and relevant Ministry, for the foregoing data disclosure operations. Apparently this allows a system to be established for direct and live collection of such data.

As the Amendment Law introduces a disclosure for exceptional circumstances, it clearly prohibits the use of data which is obtained with the authorizations provided under the Amendment Law, for other purposes.

[41] Published on the Official Gazette, https://www.resmigazete.gov.tr/eskiler/2020/03/20200326M1-1.htm (Last accessed on March 30, 2020).

[42] Law on Provincial Administration https://www.mevzuat.gov.tr/MevzuatMetin/1.3.5442.pdf (Last accessed on March 30, 2020).

Article 1 of the Amendment Law entered into force as of their publication in the Official Gazette of March 2020.

II. Process Prior to the Amendment

Prior to the Amendment Law, the Law did not govern any provision requiring the disclosure of subscribers' data in terms of telecommunication services. However, the Law on Electronic Communications[43] ("***EC Law***") and Regulation on Processing and Protecting Privacy of Personal Data in Electronic Communications Sector[44] ("***EC Regulation***") which is enacted under the EC Law already provided provisions regarding the processing of personal data for emergency cases.

As per Article 51 of the EC Law, in principle, the personal data of the subscribers and users might only be processed with explicit consent for the purposes other than providing electronic communication services. On the other hand, Article 51 of the EC Law and Article 11 of the EC Regulation provide that without prejudice to the cases where relevant legislation and court orders require, location and identity data of the subscribers and users might be processed by the persons who are authorized by electronic communication service operators, without explicit consent, only for emergency calls and the disaster and emergency situations which are defined under the Law on Corporation and Duties of Disaster and Emergency Management Presidency (which was amended as Law on Disaster and Emergency Management Presidency and Certain Relevant Regulations, in 2018)[45].

In light of the foregoing, at the first glance it appears that electronic communication service operators, but not ICTA, could process personal data of the subscribers and users for emergency calls, and disaster and emergency situations, without explicit consent, prior to the Amendment Law. However, Article 60 of the EC Law grants ICTA an extensive authority to obtain and request any data, document and records within the scope of its duties. When Article 60 is also considered, it might be argued that ICTA already had an access to such data prior to the Amendment Law.

III. Process after the Amendment

Although the implementation of Article 1 will become clearer in time, when the previous provisions and current amendment is evaluated together, one might argue that (i) electronic communication operators might process personal data of subscribers and users for emergency calls, and disaster and emergency situations, without explicit consent, (ii) ICTA could request such data from electronic communication operators for emergency calls, and disaster and emergency situations and (iii) ICTA should provide the data which is needed by Disaster and Emergency Management Presidency (AFAD),

[43] Law on Electronic Communications, https://www.mevzuat.gov.tr/MevzuatMetin/1.5.5809.pdf (Last accessed on March 30, 2020).

[44] The Regulation on Processing and Protecting Privacy of Personal Data in Electronic Communications Sector, https://www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=7.5.16405&MevzuatIliski=0&sourceXmlSearch=elektronik%20haberle%C5%9F (Last accessed on March 30, 2020).

[45] The definitions removed from the Law on Disaster and Emergency Management Presidency and Certain Relevant Regulations with the amendments dated 2018. Currently, relevant definitions included in the Regulation on Disaster and Emergency Case Intervention Services as follows:
"Emergency Situation: Situations which cease or suspend the normal life and operations of all society or certain portion of society and require emergency intervention, and the crisis situation that such situations cause.
Disaster: Natural, technological or human-driven situations which cause physical, economic and social loss for all society or certain portion of society, and which cease or suspend the normal life and human operations, and that the handling capacity of the affected society is insufficient."

112 emergency call centres or relevant governorships.

Banking and Finance Law

Significant Changes in the Turkish Banking Legislation

I. Introduction

The Law No. 7222 on Amendments to the Banking Law and Certain Laws ("***Law No. 7222***") was published in the Official Gazette on February 25, 2020 and entered into force the same date. The Law No. 7222 has introduced various changes to the Turkish banking laws, regulations of financial leasing, factoring and finance companies as well as capital markets law regime. In this article, our aim is to especially focus on and present key changes made to the Banking Law No. 5411 ("***Banking Law***").

II. What Has Been Changed?

a. List of the transactions that are deemed as loans have been extended

Article 48/1 of the Banking Law lists the transactions that are deemed as loans for the implementation of the Banking Law. Accordingly, the following instruments that are provided by banks will be deemed as loans: cash loans; non-cash loans such as letters of guarantee, counter-guarantees, surety ships, bills of guarantee, endorsements, acceptance loans and commitments bearing such characteristics; bonds and similar capital market instruments that have been purchased; funds lent through making a deposit or by any other way; receivables arising from sales of assets by instalment; overdue cash loans, accrued but not collected interests, values of non-cash loans that have been converted into cash, receivables incurred from reverse repurchasing transactions; risks undertaken within the scope of futures and option agreements and other similar agreements, partnership shares and transactions recognized as loan by the Banking Regulation and Supervision Authority ("***BRSA***").

