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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.

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Preface to the June 2020 Issue

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

Primarily, the Competition Law section sheds light on the recent amendments to the Law No.4054 on the Protection of Competition. Moreover, the section discusses three recent cases of the Competition Board. The topics in this section vary from - the third rejection of a particular individual exemption application, a decision demonstrating the Board's most recent approach to wage fixing and no-poaching agreements and the administrative monetary fines issued as a result of hindering and/or obstructing an on-site inspection conducted by the Competition Authority's case handlers.

The Banking and Finance Law section addresses the legislative changes to the Turkish Banking framework; whereas Capital Markets Law examines the newly introduced centralized commercial electronic communication management system.

The Employment Law section discusses the measures to be taken in offices and workplaces as employees are making their return following the ease of restrictions and measures following the COVID-19 outbreak.

Under the Litigation chapter, the much debated Second Judiciary Reform is examined in-depth, by contrasting the amendments with the existing legislative framework.

The Internet Law section sheds light on the case of Wikipedia in Turkey, as the Constitutional Court has recently reinstated access to the website, after a long legal process.

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.

June 2020

Corporate Law

Further Clarifications to the Recent Restrictions on the Distribution of Dividends amid COVID-19 Outbreak[1]

The Communiqué on Procedure and Principles of Implementation of Provisional Article 13 of the Turkish Commercial Code No. 6102 ("**Communiqué**") has been published in the Official Gazette on May 17, 2020 and entered into force on the same date.

The Communiqué regulates principles of and exemptions on the restrictions on the distribution of dividends and financial statements that need to be taken into consideration during distribution of dividends.

Under Article 4 of the Communiqué, in all stock companies (*e.g.* joint-stock companies, limited liability companies, limited partnerships in which capital is divided into shares) other than state-owned enterprises ("**Companies**"), from April 17, 2020 (when Provisional Article 13 of the Turkish Commercial Code No. 6102 ("**TCC**") has entered into force) to 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 to distribute previous years' profits and free reserves and (iii) cannot grant board of directors the right to distribute advance dividend. It is also regulated in the Communiqué that the restrictions will not apply to share capital increase transactions from internal sources.

Pursuant to Article 4 of the Communiqué, if the general assemblies of the Companies have resolved to distribute dividend for the fiscal year 2019 before entry into force Provisional Article 13 of the TCC, but the payment has not been made yet or partial payment has been made to the shareholders, (i) the payments exceeding 25% of the net profit for 2019 and (ii) the payment, which has not been made, have to be postponed until September 30, 2020 (in case it has been resolved to distribute free reserves, even though the Company incurred loss in the fiscal year 2019). Additionally, if the general assemblies of the Companies have resolved to grant board of directors the right to distribute advance dividend before entry into force Provisional Article 13 of the TCC, then, distribution of advance dividend have to be postponed until September 30, 2020. The Communiqué also regulates that no interest can be applied on postponed payments.

Under Article 5 of the Communiqué, aside from the provisions related to obtaining approval from the Ministry of Trade as required by Article 6 of the Communiqué, following Companies are exempted from the restrictions on the distribution of dividends in the event of the following circumstances:

(i) If it will be resolved to distribute dividends in the amount of less than TRY 120,000, provided that (a) they have not benefitted from short-time working allowance and/or unpaid leave, monetary wage support due to COVID-19 in line with the relevant legislation and (b) they have not utilized credit surety supported by the Treasury and still have open credit-debt balance;

(ii) If it will be resolved to distribute dividends, on the condition that the shareholders will use more than half of

[1] This article was previously published on Mondaq. (https://www.mondaq.com/turkey/shareholders/937844/further-clarifications-to-the-recent-restrictions-on-the-distribution-of-dividends-amid-covid-19, published on May 20, 2020) (Last accessed on June 18, 2020).

the dividend for payment of the share capital commitment against another stock company in line with the TCC;

(iii) If it will be resolved to distribute dividends, on the condition that the shareholders will use the dividend for fulfilling the obligations arising from credit agreements or project finance agreements which will be due until September 30, 2020. (In these Companies, the payments exceeding the amount of obligations have to be postponed until September 30, 2020.)

Article 6 of the Communiqué stipulates that in order for the Companies to benefit from the abovementioned exemptions, it is required to obtain prior approval from the Ministry of Trade. In these applications, it is required to submit the following documents to the Ministry of Trade: (i) board of directors' resolution on convening the general assembly meeting (agenda), (ii) financial statements and profit-loss table regarding the fiscal year 2019 and (iii) all other documents proving the foregoing circumstances.

According to Article 7 of the Communiqué, in calculation of the dividend, following financial statements must be taken into consideration: (i) financial statements prepared in line with the standards determined by Public Oversight, Accounting and Auditing Standards Authority as per Article 88 of the TCC and (ii) financial statements prepared in line with the Tax Procedural Law No. 213 for the Companies which are not within the scope of number (i) of this paragraph. Lastly, the dividend amount to be distributed cannot exceed the total amount of sources kept in line with the Tax Procedural Law No.213.

Banking and Finance Law

Fees that Banks Can Charge Their Commercial Clients

The Communiqué on the Procedures and Principles Regarding the Fees that Banks Can Charge Their Commercial Clients ("**Communiqué**") was published in the Official Gazette dated February 10, 2020 and numbered 31035. The Communiqué mainly regulates types and upper limits of the fees that can be charged by banks for their products and services provided to commercial clients, excluding the financial institutions (*i.e.* banks, financial leasing, factoring and finance companies). Significant changes have been made to the Communiqué on February 29, 20.

20, March 11, 2020 and March 29, 2020 in order to reflect the market needs. This article aims to summarize some of the significant provisions of the Communiqué.

I. General Overview

With the Communiqué, the fees that banks can charge their commercial clients for products and services have been limited to 51 items under four categories as "*Commercial Loans*", "*Foreign Trade*", "*Cash Management*" and "*Payment Systems*".

Under Article 6/1 of the Communiqué, banks are authorized to freely determine the fees unless otherwise provided in the Communiqué. Except for the fees allowed in the Communiqué, no additional fee can be charged to the commercial clients under any other name for the products or services that would be provided under the abovementioned four categories. However, the amounts to be paid to third parties by the banks can be reflected to the commercial clients.

Article 6/3 of the Communiqué allows banks to determine special products or services, with the approval of the Central Bank of the Republic of Turkey, provided that those products or services fall under the abovementioned four categories listed in the Communiqué.

II. Commercial Loans

The Communiqué divides fees that can be charged by banks for commercial loans into four sub-categories (*i.e.* loan commitment and utilization, collateralization, loan risk process and paying off).

According to Article 9/1 of the Communiqué, loan commitment fees can be charged in return of all loan limits that can create a loan risk, including all non-cash loans within the scope of foreign trade and commercial credit cards. Loan utilization fees can be charged only for cash loans. The loan commitment fee cannot exceed 0.25% of the committed loan limit, and the loan utilization fee cannot exceed %1 of the loan granted.

Article 10 of the Communiqué states that the fees, that can be charged for expert transactions and movable and immovable pledges and mortgages carried out during the term between loan commitment and paying off the loan, cannot exceed the amount paid by the bank to third persons or reasonable amount of the service, if the service is provided by the bank.

As per Article 11/1 of the Communiqué, banks can charge their commercial clients with a prepayment fee; in case one or more installment(s) of the loan is paid before it is due date or loan debt is partially or wholly prepaid.

Accordingly, banks are required to accept commercial clients' prepayment requests in case they request to prepay entire loan. Furthermore, if commercial clients prepay one or more installment(s) or partially or wholly prepay the loan debt, then, banks are obligated to discount all interest and other cost elements that will not accrue due to the prepayment.

In such a case, the prepayment fee will not exceed (i) for Turkish lira loans with a remaining maturity of 24 months or less, 1%, and (ii) for Turkish lira loans with a remaining maturity more than 24 months, 2% of the prepaid amount, calculated through by taking into consideration the required interest and cost element discount. For foreign currency and foreign currency indexed loans, these upper fees are applied with one point increment.

III. Foreign Trade

Under the "foreign trade" category, the Communiqué regulates the fees that can be charged by banks in return of non-cash loans and all other products and services provided to commercial clients within the scope of import and export transactions. The Communiqué divides fees that can be charged by banks for foreign trade into three sub-categories (*i.e.* import transactions, export transaction and import/export common transactions), however, it does not determine an upper limit for these fees.

IV. Cash Management

The fees that can be charged by banks for cash management is divided under eight categories (*i.e.* supplier financing and direct borrowing system, deposit, participation fund and precious metal deposit account, money and precious metal transfers, safe deposit box, intermediary services, document and informing fees, cheque and promissory note transactions).

Article 14/1 of the Communiqué prohibits banks to charge their commercial clients for opening, operating, custody services and data processing system investments of deposit, participation fund and precious metal deposit accounts of commercial clients.

Except for the cash deposits carried out through branches after 15.30 PM, no cash deposit fee can be charged for cash deposits made by the commercial client or a third person to the commercial client's deposit and participation fund account. Article 14/3 of the Communiqué prohibits banks from charging fees for limit/debt/balance inquires conducted by the commercial client through ATMs of the bank where its account is located and for withdrawals within the scope of limits determined under the agreement executed between the bank and the commercial client. Furthermore, Article 14/4 of the Communiqué stipulates that (i) the fee that can be charged for the transactions carried out using the methods and (ii) the tools outside the bank, cannot not exceed 15% of the amount paid to the other institution for such transaction.

Communique also sets forth the upper limits for fees to be charged for electronic fund transfers (EFT).

Under Article 16 of the Communiqué, banks are allowed to charge their commercial clients with safe deposit box fees for services determined under the agreement executed between the bank and the commercial client and such fee cannot exceed one-year rental fee of the safe deposit box.

V. Payment Systems

According to the Communiqué, fees that banks can charge their commercial clients for payment systems are listed under three sub-categories (*i.e.* POS fees, member merchant fees and transactions with commercial cards).

Article 20 of the Communiqué regulates the fees to be applied to member merchants in detail.

At the purchase of products and services with no installment, in case the transaction amount is transferred to member merchant's account on the following day of the transaction, the fee to be applied cannot exceed the total of the figure as 0.45 points added to the monthly reference rate which is announced by the Central Bank of the Republic of Turkey. Such maximum fee for member merchant is applied by updating the reference rate as of the first day of the month following the date of publication of the reference rate.

At the use of credit cards which are issued abroad, in case the transaction amount is transferred to member merchant's account on the following day of the transaction, the maximum member merchant fee cannot exceed 1.60%.

As per Article 20/3 of the Communiqué, at the purchases of products and services, payments of which are made by installments, the maximum member merchant fee is reached by adding the maximum applicable member merchant fee applied to purchases payments of which are made in a single payment (*i.e.* payment without any installment) to at most 50% of this amount for each installment.

Article 20/5 of the Communiqué states that in case the transaction amount is not transferred to member merchant's account on the following day of the transaction, maximum member merchant fee is decreased by considering the number of days between the following day of the transaction and the day when the

transaction amount is transferred to member merchant's account. The period in which the transaction amount is transferred to member merchant's account cannot exceed 40 (forty) days as of the following day of the transaction with no installment.

Lastly, under Article 21 of the Communiqué, no fee can be charged on commercial credit cards for limit excess, receipt postponement, installment, payment date extension and other similar services.

VI. Conclusion

The Central Bank of the Republic of Turkey has introduced the Communiqué in order to determine upper limits of fees that can be charged by banks for their products and services provided to commercial clients. This Communiqué will increase predictability and transparency in the transactions carried out between banks and their commercial clients and prevents excessive charging.

Capital Markets Law

Abolishment of Privileges Granted to Certain Shares in Public Companies

In accordance with Article 28 of the Capital Market Law No. 6362 ("**Capital Market Law**"), in the event that (i) a public company incurs loss for five years in a row and (ii) there were not any reasonable or compulsory grounds behind the loss that might be linked to the company's activities, the privileges that are granted to certain shares, through share groups, regarding "*right to vote*" and "*right to be represented in the board of directors*" can be abolished by the Capital Markets Board ("**CMB**"). However, if the shares granted with the privileges are held by public institutions and organizations, the foregoing article does not apply for their shares.

According to preamble of Article 28, the reason of this article is to protect other shareholders and investors that hold ordinary shares and are not able to take part in the management of a public company, and to urge the shareholders having privileged (preferred) shares to appoint more competent and efficient directors/executives for the benefit of the company and all the shareholders. Such article also aims to prevent unlimited dominance of family members on family-owned companies offered to the public to a certain extent.

In order to elaborate implementation path of Article 28 of the Capital Market Law, the CMB has introduced the Communiqué on Principles of Abolishing the Privileges regarding Right to Vote and Right to be Represented in the Board of Directors (II-28.1) on January 10, 2020 ("**Communiqué**") with immediate effect.

The Communiqué is mainly in line with Article 28 of the Capital Market Law. On the other hand, the novel principles and clarifications stipulated with the Communiqué could be briefly explained as follows:

- The five-year period begins with the next fiscal year upon becoming a public company;
- If the company is publicly held since effective date of the Capital Market Law (*i.e.* December 30, 2012) and subject to ordinary fiscal year (January 1 - December 31), the five-year period begins with the fiscal year ending December 31, 2013;
- If the company is publicly held since effective date of the Capital Market Law (*i.e.* December 30, 2012) and

subject to private fiscal year, the five-year period begins with the private fiscal year ending in 2014;
- The financial statements, which have been audited and disclosed to public, must be taken into consideration in order to detect whether the company made loss or not;
- For the public companies that are required to prepare consolidated financial statements, these financial statements are taken into account rather than the solo financial statements;
- A public company which incurred loss for five consecutive years must notify the reasonable or compulsory ground(s) behind the loss that might be linked to the company's activities (*if any*) to the CMB within twenty business days upon disclosure of the latest financial statements (*i.e.* belonging to the fifth financial year);
- The reasonable or compulsory ground(s) should be substantially related to the incidents that were out of the public company's control and affected the whole economy, sector where the company operates in or the company itself;
- In the event that the CMB is decided to abolish the privileges regarding right to vote and right to be represented in the board of directors in a public company, these privileges shall be no longer be used as of the decision date;
- The CMB also informs the Central Securities Depository Institution ("**MKK**") and the Ministry of Trade to ensure proper implementation of its decision;
- Following the abolishment decision taken by the CMB, the company must apply to the CMB within two months to obtain the CMB's consent on removal of the privileges from the articles of association and making necessary amendments therein;
- If the CMB approves amendment of the articles of association in parallel with the abolishment decision, accordingly the amendment must be included in the agenda of the upcoming general assembly meeting to be held;
- If the company does not apply to the CMB within two months or include amendment of the articles of association as approved by the CMB in the agenda of the general assembly meeting, then the CMB compels the company to include amendment of the articles of association in the agenda;
- In the general assembly meeting, the shareholders must resolve on removal of the privileges in line with the CMB's abolishment decision and update the articles of association;
- If certain shareholders acquire the management control of the company as a result of the abolishment decision taken by the CMB and due to the fact that they have already had more than 50% of the current voting rights, such situation does not trigger mandatory takeover bids.

In light of the above, it could be inferred that unless there were reasonable or compulsory grounds behind a public company's continuous loss for five years in a row, the CMB deems this situation as board of directors' failure and therefore it aims to diminish effects of real person and private entity preferred shareholders on election of the board of directors.

Competition Law / Antitrust Law

Recent Amendments Introduced to the Law No. 4054 on Protection of Competition

After rounds of revisions and failed attempts of enactment over a span of several years, the proposal for an amendment to the Law No. 4054 on Protection of Competition ("**Law no. 4054**") ("**Amendment Proposal**") has finally been approved by the Turkish parliament, namely the Grand National Assembly of Turkey. On June 16, 2020, the amendments passed through the parliament and entered into force on June 24, 2020 ("**Amendment Law**").[2] According to the recital of the Amendment Proposal, these amendments aim at reflecting in the Law No. 4054, the Authority's experience in over 20 years of enforcement and bringing Turkish competition law closer to the EU law.[3]

The Amendment Law essentially (i) clarifies certain mechanisms in the Law no. 4054 which might have led to legal uncertainty in practice to a certain extent, and (ii) introduces new mechanisms as to the selection of cases for the Authority to focus on, a new substantive test for merger control, behavioral and structural remedies for anti-competitive conduct and procedural tools enabling the Board to end its proceedings in certain cases without going the whole nine yards when the parties opt for commitments or settlement. The Amendment Law also includes certain provisions concerning the organizational structure and personnel of the Authority.

[2] The Amendment Law was published on the Official Gazette dated June 24, 2020 and numbered 31165.

[3] Available at: https://www2.tbmm.gov.tr/d27/2/2-2875.pdf, last accessed on June 17, 2020.

The most prominent changes introduced by the Amendment Law are as follows:

(i) *De minimis* principle

One of the most important amendments in the Amendment Law is the introduction of the "*de minimis*" principle. With this amendment, the Turkish Competition Board ("**Board**") will be able to decide not to launch a full-fledged investigation for agreements, concerted practices and/or decisions of association of undertakings which do not exceed the thresholds (e.g., a certain market share level or turnover) that will be determined by the Board. This principle will not be applicable to hard-core violations such as price fixing, territory or customer sharing and restriction of supply. With this new mechanism, the Turkish Competition Authority ("**Authority**") appears to aim steering its direction, as well as public resources, to more significant violations.

Introduction of the "*de minimis*" principle appears to be a more appropriate (and legally less controversial) measure for the Authority to prioritize cases, which has previously used Article 9(3) of the Law No. 4054 to terminate a pre-investigation on procedural efficiency grounds, among others, when the infringement affects only a small market.[4] Article 9(3), however, is an interim measure to be used by the Board to explain to companies how to terminate the infringement until the final decision is made. It still remains to be seen whether the introduction of the *de minimis* exception will end this excessive use of Article 9(3) altogether given that, for instance, hard core restrictions in small markets will still not benefit from the *de minimis* provision.

[4] See, e.g., Izmir Container Transporters Decision, (20-01/3-2, 02.01.2020).

The Amendment Law refers to "turnover" and "market share" thresholds for the *de minimis* exception but leaves the setting of the threshold to the Board. It is therefore not yet clear how the Board will define the limits of the safe harbor the new law has introduced. That said, given the goal of the Amendment Law to bring the Law No. 4054 closer to the EU law, it would be fair to expect that the threshold will be inspired by the European Commission's ("**Commission**") Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union ("**TFEU**") ("**De Minimis Notice**"). According to the De Minimis Notice, agreements between competitors with a combined market share of less than 10% and those between non-competitors whose aggregate market share does not exceed 15% can benefit from the safe harbor, except for hardcore restrictions. When cumulative foreclosure effects of parallel networks are concerned, these thresholds are reduced to 5%.[5] This notice could be a reference point for the Board to determine the *de minimis* threshold for Turkish law.

(ii) *SIEC* test

In line with the EU law, the Amendment Law replaces the current dominance test with the "*significant impediment of effective competition*" (SIEC) test. This amendment aims to allow a more reliable assessment for the unilateral and cooperation effects that might arise as a result of mergers or acquisitions. With this new test, the Board will be able to prohibit not only transactions that may result in creating a dominant position or strengthening an existing dominant position, but also those that can significantly impede competition.

On the other hand, the SIEC test may also reduce over-enforcement as it focuses more on whether and how much the competition is impeded as a result of a transaction. [6] Thus, pro-competitive mergers and acquisitions might benefit from the test even though a transaction leads to significant market power based on, for instance, major efficiencies. Likewise, dominant undertakings contemplating transactions with *de minimis* impact may also benefit from the new approach.

(iii) Behavioral and Structural Remedies for Anti-competitive Conduct

The Amendment Law aims to grant the Board the power to order structural remedies for anti-competitive conduct infringing Articles 4, 6 and 7 of the Law No. 4054, provided that behavioral remedies are first applied and failed. Further, if the Board determines with a final decision that behavioral remedies have failed, undertakings or association of undertakings will be granted at least 6 months to comply with structural remedies. Both behavioral and structural remedies should be proportionate to and necessary to end the infringement effectively. This amendment is in line with the EC

[5] The Commission also has another notice on the effect on trade, (Commission Notice — Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty; OJ C 101, 27.4.2004, p. 81–96), which provides that even agreements including a restriction by object may fall outside the scope of Article 101 if the parties' combined market share is 5% or less and their aggregate annual turnover is EUR 40 million or less. Given that the Amendment Law excludes hardcore restrictions from the safe harbor, however, De Minimis Notice appears to be a more likely reference point for the Authority than the Notice on the Effect on Trade.

[6] The Impact of the New Substantive Test in European Merger Control, Lars-Hendrik Röller and Miguel De La Mano, European Competition Journal, April 2006, p.17 et seq. https://ec.europa.eu/dgs/competition/economist/merger_control_test.pdf

Regulation No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty[7], but takes a step further to provide assurance to the companies that structural remedies for competition law infringements will only be applied when behavioral remedies have first been tried but proved to be ineffective.

A curious point as to this remedy provision added to Article 9 is its potential implications for Article 11 of the Law No. 4054, which also concerns the Board's power to impose remedies for gun-jumping in mergers (that results in an infringement of Article 7 concerning mandatory notification of mergers exceeding jurisdictional thresholds). Article 11 allows the Board to dissolve a notifiable merger that has been realized without the Board's approval through several methods including divestitures, and there is no precondition of trying out behavioral remedies first. With the Amendment Law, however, Article 9 now introduces "first behavioral, then structural remedy" rule also for Article 7 violations. How the Board will reconcile these two provisions in practice remains to be seen.

(iv) Settlement and Commitment

The Amendment Law introduces two new mechanisms that are inspired by the EU law and aim to enable the Board to end investigations without going through the entire pre-investigation and investigation procedures.

The first mechanism is the commitment procedure. It will allow the undertakings or association of undertakings to voluntarily offer commitments during a preliminary investigation or full-fledged investigation to eliminate the Authority's competitive concerns in terms of Articles 4 and 6 of the Law No. 4054, prohibiting restrictive agreements and abuse of dominance. Depending on the sufficiency and the timing of the commitments, the Board can now decide not to launch a full-fledged investigation following the preliminary investigation or to end an on-going investigation without completing the entire investigation procedure. However, commitments will not be accepted for violations such as price fixing between competitors, territory or customer sharing or and the restriction of supply. The Board will provide the details of these new procedures by secondary legislation. Additionally, the Board may reopen an investigation in the following cases: (i) substantial change in any aspect of the basis of the decision, (ii) the relevant undertakings' non-compliance with the commitments, (iii) realization that the decision was decided on deficient, incorrect or fallacious information provided by the parties. Second, the Amendment Law also introduces the settlement procedure. As the relevant provision is added to Article 43 concerning investigations of anticompetitive conduct in general, and that the Amendment Law does not limit the settlement option to cartels only, it appears that this new procedure will also be applicable to "other infringements" under Article 4 and abuse of dominance cases under Article 6.