With the amendment made to Article 48(2) of the Banking Law, the following instruments that are provided by development and investment banks will also be deemed as loans: financing provided through payments of movable and immovable property, service fees, profit and loss sharing investments, immovable – equipment – financial leasing documents, financing in return for goods and joint investments.

In addition to listing certain financial instruments which will also be deemed as loans, the Law No. 7222 has also authorized the BRSA to extend the scope of transactions that are deemed as loans in case new financing methods and instruments are developed by development and investment banks.

b. Scope of the risk group within the bank has been re-determined

The Turkish banking legislation determines certain risk groups for credit transactions. Under Article 49 of the Banking Law, a real person and such person's spouse and children; partnerships in which such persons assume duties as board members or general managers or which are directly or indirectly controlled by such persons alone or together with a legal person or which have been participated by such persons with unlimited liability constitute a risk group.

Moreover, partnerships which are jointly or individually and directly or indirectly controlled or participated with unlimited liability by a bank and qualified shareholders of a bank, board members and general managers of such bank, or in which a bank and qualified shareholders of the bank, board members and general manager of such bank assume duties as board members or general manager constitute a risk group for the bank.

Turkish banking regulations stipulate certain criteria for providing loans to specific risk groups. For instance, under Article 50 of the Banking Law, if loans will be provided to real and legal persons in the risk groups of the banks, it is required for the bank to take a board resolution on the matter by 2/3 of the total number of board of directors. Moreover, loan conditions should not be different from other loan arrangements of the bank.

In order to comply with provisions of Basel Core Principles for Effective Banking Supervision, the Law No. 7222 has re-determined the scope of bank's risk groups to also include (i) deputy general manager, (ii) executives who are employed with different titles and work in equal or higher positions than the previously listed persons as well as (iii) spouses and children of the previously listed persons in the relevant bank's risk group.

With the amendment made to Article 49 of the Banking Law, banks owned by the Turkey Wealth Fund, Turkey Wealth Fund Management Co. and public administrations within the scope of central management will form an individual risk group. In addition, each public institution and organization, the majority of shares of which is owned by the Turkey Wealth Fund and Turkey Wealth Fund Management Co. will also constitute an individual risk group.

c. Turkey Wealth Fund and Turkey Wealth Fund Management Co. have been included in the scope of transactions which are exempted from loan limitations

Article 54 of the Banking Law lists loan restrictions. For instance, the total amount of loans that can be provided by a bank to a real or a legal person or a risk group cannot be more than 25% of its total equity. On the other hand, the limit for the total amount of loans that can be provided by banks to all shareholders, having more than 1% of the share capital of the relevant bank and persons who constitute a risk group with those persons is set as 50% of the bank's own funds.

There are also certain exemptions to the foregoing rules and the Law No. 7222 has expanded these exemptions to also include the transactions conducted with Turkey Wealth Fund, Turkey Wealth Fund Management Co. and bonds, securities and similar instruments issued or guaranteed by these institutions. Therefore, these transactions will no longer be subject to loan restrictions stated in Article 54 of the Banking Law.

d. The areas of activity of development and investment banks have been extended

With the aim to extend the areas where development and investment banks may procure funds, funds procured by credit customers, partnerships and shareholders of development and investment banks will no longer be considered as deposits. Following the amendment made to Article 60 of the Banking Law, the BRSA has been granted with more authority to regulate these areas. Following these changes, for BRSA it will be possible to regularly monitor the practice of these areas.

By the amendments made to Article 77 of the Banking Law, participation banks, development banks and investment banks may carry out activities with interest-free methods. The BRSA has also been authorized to determine the procedures and principles of the interest-free transactions to be performed by the participation banks, development banks and investment banks. Moreover, partnerships in which participation banks, development banks and investment banks participated with the aim to provide finance without interest will not be considered within the risk group of

the relevant bank. Therefore, these partnerships will not be subject to the certain loan restrictions stipulated in the Turkish banking legislation for risk groups of the banks and will freely obtain loans from the banks within the scope of the general provisions of the Banking Law.

e. The obligation to prepare prevention plans has been introduced for banks

The Law No. 7222 aims to boost the effectiveness of oversight and supervision processes and increase speed of decision-making and implementation processes through requiring the banks to prepare prevention plans. Pursuant to the newly legislated Article 66(A) of the Banking Law, the banks, which are classified as systemically important by the BRSA, are obliged to prepare and submit a prevention plan to the BRSA in order to pre-determine the measures to be taken in case of any issues that might hinder their financials. Banks are also required to take necessary measures and inform the BRSA urgently in case of occurrence or the possibility of occurrence of any issues causing disruption in financial structures of banks. Article 66(A) of the Banking Law authorizes the BRSA to request the relevant bank to take required precautions stipulated in the prevention plan if it determines an occurrence or potential occurrence of situations hindering the such bank's financials.