[7] The EC Regulation No. 1/2003 provides that the Commission's power to impose any remedy, whether behavioural or structural, which is necessary to bring the infringement effectively to an end, having regard to the principle of proportionality. Structural remedies should only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy. Changes to the structure of an undertaking as it existed before the infringement was committed would only be proportionate where there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking" (Recital 12 and Article 7.1).

The new law will enable the Board, *ex officio* or upon parties' request, to initiate the settlement procedure. Unlike the commitment procedure, settlement could only be offered in full-fledged investigations. In this respect, parties that admit an infringement can apply for the settlement procedure until the official service of the investigation report. The Board will set a deadline for the submission of the settlement letter and if settled, the investigation will be closed with a final decision including the finding of a violation and administrative monetary fine. If the investigation ends with a settlement, the Board can reduce the administrative monetary fine by up to 25%. Other procedures and principles regarding settlement will be determined by the Board's secondary legislation. That said, technically both commitments and settlement could be offered in the ongoing proceedings as the Amendment Law is effective as of June 24, 2020.

(v) On-Site Inspection Process

The Amendment Law also includes an explicit provision that during on-site inspections, the Authority can inspect and make copies of all information and documents in companies' physical records as well as those in electronic space and IT systems, which the Authority already does in practice. This is also confirmed in the Amendment Proposal's preamble as it indicates that the amendment serves "further" clarification on the powers of the Authority which are particularly important for discovering cartels. Based on the Authority's current practice, therefore, this does not constitute a novelty.

(vi) Self-Assessment Procedure

Before the amendment, Law No. 4054 stipulated that the Board may individually exempt certain agreements, concerted practices and decisions of associations of undertakings, which left it somewhat unclear whether "self-assessment" is applicable. The amendments aim to provide legal certainty as to the individual exemption regime by clarifying that the *"self-assessment"* principle applies to agreements (as well as concerted practices and decisions of associations of undertakings) that may potentially restrict competition. The option to apply to the Board for individual exemption is still available.

(vii) Time extension for the Authority's Additional Opinion in Investigations

Prior to the Amendment Law, the Law No. 4054 granted the investigated parties a right to request for a time extension for their second and third written defenses, which are submitted in response to the Authortiy's investigation report (akin to the Statement of Objections of the Commission) and the so-called "additional opinion" respectively. On the Authority's side, it has 6 months to finalize their investigation report but this period can be extended with an additional 6 months by the Board. As regards the additional opinion, the Authority used to have only 15 days to provide this document. The Amendment Law now also includes an option to double the time period for the submission of the Authority's additional opinion. Accordingly, provided that it is justified, the Authority will now have up to 30 days to submit its additional opinion in full-fledged investigations.

(viii) Conclusion

The Amendment Law contains elements that would help with the convergence of the enforcement of Authority with that in

the EU. It is designed to be more compatible with the way the law is actually being applied and aims to further comply with the EU competition law legislation on which it is closely modelled and align with the amendments in the EU competition law. It introduces several new dimensions and changes which promise a procedure that is more efficient in terms of time and resource allocation as well as the amendments serving further clarification on the scope of the Authority's power during on-site inspections.

That said, the new law will no doubt raise a number of question marks over the implementation of the new substantive test for mergers and the new procedures related to anticompetitive conduct proceedings. The Authority's secondary legislation is expected to shed some light on these practical concerns.

Roche's Third Negative Clearance/Exemption Application for Minimizing the Number of Warehouses Rejected: A Competition Law Analysis of the Pharma Sector

The Board recently published its reasoned decision[8] on the application for negative clearance or exemption introduced by Roche Müstahzarları Sanayi A.Ş. ("**Roche**") regarding Roche's intended distribution system, through which Roche will limit to ten or less the number of pharmaceutical warehouses that will be designated to distribute Roche's human medicine to pharmacies and private hospitals ("**Intended Distribution System**").

[8] The Board's decision dated December 12, 2019, and numbered 19-44/732-312.

(i) Roche's Intended Distribution System Candidate to Negative Clearance/Individual Exemption

The Intended Distribution System aims to limit the number of over thirty warehouses Roche is currently working with, to be no less than five but no more than ten. Furthermore, if the Intended Distribution System is implemented, Roche will not work with any other pharmaceutical warehouses other than the ones designated. The Intended Distribution System further includes the following elements:

(i) Limiting the number of pharmaceutical warehouses to be worked with and imposing obligations on the warehouses for maintaining service quality standards;
(ii) Refraining from assigning certain regions or customers to certain pharmaceutical warehouses and within this framework, ensuring that warehouses can enter into sales relationships with pharmacies across Turkey;
(iii) Refraining from imposing restrictions for the sales of rival products (*i.e.*, no non-compete obligation);
(iv) Bringing a minimum order/purchase amount condition for the warehouses so that each order made by the warehouses does not fall under a certain amount;
(v) Ensuring that the warehouses are entirely free to sell products to other warehouses that have not entered into any agreement with Roche, without prejudice to certain legitimate contractual restrictions such as the export ban;
(vi) Requiring warehouses to act in accordance with the price regulations of the Ministry of Health;
(vii) Requiring warehouses to distribute Roche products only within the

country (refraining from conducting export sales);

(viii) Ensuring that the duration of the contracts to be signed with the warehouses does not exceed three years.

Roche planned to consider various factors to choose which pharmaceutical warehouses it will work with in the Intended Distribution System such as sufficiency of facility, adequate distribution practices, prior contractual relationship with Roche, operational and technical competencies, having no overdue debts in their current commercial relations with Roche *etc*. Roche informed the Competition Authority that there will be six warehouses which (i) fulfill the relevant criteria, thus (ii) Roche intends to work initially with at these six warehouses.

As for the relevant market analysis, the Board took into consideration the relevant product markets for pharmaceutical warehousing and pharmaceutical services in its assessments while it ultimately left open the definition of the relevant product market.

The Board found that the Intended Distribution System that aims to limit the number of pharmaceutical warehouses to be no less than five and no more than ten warehouses might (i) hinder the activities of small and middle sized pharmaceutical warehouses in particular; (ii) increase market concentration as (a) small and mid-sized warehouses may exit the market or (b) there might be no new entries. In this regard, the Board concluded that a negative clearance cannot be granted to the Intended Distribution System as it falls under the scope of Article 4 of Law No. 4054.

Accordingly, the Board conducted an assessment on whether the Intended Distribution System fulfills the exemption criteria under Article 5 of Law No. 4054.[9] The Board first assessed the Intended Distribution System in terms of the exemption criterion indicating that "*[the agreement] should not eliminate competition in a significant part of the relevant market*". Main findings of the Board as a result of its exemption analysis were as follows:

(i) Concentration in the pharmaceutical warehouse market is currently high. To that end, the results of practices that will lead small players to leave the market will have more severe effects on competition as compared to a market where concentration level is not high.

(ii) As maximum profit margins are determined by the public authority in this sector, the profit that pharmaceutical warehouses can obtain from sales is limited. Therefore, competition is achieved over factors such as term, discount, and product surplus. There are approximately 25,000 pharmacies in all over Turkey and it is therefore very important for warehouses to provide services to remote parts of the country. To that end, warehouses which distribute medicines to pharmacies carrying out activities in different parts of the

[9] The list of the conditions for an individual exemption set out under Article 5 of Law No. 4054 is as follows:

a. the agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress,
b. it must allow consumers a fair share of the resulting benefit,
c. it should not eliminate competition in a significant part of the relevant market,
d. it should not limit competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b).

country serve the very important function of medicine supply.

(iii) Pharmacies naturally want to fulfill their needs within the shortest time possible and take the proximity and the sales conditions of the warehouses into account in choosing the warehouse they will work with. Accordingly, pharmacies prefer to work with multiple warehouses in practice to fulfill their needs within the shortest time possible and receive the best sales conditions. This shows that small scale warehouses can be alternative to large (national) scale warehouses in places where there are multiple warehouses. Indeed, small scale warehouses may impose easier terms of payment on pharmacies and help pharmacies, with which the large scale warehouses refuse to work as they find it risky, survive in the market. In a market structure where small scale pharmaceutical warehouses are not alternative to national-large scale pharmaceutical warehouses, it will be difficult for some pharmacies to operate and therefore concentration will be higher. As a result, warehouses will be able to determine the sales conditions, thereby disruptions in both cost increase and service delivery for patients may occur.

(iv) Not being able to distribute important drugs would be disadvantageous for warehouses newly entering the market; it may even create barriers to market entry with a deterrent effect.

(v) Therefore, as a result of the Intended Distribution System, the market may remain under the control of certain undertakings for a long time. A small number of warehouses that can distribute all products will be able to apply tying/ loyalty discounts in order to make package purchases more appealing. As such, they will be able to shift the purchases of pharmacies to themselves.

(vi) Considering that warehouses other than those specified would not be able to carry out practices such as tying/loyalty discounts due to non-supplied products, the activities of small scale warehouses may become more difficult.

The Board further stated that, if concentration increases, the warehouses that cannot distribute all products will not be able to subsidize products with low price and frequent distribution, and may request higher distribution prices from producers. However, if the frequency of visits to pharmacies by warehouses decreases, service competition will also be negatively affected.

In conclusion, the Board decided that Roche's practice under the Intended Distribution System is within the scope of Article 4 of Law No. 4054, so negative clearance pursuant to Article 8 of Law No. 4054 cannot be granted. The Board further concluded that an individual exemption cannot be granted either as the conditions set forth under Article 5 of Law No. 4054 are not met.

The decision includes one dissenting opinion of a Board member which states that (i) the decisions made unilaterally by pharmaceutical companies in terms of limiting the number of warehouses they will work with would not give rise to competition law concerns, (ii) consumer welfare cannot be determined through assumptions, (iii) the purpose of Law No. 4054 is not to protect undertakings, but competition, (iv) interventions do not guarantee service quality in terms of pharmacies and consumers, and (v) the

intended practice would not negatively affect the pharmaceutical distribution level of the market.

You again? - Antitrust in Labour Markets: Competition Board's Approach to Wage Fixing and No-Poaching Agreements in Light of the Recent Izmir Container Transporters Decision

The Competition Authority ("**Authority**") conducted a preliminary investigation against container transporters in Izmir to determine whether they have violated Article 4 of Law No. 4054 on Protection of Competition ("**Law No. 4054**") via wage fixing arrangements [10]. The preliminary investigation was initiated *ex officio* in light of the findings during on-site inspections within the scope of a different investigation concerning price fixing arrangement allegations among container transporters ("**Investigation dated 2018-4-036**"). The reasoned decision contains written correspondences, mostly WhatsApp group chats but also e-mails, among the investigated container transporters to fix driver salaries.

Before delving into details of its substantial assessment, the Turkish Competition Board ("**Board**") first analysed competition law infringements on the buyer side. Within this scope, the Board referred to its *Cherry Exporters* [11] decision which emphasized that fixing the purchase price is considered within the same type of agreements such as price fixing and customer allocation; thus, constitutes *per se* infringement. Likewise, the Board also referred to its *Tobacco Leaf* [12] decision which stated that the existence of certain criteria such as: (i) purchasers purchasing the biggest part in the market and total number of buyers, (ii) entry barriers in the purchasing market, (iii) positive supply curve, and (iv) communication between the buyers are necessary for applying buyer power. While the *Tobacco Leaf* decision seemed to provide some sort of effect analysis towards the undertakings creating a monopsony power, it also emphasized that Article 4 of Law No. 4054 could be infringed by object. In addition, the Board also referred to cases on buying cartels in other jurisdictions (the EU [13] and Germany[14]) including cases where buying cartels were fined by the relevant authorities.

The Board moved on to assessing violations related to the labour market and acknowledged that, if a productive employee switches to a rival firm in the industry, a considerable loss will occur to the employer [15]. In this regard, both the transfer of qualified personnel (particularly in innovative markets) as well as unqualified personnel (when the markets are short of employees) could create such considerable loss. The Board also noted that labour is one of the most significant cost items affecting way of conduct and market power of undertakings. Therefore, undertakings would benefit from reducing the employee mobility and suppressing wages.

[10] The Board's decision dated 02.01.2020 and numbered 20-01/3-2.
[11] The Board's decision dated 24.07.2007 and numbered 07-06/713-245.
[12] The Board's decision dated 19.09.2002 and numbered 02-56/699-283.
[13] Case No COMP/AT.40018 (8.2.2017) – Car battery recycling
[14] https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/21_11_2019_Bussgeld_Stahl.html
[15] SHY, O. & STENBACKA, R. (2019) "*Anti-poaching agreements in labour markets*" Economic Inquiry, Vol. 57, No. 1, p.243-263.

Accordingly, undertakings might enter into wage fixing arrangements or no-poaching agreements[16] to eliminate competition in the labour market, since usually employees are "poached" by rival undertakings who offer higher wages (which is the most significant competitive factor in labour markets). Through anti-competitive agreements in the labour market employers might gain monopsony power which they could not have gained otherwise. Such behaviour is prohibited by Article 4 of Law No. 4054 as much as any in other product or services markets, as clarified by the Board from a theory of harm perspective. On the other hand, with the monopsony power, they can also reduce wages without sustaining significant loss of employees. While disputable, undertakings may pass on the welfare that could increase due to reduced wages to consumers. However, by referring to its recent *BFIT* [17] decision, the Board emphasized that the focus in such agreements should be on the direct restrictions in the input market, *i.e.*, the labour market, rather than the indirect possible effects in the output market (*i.e.*, on the consumers). Moreover, as confirmed by the Board, there are opposing views in the literature which would argue that the consumer welfare may as well decrease due to price fixing and no-poaching agreements. [18] Accordingly, when labour is reduced due to wage suppression, this might lead to decrease in production, thus, decrease in input and because of the reduced input, prices might increase which would ultimately result in loss of consumer welfare.[19] At this point, the Board also noted that the market's monopsony structure might prevent distribution efficiency similar to a monopoly.[20]

The Board further explained that wage fixing or no-poaching agreements can restrict competition by effect or by object and emphasized that they are no different from buying cartels. Likewise, it also confirmed that no-poaching agreements have no fundamental difference from customer or market allocation with the exception that the former is on the seller side and the latter on the buyer side as has also been confirmed in the literature[21].

After providing detailed insight on the approach concerning the labour market (including no-poaching and wage fixing agreements) in the US[22] and the EU[23], the

[16] Other typical forms of relevant anticompetitive practices among competitors in labour markets include fixing working conditions or exchanging sensitive information which are also referred to by the Board via the OECD paper "*Competition Concerns in Labour Markets – Background Note*" (2019), p.19-21.

[17] The Board's decision dated 07.02.2019 and numbered 19-06/64-27.

[18] MARINESCU, I. & HOVENKAMP, H. (2018) "*Anticompetitive Mergers in Labor Markets*" Institute For Law And Economics, Research Paper No. 18-8, p.39.

[19] HOVENKAMP, H. (2019) "*Competition Policy for Labour Markets*" U of Penn, Inst for Law & Econ Research Paper No. 19-29, p.2-3; NAIDU, S., POSNER, E. & WEYL, E. G. (2018) "*Antitrust Remedies for Labor Market Power*", 132 HARV. L. REV. 536.

[20] OECD (2019), "*Competition Concerns in Labour Markets – Background Note*", p.10.

[21] "*In re: Railway Industry Employee No-Poach Antitrust Litigation*", Civil No. 2:18-MC-00798-JFC, MDL No. 2850 (https://www.justice.gov/atr/case-document/file/1131056/download); United States v. eBay, Inc., 968 F.Supp.2d 1030 (N.D. Cal. 2013); TALADAY, J. M & MEHTA, V. (2017), "*Criminalization of wage-fixing and no-poaching agreements*" CPI's North America Column, p.1-2; Phillip E. Areeda and Herbert Hovenkamp (2019), Antitrust Law - An Analysis of Antitrust Principles and Their Application, Wolters Kluwer.

[22] *United States v. Knorr-Bremse AG and Westinghouse Air Brake Technologies Corporation*, No. 1:18-cv-00747 (03.04.2018)

[23] Décision no 16-D-20 du 29.09.2016 French Competition Council; Competition and Markets Authority, Case CE/9859-14, "Conduct in the modelling sector" (16.12.2016); Case S/DC/0612/17 Montaje y Mantenimiento Industrial; LJN: BM3366 (Court of Hertogenbosch) HD 200,056,331.

Board continued with its relevant precedents on the subject. Accordingly, the Board first referred to its *TV Series Producers* [24] decision which determined that a wage fixing agreement could be defined as an agreement for fixing purchasing prices and thus might have the object of restricting competition. Second, the Board referred to its *Private Schools*[25] decision which set forth that information on wages were competition sensitive information and thus, exchange of such information might lead to competition law violation. The Board referred again to its recent *BFIT* [26] decision where BFIT imposed non-compete obligation and no-poaching obligation on franchisee and franchisee's employees, and required its approval before a franchisee employed other franchisees', BFIT's or competitors' old/current employees. After considering the Guidelines of the Federal Trade Commission and the US Department of Justice stating that no-poaching or wage fixing are considered *per se* illegal, the Board concluded that the non-compete and no poaching clauses should be subject to modification to comply with the conditions of individual exemption which resulted in limiting the relevant clauses with the agreement period and BFIT providing a clear reasoning when its prior written approval is required.

In light of the above case law, the Board reviewed the information and documents obtained during the preliminary investigation and concluded that the undertakings aimed fixing the wages and preventing the employee mobility. The Board also considered that none of the undertakings objected to the agreement on the employees. On the contrary, they reacted against wage levels and employee transfers to competitors which together pointed to a violation of Law No. 4054.

While wage fixing and no-poaching agreements might lead to interconnected similar results, based on the findings of the case, the Board determined that the mutual understanding among the container transporters seemed to be on fixing wages whereas no-poaching and prevention of mobility was rather a part of the wage fixing agreement or one of the outcomes that are aimed by means of the wage fixing agreement. In any case, the Board stated that wage fixing could be analysed as a competition law infringement in terms of a buying cartel but also from the aspect of their anti-competitive effects in the labour markets as in the abovementioned *BFIT* decision.

The Board also considered whether or not the cooperation among the container transporters has legitimate grounds or is reasonably necessary; and ultimately concluded that the agreement among the container transporters constituted a competition law violation by object. Furthermore, the wage fixing was a clear agreement on the buyer side next to the alleged price fixing agreement subject to the Investigation dated 2018-4-036.

Furthermore, the Board considered that an anti-competitive effect in the input market (the labour market) would also gradually lead to loss of consumers' welfare (in the output market) since the labour supply would be decreased due to wage suppression.

As for the effect in the market, after analysing the information and documents obtained in scope of the preliminary

[24] The Board's decision dated 28.07.2005 and numbered 05-49/710-19.
[25] The Board's decision dated 03.03.2011 and numbered 11-12/226-76.
[26] The Board's decision dated 07.02.2019 and numbered 19-06/64-27.

investigation, the Board did not arrive at the conclusion that mobility in the market was restricted. Besides, while the wages of the undertakings were parallel to a certain level; the wage levels were determined based on minimum wages which could be also observed from the wage level graphics prepared based on the date collected from the investigated undertakings. Therefore, the Board determined that the agreement did not create appreciable effect in the market.

Moreover, the Board also determined that the undertakings subject to the preliminary investigation did not cover the biggest part of the market, thus they would not create a significant buyer power. As indicated above, the minimum wage oriented-approach did also contribute to the decrease of the possible effects of the wage fixing agreement. Together with the fact that the scope of relevant geographic market was relatively limited, the Board decided not to initiate a full-fledged investigation; but instead, referred to Article 9(3) of Law No. 4054 pursuant to which the Board may issue an opinion letter to undertakings to terminate the infringement in cases where it is possible to fully shed light on the case during the preliminary investigation phase, and (i) the violation is so minor that initiating an investigation is not required, and/or (ii) it is also possible to eliminate entirely the effects of the violation and compensate the anti-competitive effects of the violation or (iii) the violation is made in markets which are not completely open to competition due to structural and legal barriers.[27] On this basis, the Board decided to issue an opinion letter to each of the undertakings subject to the preliminary investigation to terminate their behaviours that could be an anti-competitive agreement as per Article 4 of Law No. 4054; which also indicates that the Board could initiate proceedings within the framework of Law No. 4054 if the undertakings act against the Board's opinion letter.

Nonetheless, the decision of the Board was rendered by a large majority. According to three Board members' dissenting view, there is a wage fixing agreement between the container transporters that violated competition law by object. Thus, the infringement determined in the preliminary investigation should have been included into the Investigation dated 2018-4-036 considering that the wage related violation overlapped with the subject of the Investigation dated 2018-4-036 in terms of purchasing products/services.

Administrative Monetary Fines Imposed on Siemens Healthcare Sağlık A.Ş. due to Hindering and/or Obstructing On-site Inspection

The Board published its reasoned decision[28] through which it decided that Siemens Healthcare Sağlık A.Ş. ("**Siemens Healthcare**") has hindered and obstructed the on-site inspection conducted at its premises on October 2, 2019. The specifics of the case file are provided below.

Within the scope of the preliminary investigation[29], the case handlers of the Competition Authority decided to conduct an on-site inspection, during which they examined the offices and computers of certain employees.

[27] 13th Chamber of Council of State's *Burdur Private Teaching Institutions* decision dated May 30, 2014 and numbered 2010/4818 E., 2014/2197 K.

[28] The Board's decision dated November 7, 2019, and numbered 19-38/581-247.

[29] The preliminary investigation has been initiated based on the Board's decision dated February 7, 2019 and numbered 19-06/55-M

Simultaneously, the case handlers requested to conduct an electronic review based on a keyword-based search and specific time period, which would cover all of Siemens Healthcare employees. When they inquired how the relevant review could be conducted, the information technology supervisors responded that the application utilized within the entity is Microsoft Office 365 ("**O365**") and that the case handlers would have to refer to the global headquarters should they wish to be informed on the methods to conduct the review in question. Siemens Healthcare representatives further added that the respective review could be conducted via the "eDiscovery" feature of the O365 application, and certain permissions to use this feature must be granted at a global level.