Article 67(h) of the Banking Law states that in case (i) the bank does not take precautions stipulated in the prevention plan, (ii) issues cannot be resolved despite the measures or (iii) it is determined that no results can be obtained even if the measures are taken, the BRSA shall require the board of directors of the relevant bank to take the certain precautions such as suspension of distribution of profits temporarily, increase in the provisions set aside, ensure liquidity by selling off assets; restrictions on new investments.

f. The terms of market manipulation and misleading transactions have been determined

The newly introduced Article 76(A) of the Banking Law defines the financial market manipulation and misleading transactions. Accordingly, the following are considered as financial market manipulation and misleading transactions: Transactions and practices aiming to create artificial supply, demand or price formation (including exchange rates); providing inaccurate and misleading information by different means (including through internet); providing inaccurate and misleading guidance or carrying out similar transactions and practices for these purposes. The BRSA has been authorized to determine transactions and practices which will fall within the scope of this provision. It is also worth mentioning that an administrative fine is introduced for those performing transactions and practices which are considered as market manipulation and making profit from it.

g. Protection of banking secrets has been strengthened

According to the amendment made to Article 73(3) of the Banking Law, once the client relationship is established with the bank, all data belonging to real persons and legal entities will be considered as confidential information. Banks will be prohibited from sharing client information with domestic and foreign individuals or legal entities without the client's active request or instruction, regardless of whether an explicit consent is obtained pursuant to the Law No. 6698 on Protection of Personal Data.

III. Conclusion

Turkey has introduced a number of amendments to the Turkish banking legislation. These changes particularly aim to guarantee effective operation of financial markets and to fully comply with international

principles and standards in the areas of supervision and oversight of financial sector in order to increase trust towards the Turkish banking system. Accordingly, these amendments will guarantee market security and boost the Turkish banking sector as well as ensure financial stability.

Capital Markets Law

Amendments to the Capital Market Law regarding Significant Transactions and Appraisal Rights

I. Introduction

Significant amendments have been introduced with the Law No. 7222 Amending Banking Law and Other Laws, published in the Official Gazette dated February 25, 2020 numbered 3150 ("***Amending Law***") under the Capital Market Law No. 6362 ("***Capital Market Law***"). According to the preamble of the Amending Law, the need to make changes in the Law have arisen from the necessity to ensure that the market is operating in a trustworthy, transparent, efficient, consistent, fair and competitive environment, and to protect the rights and benefits of the investors.

In this article, we will be examining the two major changes made in the Capital Market Law, with respect to significant transactions of public companies and appraisal rights granted to shareholders.

II. Changes Made With Respect to Significant Transactions

Prior to the Amending Law, Article 23 of the Capital Market Law was giving 5 (five) examples to significant transactions. In this respect, any matter such as (i) being a party to merger and demerger transactions, taking decisions for changing the type of the company or dissolution, (ii) transfer of whole or a significant portion of assets or establishment of rights in rem or leasing the assets, (iii) changing the public company's field of activity wholly or significantly, (iv) granting privileges or changing scope or content of the privileges and (v) delisting from stock exchange were being considered as significant transactions.

The Amending Law has simplified the matters defined as significant transactions and eliminated the vagueness of the wording of Article 23 of the Capital Market Law. Accordingly, only (i) being a party to merger and demerger transactions, (ii) changing the type of the company and (iii) granting privileges or changing scope or content of the privileges shall be considered as significant transactions. It is important to note that any fundamental transaction related to the structure of a public company that may affect investment decisions of investors such as the ones listed in the amended Article 23 of the Capital Market Law shall be deemed as significant transactions.

Lastly, the Amending Law expanded the Capital Markets Board's ("***CMB***") authority to determine the significance criteria, necessary principles and procedures to perform significant transactions or to take any resolution in this matter and allowed the CMB to determine different principles and procedures based on aspects of each public company.

III. Changes Made With Respect to Appraisal Rights

The Amending Law has also introduced significant changes to Article 24 of the Capital Market Law, which grants appraisal right to the shareholders who have attended the general assembly meetings regarding significant transactions, dissented and registered such dissent in the meeting minutes. According to said changes:

(i) The CMB has been granted with the authority to determine the procedures of using

appraisal rights for the shares owned by the shareholders on the date when the significant transaction is disclosed to the public, by taking in the consideration the aspects of the public companies.