Subsequently, the case handlers requested access to the respective feature solely for the purpose of their review covering employees within Turkey. The case handlers made it clear that (i) the review would be limited to "Siemens Healthcare" users and (ii) the undertaking's representatives can be present during the review in order to eliminate any potential legal concerns. However, they were not granted access since the headquarters responded that such review would be translated into an access granted for the entirety of the employees' information within the EU and this may, in turn, give rise to different legal risks in certain other jurisdictions. Thereby, the case handlers were not granted access and therefore could not conduct the e-Discovery review.

Siemens Healthcare also indicated that in order not to give rise to an unlawful conduct in another jurisdiction, should the case handlers provide the relevant person to be reviewed, the date and the search parameters, they would be willing to prepare the relevant information and submit it for the Competition Authority's review. At that stage, the case handlers reminded their authorities granted by the Law No. 4054, and informed the undertaking's representatives that the on-site inspection cannot be conducted under these circumstances and all of the above would be recorded on the official on-site inspection report.

Successively, the undertaking has submitted a petition to the records of the Competition Authority, indicating that the "immediate" access to the requested database could not be granted at the time of the on-site inspection, since it is not possible to limit the scope of the review solely with the employees in Turkey due to the global informatics infrastructure. Therefore, complying with the relevant request would have resulted in a breach of various safety protocols, contractual obligations, intellectual property matters and last but not least, of the data protection laws in force within the European Union, United States of the America and rest of the world.

In addition, the undertaking added that it is exploring further methods to comply with the Competition Authority's request and submitted certain proposals to grant full review access –limited with the employees in Turkey– to the Competition Authority. Thereon, based on the respective set of solutions, the case handlers conducted another on-site inspection on October 15, 2019 at the undertaking's premises.

In its decision, the Board indicated that the fact that the system has not been altered between the first and second on-site inspections can be corroborated. However, since the "eDiscovery" feature allows the review of the e-mails categorized under "hard delete" up to 30 days before October

2, 2019, the case handlers have found that the review conducted during the second on-site inspect –during which they were granted access to the system– covers a shorter period when compared to the first on-site inspection. Therefore, the Board concluded that it is not possible to consider the data gathered during the two on-site inspections as one and the same. The Board also indicated that during the initial on-site inspection, the representatives of the undertaking also gained access to the keywords typed in by the case handlers, and therefore, the undertaking has had a chance to conduct its own keyword search via the "eDiscovery" feature.

The Board recalled that refraining from hindering and/or obstructing the on-site inspection does not only mean that the investigated undertaking should submit solely the information and documents which it grants access to, within the time frame and manner it sees suitable; but also encompasses the inspection to be conducted at the undertaking's premises on the date, scope and within the units that the Competition Authority considers as necessary.

In light of the foregoing, the Board decided that Siemens Healthcare has indeed hindered and obstructed the on-site inspection and imposed an administrative monetary fine on the undertaking pursuant to Articles 16(1)(d) and 17 of Law No. 4054, which includes (i) the administrative monetary fines at the rate of 0.5% of Siemens Healthcare's 2018 Turkish turnover for hindering the on-site inspection, and (ii) a proportional administrative monetary fine at the rate of 0.05% of Siemens Healthcare's 2018 Turkish turnover; starting from the day following October 2, 2019 on which the relevant conduct is deemed to have taken place, for each day that the violation continued until October 15, 2019, when Siemens Healthcare invited the Authority for another on-site inspection.

Employment Law

Getting the Workplace Ready for the Return to Work

Somewhere in between the deceleration of the COVID-19 outbreak and the prospective second wave, the Turkish government started to loosen the restrictions that were previously introduced in the fight against the COVID-19 pandemic. Likewise, private entities have put the "*easing of restrictions*" on the agenda, which were implemented to prevent the spread of the virus. Currently, businesses are seeking to get their workplaces ready for the return to work again, and naturally, various questions have arisen, in terms of rights and obligations of the employers, as well as the employees. This study is aimed to provide an overall guideline in this regard.

I. Requiring Employees to Return to the Workplace

Nowadays, both employers and employees are seeking to know whether or not employers may require employees to return to the workplace and whether or not employees may reject this request, given the circumstances. In principle, employers can call the employees back to the workplace and employees cannot reject this call.

Nonetheless, under Turkish law, employees have the right to abstain from work in case of severe and imminent danger. Moreover, in Turkey, the current regulations on COVID-19 restrict certain individuals from leaving their domicile; therefore they cannot be required to return to the workplace.

a. Employees right to abstain from work

Under Law No. 6331 on Occupational Health and Safety ("**LoHS**"), employers have an obligation to ensure the safety and health of employees in every aspect related to the work. Employers' obligations pertaining to occupational health and safety are also regulated under Turkish Code of Obligations numbered 6098 ("**TCO**") wherein it is provided that "*the employer shall be responsible for taking all the measures required for ensuring work health and safety in the workplace*". Wording of this article explicitly states that employers should take "*all*" precautions that intelligence, science and technology enable, and should not content themselves with the reasonable precautions.[30]

In this regard and in accordance with the Article 13 of LoHS, the employees who are exposed to severe and imminent danger may resort to the employer or the occupational health and safety committee and request for determination of the situation and implementation of necessary precautions. If the employer/committee accepts this request, the employees have the right to abstain from work until necessary measures are taken. In such case and during abstention, the employees are entitled to payment, and their right arising from applicable laws and their employment agreements are preserved. Furthermore, if severe and imminent danger is unavoidable, the employees have the right to leave the workplace or the hazardous area and go to the pre-determined safe place. In such a case, the rights of employees cannot be restricted. The employees have the right to terminate their employment agreement if necessary precautions are not taken despite their request.

Currently, COVID-19 outbreak can still be regarded as a "*severe and imminent danger*". Therefore, the employees would have the right to request implementation of measures to prevent spread of this disease and abstain from working till their just demand is met. Employers' failure to take necessary measures will constitute a violation of their obligations pertaining to occupational health and safety under from TCO and LoSH and in such case the employees will have the right to terminate their employment agreement.

b. Employees who are subject to curfew

Current regulations on COVID-19 restrict the following individuals from leaving their domicile: (i) individuals over the age of 65; (ii) individuals with chronic illnesses; and (iii) individuals under 20 (*i.e.* born before or on January 1, 2000). Public officers, contracted personnel or employees in public institutions and organizations, those who have a regular job in the private sector and document this with a social security registration document and seasonal agricultural workers are exempt from the latter restriction, unless they were born after January 1, 2002. Even though the government provides occasional exceptions for those subject to curfew, this is limited to leaving their domicile within the walking distance and only for 4-6 hours. Accordingly, employers cannot require the employees who are subject to curfew, to return to work.

[30] Yeşim Tokgöz, *Employers' Liabilities Arisen from the Occupational Health and Safety in Light of the Decisions of the Court of Cassation*, February 2018, <http://www.mondaq.com/turkey/x/682696/Health+Safety/Employers+Liabilities+Arisen+From+The+Occupational+Health+And+Safety+In+Light+Of+The+Decisions+Of+The+Court+Of+Cassation> (Last accessed on June 18, 2020).

II. Occupational Health and Safety Measures amid COVID-19 Pandemic

As indicated above, employers have an overall responsibility to ensure that "*all*" practicable preventive and protective measures are taken to minimize occupational risks. In that sense, the scope of employers' occupational health and safety obligations are very wide. It is important to note that occupational health and safety measures vary depending on, *inter alia*, employers' number of employees, hazard level of the workplace (*which is determined according to employers' NACE codes*) and definition of each job. The assessment herein concerns ordinary office work.

As to health and safety measures to be implemented specifically for COVID-19, various governmental and international organisations, such as the Ministry of Family, Labour and Social Services, Ministry of Health, World Health Organisation and International Labour Organisation, have issued guidelines for getting the workplaces ready for COVID-19. These guidelines should be examined and complied with, to the extent applicable, to ensure compliance with occupational health and safety measures. Accordingly, below is a non-exhaustive list of measures recommended by these organisations.

1. Preparation Team

- There should be a team ready to implement measures against COVID-19. Measures should be implemented by either (i) the occupational health and safety committee (*if exists*) or (ii) by a team consisting of workplace doctor, occupational safety specialist and healthcare personnel, employee's representative and persons who are educated or experienced on first aid (*if there is not an occupational health and safety committee at the workplace*).
- The preparation team should carry out the operations as to the measures against COVID-19; take care of operations regarding workplace hygiene; coordinate internal and external communications; keep the emergency plan up-to-date; ensure communication with the official contact line (*ALO 184 – Coronavirus Consultancy Line*) and the closest hospital affiliated with the Ministry of Health, in case of a suspected circumstance; follow-up the recommendations of the public authorities and information notes published by the Directorate General of Occupational Health and Safety.

2. Emergency Plan and Risk Assessment

Pursuant to Article 11 of LoHS, employers are required to take protective precautions, compose an emergency planning and carry out necessary measures in order to prevent any potential situations posing any kind of risks. Likewise, according to Article 10 of LoHS, employers are required to make or have others make risk assessment in terms of occupational health and safety.

In this regard, employers should, *inter alia*:

- Update emergency plans considering COVID-19 and engage with the emergency plans;
- Communicate to the employees and contractors about the plan and make sure they are aware of what they need to do, or not do, under the plan;
- Update existing health and safety risk assessments (*in light of the need to prevent COVID-19*), systematically assess any risk of infection in workplace settings and to determine any appropriate control measures that

should be implemented; assess the risk of potential for interaction with employees, contractors, customers and visitors at the workplace and contamination of work environment, and implement measures;
- Arrange workplace operations and working organization in a way to prevent risks connected to COVID-19.

3. Prevention of the Spread of the Disease

As well-known, COVID-19 is a highly contagious disease. Taking precautions to prevent the spread of COVID-19 is included in employers' occupational health and safest obligations. Accordingly, employers should, among others:

- Conduct temperature checks with contactless thermometers before starting to work and refer those who have a fever to the workplace doctor (*data protection concerns in case of temperature checks are explained under Section III*);
- Organise work in a way to allow for physical distancing of at least 1.5 meters from other people;
- Place posters/instructions that encourage staying home when sick, promote cough and sneeze etiquette and address the importance of hand hygiene, at the entrance of their workplace and in other workplace areas where they are likely to be seen;
- Encourage the employees to seek medical care if they experience fever, cough and difficulty breathing;
- Provide the employees with separate trash bags for disposable tissues and biological waste, informing the cleaning staff on how to empty the trash without touching the substance inside them;
- Instruct employees to wash their hands with soap and water for at least 20 seconds or clean their hands regularly with an alcohol-based hand sanitizer if soap and water is not available;
- Advise employees to avoid touching their eyes, noses, and mouths;
- Provide adequate cleaning supplies for the employees, placing disinfectants in multiple locations to encourage hand hygiene;
- Take additional measures for employees at the high-risk group; implement remote working for employees at the high-risk group, if possible;
- Inform employees of their possible exposure to COVID-19 in the workplace, in case an employee is confirmed to have COVID-19 infection, while maintaining confidentiality, and get in touch with health institutions;
- Ensure taking precautions through accurate and efficient briefing and considering psychosocial risks, in order to protect the employees' mental health;
- Resort to reliable sources to follow-up with the recent information (such as the Ministry of Health, WHO); inform the employees on recent developments as to COVID-19 outbreak;
- Organise remote occupational health and safety trainings and prioritize matters such as workplace hygiene and order, general hygiene and psychosocial risk factors.

4. Cleaning and Hygiene

As indicated, employers have an overall responsibility to ensure a safe and healthy work environment, and hygiene of a workplace is crucial to that end. In this regard, employees should, *inter alia*;

- Prevent close interaction of employees with each other; prevent common use of the workplace equipment;

- Establish all necessary hygiene conditions and safety measures at workplace; establish workplace hygiene and cleanliness particularly for services frequently and/or jointly used, contacted work areas, vehicles, devices and equipment; make disinfectants available particularly at lavatories, toilets, baths, stair rails, faucets, mess halls, dormitories, elevators etc.; examine vehicles, devices and equipment, and ensure maximum compliance with hygiene rules;
- Disinfect the workplace regularly; routinely clean and disinfect all frequently touched surfaces in the workplace, such as workstations, countertops, computer equipment and doorknobs;
- Maintain good environmental hygiene and good and regular indoor ventilation;
- Raise awareness on hygiene among the employees, such as informing the employees on effective hand washing, covering their noses and mouths with a tissue when coughing or sneezing (or an elbow or shoulder if no tissue is available);
- Restrict workplace visits; cancel non-emergency visits and outsourced services;
- Provide everyone visiting the workplace with easily accessible places where they can wash their hands with soap and water; in case it is not feasible, make available alcohol-based hand sanitizers for their use;
- Ensure hygiene of dining halls; implement measures to decrease the number of employees dining at the same time.

5. Guidance on Personal Protective Equipment ("PPE")

Employers are required to provide PPE as part of their health and safety obligations. Under Turkish labour law, PPE is defined as the equipment that is designed and produced to be worn or held by the persons in order to protect them from one or more health and safety risk. There is no specific definition to determine which equipment is considered as PPE. The scope of PPE varies depending on the specifics of each job.

- As to COVID-19, pursuant to the Ministry of Interior's circular dated April 3, 2020, it is mandatory to wear a mask at places where people are present collectively, including supermarkets, marketplaces, and workplaces where employees work collectively. Furthermore, the Ministry of Health issued guidelines on measures to be implemented at various workplaces (such as offices, malls and banks etc.) and stated that employees/customers/staff of certain workplaces should wear a mask. For instance, pursuant to the Ministry of Health's guideline dated April 9, 2020 titled "*Measures to be Implemented at the Indoor Workplaces/Offices*", employees are required to wear a mask. As per the same guideline, cleaning personnel should use masks and gloves.
- Employers should ensure that employees are using fully closed eye protector or face guard (EN-166), protective clothes (EN-13126), respiratory protective equipment (EN-149/FFP2 or FFP3), anti-valve masks and gloves (EN ISO 374-5 and with virus pictogram), in work environments where there is a risk of contamination or direct contact with persons who bear risk of infection. Masks having "*NR*"

sign –which means "*non-reusable*"– must be provided.
- Occupational health and safety professionals should provide hands-on trainings for efficient and correct use, maintenance and disposal of PPE, as well as waste management as per the Regulation on Controlling Medical Waste; employees' awareness should be expanded on hygiene-related matters.

6. In case there is an employee at the workplace, who is confirmed or suspected to have COVID-19

- Employers should isolate the respective employee from the other employees. The employee should be placed in a pre-determined confined space which would prevent the spread of COVID-19. The employee should be referred by getting in touch with the related health authority of the Ministry of Health. The employee's waste at the workplace should be treated in accordance with the Regulation on Controlling Medical Waste.
- If employee contracts COVID-19 during work, contracting COVID-19 might constitute "work accident". Employers are required to notify the Social Security Institution regarding the work accidents and/or occupational diseases. Employers must make this notification within three business days (i) as of the realisation of accident, or (ii) as of the learning date of the incident from the healthcare servers or workplace doctor.
- Employers have an obligation to ensure a safe and healthy workplace and protect their employees' wellbeing. In order to keep their employees safe and healthy, taking into account the level of contagiousness of COVID-19, employers should notify other employees that a co-worker has tested positive so that they can act to mitigate any potential negative effect in relation to COVID-19. That said, employers should not disclose more information than necessary. If it is necessary to reveal employee's name, the concerned employees should be informed in advance and their dignity and integrity should be protected. Also, the employer may disclose information about an employee to authorities for public health.
- Likewise, employees have an obligation to inform the employer if they contract COVID-19. This is because employees are obliged to abstain from causing any harm to the safety of other employees. Employees are also required to cooperate with the employer as regards to occupational health and safety of the workplace. Therefore, employees must notify their employer if they contract COVID-19, bear a particular risk as to being infected by COVID-19 (such as being returned from abroad in 14 days or being in close communication with someone who turned out to be COVID-19 positive) or demonstrate COVID-19-like symptoms.
- Lastly, if an employee test positive for COVID-19, Infectious Diseases Unit of the Provincial/District Health Directorate should be notified immediately.

7. Meetings, Trainings and Travel

- Employers should avoid face-to-face meetings and trainings; give preference to phone calls, email or virtual meetings; conduct remote trainings;
- If face-to-face meetings/trainings are unavoidable, employers should minimise the number of people attending to the meetings/trainings; provide a room of an adequate size to ensure physical distancing (or hold the

meeting outside); ensure compliance with social distancing and hygiene requirements; avoid the shaking of hands; promote opening windows and doors whenever possible to make sure the venue is well ventilated; pre-order sufficient supplies and materials, including tissues and hand sanitizer for all participants; display dispensers of alcohol-based hand rub prominently around the venue; encourage participants to cover their face with the bend of their elbow or a tissue if they cough or sneeze;

- Employers organising a meeting/event should make sure all participants, caterers, and visitors at the event provide contact details and clearly state that their details will be shared with local public health authorities if any participant becomes ill with a suspected infectious disease (*anyone who does not agree to this condition should be prevented from attending the event or meeting*); retain the names and contact details of all participants for at least one month (*this will help public health authorities trace people who may have been exposed to COVID-19 if one or more participants become ill shortly after the event*);
- If someone at the meeting or event was isolated as a suspected COVID-19 case, the organiser should inform participants. They should be advised to monitor themselves for symptoms for 14 days.
- Travel should be avoided if not essential.

Although the Turkish Government has already started to normalize the daily routine gradually, the effects of COVID-19 continue. So the employers are obliged to make sure that the workplace is safe enough for the employees to call the employee back to work, except the ones who are subjected to curfew such as those having a chronic illness. Even though the criteria of precautions that must be taken by the employers are vague, the most reliable sources to take into consideration could be health and safety guidelines of various governmental and international organizations, such as the Ministry of Health and/or World Health Organization and International Labor Organization. With reference to those, it is advisable that a team for the implementation of the measures against COVID-19 should be kept ready, and also an emergency plan and potential risk assessment should be created, PPEs should be provided, and the overall target should be minimizing the close interaction between the employees and prefer teleconferences or virtual meetings instead, et cetera. Surely the precautions mentioned in this article are non-exhaustive and these may differ according to the characteristics of the work and/or the developments in terms of available precautionary measures during the fight against COVID-19.

Litigation

Proposed Amendments within the Scope of the Forthcoming Second Judicial Reform

The first package of the Judicial Reform Strategy was entered into force with the publication of the Law No. 7188 on the Amendment of the Code of Criminal Procedure and Certain Laws on the Official Gazette on October 24, 2019. Subsequently, the second package of the Judicial Reform Strategy was put on the parliament's agenda with the Legislative Proposal on the Amendment of the Code of Civil Procedure and Certain *Laws* ("**Proposed Law**"). The Proposed Law

embodies amendments that concern various laws and matters, *inter alia*:

- Pursuant to Article 28/1 of the Code of Civil Procedure No. 6100 ("**CCP**"), hearings are public. However, as per Article 28/2 of the CCP, the court may decide to exclude the public from all or part of the trial, *ex officio* or further to a party's request, when public morality and public security necessitates so. Article 2 of the Proposed Law amends Article 28/2 of the CCP by adding "*when relevant persons' best interest that is worth preserving necessitates so*" as a ground for confidentiality. The amendment also makes it possible for any relevant person to request confidentiality in a trial.
- Article 36 of the CCP regulates grounds for recusation. Article 3 of the Proposed Law amends Article 36 by adding the following as grounds for recusation: "*if the judge has acted as a mediator or conciliatory at the dispute*".
- The old version of Article 107 of the CCP enabled the claimant to increase their claims in unquantified debt lawsuits; however, the current version of the article does not stipulate any time limits regarding this demand. Article 7 of the Proposed Law amends the relevant article and provides that judges may grant a peremptory term of 2 weeks to claimants to increase their claims in unquantified debt lawsuits, when it becomes possible to precisely determine the amount or value of the claim.
- Article 11 of the Proposed Law amends Article 125 of the CCP by regulating that, in case the lawsuit is concluded against the plaintiff, the transferor of the subject matter and the transferee will be jointly severally responsible for the court expense.
- Article 12 of the Proposed Law amends Article 127 of the CCP by providing that, in cases where it is very difficult or impossible to prepare the reply petition during the period of two weeks as of service of the lawsuit petition, the defendant who applied to the court can be given an additional period up to one month, "*starting from the end of the original reply period*". Without this amendment, the current text of the article does not specify the starting point of the additional period. Nevertheless, the courts grant this period in practice, starting from the end of the original reply period.
- Article 13 of the Proposed Law redefines the content of the invitation (summon) for the preliminary examination hearing. It adds that, the summon shall include a warning that the parties should complete their evidences within two weeks of peremptory period starting from the receipt, otherwise the parties shall deem as they have desisted from basing their claims on those evidences.
- As per Article 141 of the CCP, the parties may extend their claims and defenses during the preliminary examination hearing, provided that the counterparty openly consents to it. Article 15 of the Proposed Law amends Article 141 of the CCP by stipulating that the parties can amend their claims or defenses only with their replication and duplication petitions and that they will be subject to prohibition of extension of claims and defenses after this stage.
- Pursuant to Article 17 of the Proposed Law, courts have given the authority to decide to hold hearings elsewhere within the provincial boundaries, through sound and video information

system, in case of factual obstacles or security reasons.