(ii) Calculation of appraisal rights defined under Article 24(1) of the Capital Market Law has been changed to make it in line with the practices around the world. Prior to the Amending Law, public companies were required to purchase shares of the shareholders who are using their appraisal rights from the purchase price calculated based on the average of the weighted average price in the preceding 30 (thirty) days at the stock exchange. Now, shareholders will be able to sell their shares on the fair value which will be determined in accordance with the principles to be established by the CMB.

(iii) The CMB has been granted with the authority to determine the principles and procedures to offer the shares subject to appraisal rights to other shareholders or investors before such shares are purchased by the public companies. In other words, other shareholders or investors will have rights similar to pre-emptive rights when a shareholder exercises its appraisal right.

(iv) In case shareholders are unlawfully prevented from voting in the general assembly meeting, the shareholders will no longer be required to dissent to the general assembly resolution and register their dissent in the meeting minutes in order to exercise their appraisal rights.

(v) The CMB has also been granted with the authority to determine the instances where appraisal rights cannot be used, define the principles and procedures of granting exemptions to public companies from fulfilling requirements regarding appraisal rights, using appraisal right and calculation of fair value. This authority provides the CMB with more flexibility to define different principles and procedures based on the aspects of each public company.

It is also worth mentioning that following the changes in the Law, the CMB has announced a draft Communiqué on Common Principles Regarding Significant Transactions and Appraisal Rights numbered II-23.3 ("***Draft Communiqué***") with its announcement dated March 16, 2020. According to the CMB's announcement on its website, the Draft Communiqué will annul the current communiqué which regulates significant transactions and appraisal rights (*i.e.* the Communiqué on Common Principles Regarding Significant Transactions and Appraisal Rights numbered II-23.1). The CMB aims that the Draft Communiqué will be more in line with the changes made with the Amending Law.

IV. Conclusion

As explained above, the Amending Law has granted broad powers to the CMB and made the Law more coherent with foreign practices in terms of significant transactions of public companies and shareholders' right to use appraisal rights. With the Draft Communiqué, we expect the CMB to implement the changes in the near future to regulate the procedure of using appraisal rights as well as defining significant transactions within the scope of the authority granted by the Amending Law.

Anti-Dumping Law

Turkey initiates WTO dispute complaint against EU steel safeguard

World Trade Organization ("***WTO***") members are allowed to take safeguard measures, to temporarily restrict imports of products in order to protect a specific domestic industry from an increase in imports causing or threatening to cause serious injury to their industry under Article XIX of the General Agreement on Tariffs and Trade 1994 ("***GATT***") and as per the Agreement on Safeguards. Article 2 of Agreement on Safeguards indicates that a member can apply

a safeguard measure to a product only if they have determined that such product is being imported into its territory in increased quantities, thereby causing or threatening to cause serious injury to its domestic industry that produces like or directly competitive products.

Within this scope, on March 2018, the European Commission had published a notice that it had initiated a safeguard investigation concerning imports of certain steel products, which had been initiated *ex officio* by the European Commission. The European Commission listed twenty six products that were under investigation in the annex of its notification, and on June 2018, it published a notice that it included two additional product categories.

On July 2018, the European Union declared its decision to impose provisional safeguard measures regarding twenty three product categories. The European Commission concluded that there had been an increase of imports on a global basis, and that the steel industry of the European Union was in a situation of threat of serious injury and that this situation was likely to develop into actual serious injury in the foreseeable future. The provisional measures were applied for two hundred days from the date of their entry into force. Following these developments, the European Union adopted a regulation imposing definitive safeguard measures on twenty six categories of steel products on January 2019, for a period of three years, to be expired on 30 June 2021.

On March 2020, Turkey requested dispute consultations with the European Union regarding the definitive safeguard measures imposed on the steel products through the foregoing process. Through its request, Turkey expressed that it is concerned by the safeguard measures imposed by the European Union and the underlying investigation that led to the imposition of the measures, claiming the measures were inconsistent with a number of provisions of the Agreement on Safeguards and GATT.

A request for consultation is part of the dispute settlement procedure of the WTO governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes ("***DSU***"), which has three stages (consultation, adjudication and if necessary, implementation). Consultations give the parties an opportunity to reach an amicable solution. Accordingly with the procedure of consultations, a dispute will be initiated in the WTO and parties will discuss the related matters to find a satisfactory solution without proceeding with litigation. However, if the consultations between European Union and Turkey fail to resolve the issues in sixty days, upon Turkey's adjudication request, a panel will be established.

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

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

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

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

For further information, please visit www.elig.com

ELİG
GÜRKAYNAK
Attorneys at Law

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