- In civil proceedings, the parties may amend their pleadings, either completely or partially, "*until the end of the investigation phase*", in accordance with Article 177 of the CCP. Nevertheless, the exact time, until when the parties may amend their pleadings, and particularly the issue of whether the parties may amend their pleading after a reversal decision by the High Courts is highly debated under Turkish civil procedural law. There are two judgments given by the High Court of Appeal General Assembly of Unification of Judgments, ruling that amendment is not possible after a reversal. However, the debate in legal literature has not been concluded. With a view to end this everlasting debate, Article 19 of the Proposed Law, amends Article 177 of the CPP by adding that, following the reversal of a decision by the High Court of Appeals or the Regional Court, *if the Court of First of Instance carries out investigatory proceedings*, the amendment of the pleading shall be possible until the end of the investigation phase.
- Currently, the parties are not entitled to request a time extension for submitting their objections against an expert report. Article 25 of the Proposed Law amends Article 281 of the CCP by adding that parties may request a time extension to object to expert reports; however, the extension may be given only once and cannot exceed two weeks.
- Article 28 of the Proposed Law amends Article 305 of the CCP by adding that the parties may request from the Court of First of Instance to make a ruling on any issues that were not resolved during the trial of the Court of First Instance within 1 month from service of the decision.
- Articles 30 and 31 of the Proposed Law amend Article 310 and 314 of the CCP by providing that in case the withdrawal, acceptance or settlement of the case elicited after the service of decision, the file will not be sent for the appeal, even if the parties have requested for appeal. Accordingly, the relevant court shall render an additional decision in accordance with the withdrawal, acceptance or settlement.
- Article 35 of the Proposed Law amends Article 341 of the CCP and extends the scope of the appealable decisions. Further to this amendment, preliminary injunction and preliminary attachment decisions rendered in the presence of the opposing party and decisions rendered regarding the objection against such decisions in the absence of the opposing party may be appealed before the regional court.
- As per Article 41 of the Proposed Law, in case the foreign court or arbitral tribunal is competent regarding the case, a preliminary injunction decision should be requested from the Turkish court that is competent within the boundaries of the subject of the preliminary injunction.
- Pursuant to Article 45 of the Proposed Law, in case the preliminary injunction decision is rendered prior to initiating a lawsuit before the competent foreign court or arbitral tribunal, the party requesting injunction should file the lawsuit on merits before these institutions within 1 month as of the date when execution of this decision is requested, otherwise the injunction will be removed ipso facto.
- Article 46 of the Proposed Law amends the Article 398 of the CCP by detailing the proceedings in case obligors fail to

comply with orders regarding the implementation of preliminary injunction decisions or they violate the decision.

- Article 51 of the Proposed Law amends Article 258 of the Enforcement and Bankruptcy Law No. 2004. The current version of the relevant article provides that claimant may appeal the refusal decision of the preliminary injunction. The amended version of the article stipulates that the one the preliminary injunction decision is granted against may also appeal such decision.
- Article 53 of the Proposed Law amends the Cadastral Law No. 3402 with an additional article that provides an appeal opportunity before the regional courts or the Court of Appeals for decisions rendered by the cadastral court or by general courts, for cases based on pre-cadastral cause initiated following the expiration of the 30-day public display and announcement period or for cases regarding the forest cadaster.
- Pursuant to Article 54 of the Proposed Law, the case value threshold for the cases that can be pursued by a single judge stipulated under Article 5 of the Law No. 5235 on Establishment, Duties and Jurisdiction of First Instance Courts and Regional Courts of Appeal has been increased to 500,000.00 Turkish Liras.
- Article 58 of the Proposed Law amends Article 4 of the Turkish Commercial Code No. 6100, by increasing the case value threshold for commercial cases subject to simple proceedings to 500,000.00 Turkish Liras.
- Article 59 of the Proposed Law amends Article 73 of the Law No. 6502 on Consumer Protection by introducing mandatory mediation, which is subject to exceptions, as a condition for disputes within the scope of consumer courts, not arbitral tribunals for consumers.

In conclusion, the Proposed Law, by introducing the foregoing amendments, aims to solve various issues faced in practice. It goes without saying that, if enacted the Proposed Law will bring a level of clarity to many practical issues.

Real Estate Law

Effects of Termination of the Lease Agreements of the Co-Working Areas on the Contracts between the Service Provider and Their Users

I. Introduction

The co-working areas have been very recently exported into the Turkish daily business life as a result of globalization of business, and in consideration of the rising home-office practices around the world. The business models pertaining to the co-working areas, which provide standard office opportunities such as reception, stationery, and secretariat etc. in return of a fee calculated on a daily or even hourly basis, welcome both the employees' expectations by providing them a more social and available-for-networking environment, also enabling employers by lowering the operational costs and responsibilities.

On the other hand, in cases where the co-working area service provider had executed a lease agreement for the co-working area to provide such services, the users of the co-working areas (*i.e.* beneficiary of the relevant services) frequently bear the risk of being affected due to termination of that contractual relationship due to any reason. This article aims to examine the legal actions that can

be taken by the users of co-working areas in the event of termination of the lease agreement, party of which is not the user, due to COVID-19 pandemic, ultimately requiring the user to evacuate of the leased property.

II. Contract Structure of Co-working Areas

The relationship between the landlord, the co-working area service provider and the user of the co-working area ("**User**") has three dimensions; details of which will be explained below:

a. The contract between the co-working area service provider and the landlord

Turkish contractual system has defined several common contract typologies along with *sui generis* contracts, regulations of which are not specified but subject to the general provisions of the Turkish Code of Obligations ("**TCO**") pertaining to the contractual relationships. On the other hand, the standard types of contracts have also been regulated as per the specific characteristics of such relationships in daily life. Among others, lease contracts have been defined as such in Article 299 of TCO: "*The lease agreements are contracts where the lessor leaves something to be used and benefited from by the tenant while the tenant pays an amount of rent*". In addition, Turkish contract law also embraces that neither the title chosen by the parties nor the legal qualification made by them for the contract in hand, has any effect on the determination of the provisions applicable to such contract, as long as it has the characteristics of a particular type of contract.

Accordingly, regardless from the parties' approach or the qualifications of the contract, the legal relationship between the landlord and the co-working area service provider can be regarded as a lease relationship. Such relationship characteristically allows the co-working area service provider to allow a third person to use and to benefit from the lease property, provided that the landlord has given written consent in that regard.

b. The contract between the User and the co-working area service provider

The legal action that can be taken by the User would depend on the legal characteristics of the relationship between the co-working area service provider and the User. Unlike the relationship between the landlord and the co-working area service provider, the contract between the User and the co-working area service provider can arguably lead to different legal relationships. However, in light of the precedents and legal doctrine, it can be said that the contract between the User and the co-working area service provider is classified as a "sublease agreement".

As mentioned before, provision of private offices is a relatively new concept under Turkish law, but the case-law[31] and the literature standpoint suggest that such contracts should be regarded as sublease agreements, considering that the relationship between the co-working area service provider and the landlord has been characterized as a lease agreement and the co-working area service provider subleases the property on the basis of its own lease contract.

Indeed, Turkish lease law allows executing a sublease agreement, provided that the tenant of the main lease agreement has written consent for sublease. As it is commonly acknowledged and

[31] Istanbul 18th Commercial Court of First Instance's decision numbered 2019/238 E., 2019/587 K. and dated June 14, 2019.

implemented, the sublease contracts are a type of lease contract. The High Court of Appeals explicitly states that sublease contracts are subject to terms of "lease contracts". [32] Accordingly, the sublease contracts are actually subject to the same provisions of TCO but with certain exceptions, affecting the termination of the sublease agreement, as explained below.

III. Effects of Termination of the Lease Agreement regarding the Co-working Areas

Although it is debated in literature, the established jurisprudence of the High Court of Appeals sets forth that validity of a sublease contract is contingent on validity of the main lease contract. Accordingly, in case of termination of the main lease contract, the sublease contract will "*automatically*" be deemed as terminated. However, this has been criticized [33] methodologically because under Turkish Law, "any" person can legally execute a lease agreement with respect to any property, since a valid lease agreement does not require a power of disposition or a legal authority to do so. Nonetheless if an individual who executed a lease agreement regarding a property, on which the individual does not have legal authority to have it leased, such individual will bear the responsibility of default and compensation. Therefore, it is argued that the sublease agreement should remain valid even if the main lease agreement is terminated. However, the sub-lessor, *i.e.* the co-working area service provider, should be kept liable due to the failure to execute a lease agreement for a period that would allow fulfillment of the obligations stemming from the sublease agreement (*i.e.* failure to keep the leased property available for use).

Regardless of the theoretical discussions among the scholars, the User is not even required to take further action in this regard, once the main lease agreement between the landlord and the co-working area service provider is terminated, as per the settled practice of High Court of Appeals. This is because the contract will be deemed as "terminated" on the termination date of the main lease agreement between landlord and the co-working area service provider. However, to avoid future conflicts, it is still advisable to send a written notice to the co-working area service provider, pertaining to the termination of the sublease contract, due to termination of the main lease contract between landlord and the co-working area service provider. Also, this notice might be utilized as a way to convey compensation claims as well, scope of which will be explained hereunder.

Consequently, the parties of a sublease contract bear all rights and obligations arising from lease contracts. Accordingly, the co-working area service provider has certain obligations towards the User. These include keeping the leased property available for use, as well as a warranty against defects and quiet enjoyment. Thus failure of co-working area service provider to fulfill its obligations throughout the contract term will constitute a breach of the contract. The User then has the right to claim damages against the co-working area service provider for breaching its contractual obligations.

[32] General Assembly of Civil Chambers of the High Court of Appeals' decision numbered 2001/653 E. 2001/672 K. and dated October 3, 2001.

[33] Ayşe Bengü Sevinç, "Alt Kira ve Kiranın Devri", İstanbul 2010, pg. 14; Gulmammad Safarov, "Yeni Türk Borçlar Kanunu'na Göre Konut Ve Çatılı İş Yeri Kirası", Ankara 2015 p. 232

Indeed, in its case-law[34], the High Court of Appeals establishes that a sub-lessor, who causes a sublease contract to end before its term by terminating the main lease contract, is liable for the damages of the User in that regard. The High Court of Appeals also states that liability for damages will arise regardless of intention to cause damage to the User. On the other hand, it should also be noted that if co-working area service provider is not the party who had the main lease contract terminated; it will not be liable for the User's damages stemming from the termination of the contract.

IV. Termination of the Lease Agreement of the Co-working Area due to COVID-19

The businesses providing co-working areas to their users have also been affected due to COVID-19 pandemic, due to economic difficulties, health concerns and quarantine conditions. Therefore, co-working area service providers may have had to evacuate their facilities. Such business considerations affected their users the most. Accordingly, this article examines the legal outcome of the termination of the main lease agreement, specifically as a result of the COVID-19 outbreak.

As is explained in above section, if co-working area service provider is not the party who terminated the main lease contract, the provider will not be liable for the damages. In other words, the liability of the co-working area service provider due to early termination against the User, whose sublease agreement has directly affected, depends on how the main lease agreement got terminated and whether the co-working area service provider took a part in such termination. The High Court of Appeal, as explained above, requires the sublessor, *i.e.* the co-working area service provider, to cause the termination for imposition of compensation liability. Therefore the liability of the co-working area service provider hinges on the question of whether the termination of the main lease agreement due to the COVID-19 outbreak can be considered as caused by the co-working area service provider.

As it is commonly acknowledged in the current legal literature pertaining to the COVID-19 outbreak, COVID-19 alone does not allow the tenant of the lease agreement terminate the lease agreement; however, it might entitle the tenant to claim the adaptation of the lease agreement. As COVID-19 itself is not sufficient to terminate the lease agreement, if the co-working area service provider were to terminate the lease agreement due to COVID-19, it might be argued that the termination on such basis is caused by the co-working area service provider. Therefore, it can be evaluated that the co-working area service provider, who prefers to terminate the lease agreement due to COVID-19 conditions rather than adapting it, might be kept liable for the damages occurred due to the early termination of the sub-lease agreement.

V. Claimable Damages

As to the damages that the User can claim, the types of damages subject to compensation claims should be noted first.

Positive damages: Positive damage means the difference between the creditor's current assets (*i.e.* assets in consequence of the debtor's non-performance or ill-performance of its obligations) and assets that would have occurred if the debtor has

[34] 6th Civil Chamber of High Court of Appeals' decision numbered 2013/7968 E. 2014/1048 K. and dated January 29, 2014; 6th Civil Chamber of High Court of Appeals' decision numbered 2015/10631 E. 2016/2504 K. and dated March 29, 2016

duly performed its obligations. In other words, positive damage is the damage incurred by the creditor due to the debtor's non-performance or ill-performance of its obligations. Loss of profit is included in the scope of positive damages, along with "actual loss". In this regard, loss of profit refers to, *inter alia*, the loss incurred as a result of the creditor's need for entering into a new contract due to non-performance or ill-performance of the debtor. Moreover, as to lease contracts, the High Court of Appeals states that while calculating the loss of profit, it should be determined how long the lessee might lease another property under the same conditions.

Negative damages: Negative damage refers to the damages incurred by the creditor due to invalidity of a contract, which was believed to have its effects, or non-conclusion of a contract that was believed to be concluded. In other words, negative damage is based on one's reliance to validity/conclusion of a contract. It is the difference between the creditor's current assets (*i.e.* assets in consequence of cancellation of the contract) and assets that would have occurred if the parties had never entered into or negotiated such contract. So, actual loss and loss of profit might occur as negative damage, as well.

As the base of either damage is different, meaning that positive damages occur due to non-performance or ill-performance of a valid contract, whereas negative damages occur due to invalidity/non-conclusion of a contract, positive and negative damages cannot be claimed cumulatively. If there is a valid contract, which is not performed at all or not duly performed, the creditor may claim positive damages. On the other hand, if the contract is invalid or never actually concluded, the creditor may claim negative damages.

In conclusion, the User might be entitled to claim positive damages (*both actual loss and loss of profit*) occurred or will occur due to the breach co-working area service provider of its obligations under the sublease contract. In that sense, the costs for the office move and for registering a new address might be categorized as such "actual losses"; and if the lease amount of the new place that the User will move is higher than the one executed with the co-working area service provider, this can be claimed as an actual loss too.

VI. Conclusion

The co-working areas are a rising trend among white-collars and students because of its advantages, both professionally and socially. Synchronically, the literature and case law follow this new business model and characterize the contracts between the co-working area service provider and Users as a sublease agreement, subject to the lease agreement provisions of TCO; whereas the relationship between the landlord and the co-working area service provider is a typical lease agreement. Moreover the High Court of Appeals precedents establish that the termination of the main lease agreement automatically ends the sub-lease agreement as well.

This study has aimed to evaluate the consequences of the termination of the main lease agreement due to the COVID-19 outbreak and the liability of the co-working area service provider in case of such termination. Accordingly, it might be concluded that the co-working area service provider is liable against the User due to early termination of the sublease agreement, as long as the termination of the main lease agreement caused by the co-working area service provider. Also, as the COVID-19 outbreak is not sufficient to terminate lease agreement *per se*, the

termination due to the COVID-19 outbreak can be considered as such and the co-working area service provider will be liable accordingly. Finally, the User can claim positive damages within the scope of the liability of the co-working area service provider.

Data Protection Law

Protection of Personal Data in the Banking Sector in the light of Recent Developments

I. Turkish Personal Data Protection Board's Decision dated November 26, 2019 with number 2019/352

The Turkish Personal Data Protection Board ("**Board**") published its decision regarding a personal data breach occurred at a bank on the Personal Data Protection Authority's ("**DPA**") website on January 8, 2020. The decision was issued by the Board on November 26, 2019 with number 2019/352 ("**Decision**") upon data breach notification of the bank whose name was not disclosed. Even before the Decision, many data breach notifications[35] made by various banks have been published on DPA's website within the scope of Article 12 of Law No. 6698 on Personal Data Protection ("**DPL**"). These notifications and decisions emphasize on the importance of personal data protection and the technical and administrative measures that should be taken in banking sector; especially taking into account the substantiality and criticality of the personal data processed by banks such as identity, contact, customer operation and financial information.

The data breach subject to the Decision is due to a data leakage within the bank. The Decision states that the employees of the bank forwarded three customers' personal data to their private e-mail addresses, viewed the information of three other customers and withdrew money from a customer's account with forged documents. It was concluded that the employees were instrumental in the fraud for a large amount through unlawful processing personal data of at least six customers. The bank also reported that, as a result of the employees' misconduct, their employment contracts were terminated and criminal complaints were filed for fraud and embezzlement.

In the Decision, the Board stated that the bank already took some technical and administrative measures to prevent data leakage with data loss prevention systems (*i.e.*, if an employee try to send an e-mail including credit card numbers above a certain number outside of the bank, the e-mail is quarantined and cannot be sent). However, as stated in the Decision, the technical and administrative measures taken by the bank could easily be overcome by malicious people and could not prevent forgery and the withdrawal of large amounts without the knowledge and consent of the customers.

Consequently, the Board imposed an administrative fine of 70,000 Turkish Liras

[35] Examples can be accessed from the following: https://www.kvkk.gov.tr/Icerik/6690/Kamuoyu-Duyurusu-Veri-Ihlali-Bildirimi-Turk-Ekonomi-Bankasi-A-S-; https://www.kvkk.gov.tr/Icerik/6580/Kamuoyu-Duyurusu-Veri-Ihlali-Bildirimi-T-Garanti-Bankasi-A-S- ; https://www.kvkk.gov.tr/Icerik/5526/Kamuoyu-Duyurusu-Veri-Ihlali-Bildirimi-Turkiye-Is-Bankasi-A-S- ; https://www.kvkk.gov.tr/Icerik/5516/Kamuoyu-Duyurusu-Veri-Ihlali-Bildirimi-DenizBank-A-S- ; https://www.kvkk.gov.tr/Icerik/5492/Kamuoyu-Duyurusu-Veri-Ihlali-Bildirimi-Turk-Ekonomi-Bankasi-A-S- ; https://www.kvkk.gov.tr/Icerik/5375/Kamuoyu-Duyurusu-Veri-Ihlali-Bildirimi-ING-Bank-A-S- (Last accessed on March 26, 2020)

on the bank due to its failure to take all necessary technical and administrative measures for an appropriate level of security as per Article 12 of DPL and an administrative fine of 30,000 Turkish Liras since the Board was not notified of the data breach within the shortest time.[36]

II. *Amendments to the Banking Law No. 5411*

Since the entry into force of DPL, the published decisions and data breach notifications pointed out the sensitivity that should be shown to personal data of bank customers. Correspondingly, amendments regarding customer secrets were introduced to the Banking Law No. 5411 ("**Banking Law**") with Law No. 7222 published in the Official Gazette on February 25, 2020 and entered into force on the same date.[37] The amendments affect the data processing and transferring activities of banks and impose a stricter data protection regime.

As per the Banking Law, a customer secret consists of all information relating to real persons or legal entities in scope of the banking activities after customer relationship is established. Considering that personal data is defined as all information relating to an identified or identifiable real person under the DPL, customer secret has an extensive definition, including the information pertaining to legal persons. Banking Law regulates that even though the explicit consent of customers is obtained in accordance with the DPL; customer secrets shall neither be disclosed nor transferred to third parties in Turkey or abroad without a request or instruction of customers, unless otherwise regulated in mandatory provisions. Thus, the conditions to disclose and transfer customer secrets have been made stricter. However, with the involvement of the obligation to obtain "request" or "instruction" of customers which are not defined in the Banking Law, there is a possibility of encountering more bureaucratic procedures, which remain unclear.

The Banking Law also states that as a result of its assessment on economic security, the Banking Regulatory and Supervisory Board is authorized to (i) prohibit the disclosure and transfer of customer or bank secrets to any third parties abroad and (ii) render a decision on retention of information systems and their backups in Turkey. The Board is also authorized to determine and limit the scope, method, principles and procedures in relation to the disclosure and transfer of customer secrets. In spite of data localization tendencies in many sectors including banking sector, the relevant amendment might be deemed as challenging since cloud based technologies are increasingly preferred.

Moreover, customer and bank secrets shall only be disclosed and transferred provided that the disclosure and transfer is limited and proportionate to the specified purposes, even if the disclosure and transfer is made based on the exemptions regulated under Banking Law. The relevant provision introduced by Banking Law might be considered in line with the data processing principles set out in Article 4 of the DPL.

In conclusion, the protection of personal data and customer secrets and technical and administrative measures to be taken will apparently remain on the agenda of many banks in the upcoming days with the

[36] *See* https://www.kvkk.gov.tr/Icerik/5362/Veri-Ihlali-Bildirimi (Last accessed on March 26, 2020)
[37] *See* https://www.resmigazete.gov.tr/eskiler/2020/02/20200225-12.htm (Last accessed on March 26, 2020).

data protection regime introduced by the Banking Law.

Internet Law

Access to Wikipedia Reinstated In Turkey[38]

ELIG Gurkaynak Attorneys-at-Law, acting as outside counsel for Wikimedia Foundation, Inc. ("**Wikimedia**"), has secured an affirmative decision from the Turkish Constitutional Court in the matter of a universal access ban on the Wikipedia website (www.wikipedia.org) in Turkey.

The Constitutional Court's decision regarding the claims of violation of freedom of expression due to the access ban on the entire Wikipedia website was issued on December 26, 2019, and published in the Official Gazette on January 15, 2020. The Constitutional Court concluded, by a majority vote, that the access ban of the entire Wikipedia website was unconstitutional.

I. Background of the Case

The Turkish Information Technologies and Communications Authority ("**ICTA**") access banned the entirety of Wikipedia on April 29, 2017, based on the contents of certain articles on state-sponsored terrorism and foreign involvement in the Syrian Civil war, which had been published at two different Wikipedia URL addresses (https://en.wikipedia.org/wiki/State-sponsored_terrorism#Turkey and https://en.wikipedia.org/wiki/Foreign_involvement_in_the_Syrian_Civil_War#Turkey), which were deemed to be of a threatening nature to Turkey's internal and external national security and allegedly disturbing the public order.

The objection filed against the access ban decision was rejected on the grounds that the contents constituted an unjust and groundless attack on the reputation and dignity of the Republic of Turkey on international platforms and within the country, by creating the impression that Turkey was one of the initiators of the civil war in Syria and by implying that Turkey was a country that supported and provided financial assistance and weapons to terrorist organizations.

After the access ban decision became final and binding, Wikimedia, represented by ELIG Gurkaynak Attorneys-at-Law, filed an individual application before the Turkish Constitutional Court on May 9, 2017. The Constitutional Court remained silent on the issue for more than two (2) years. During this period, Wikimedia also filed an individual application before the European Court of Human Rights.

II. Constitutional Court Decision

In the session held on December 26, 2019, the Constitutional Court's General Chamber first evaluated whether there had been interference with the right of freedom of expression, and whether such interference constituted a violation, by assessing the case in terms of legality, legitimacy and necessity, *i.e.*, by evaluating whether the grounds of the interference decision had legal basis, legitimate aims or could be deemed necessary in a democratic society.

In terms of the access ban's legality, the Constitutional Court stated that the legal basis of the interference was only indicated as "Article 8/A of the Law No. 5651" in the ICTA's decision, without further

[38] This article was previously published on Mondaq. (*See* https://www.mondaq.com/turkey/terrorism-homeland-security-defence/885494/access-to-wikipedia-reinstated-in-turkey, published on January 20, 2020) (Last accessed on June 22, 2020).

elaboration. The Constitutional Court also noted that Article 8/A(1) did not include protecting "*the dignity of the government*" among the potential grounds that would allow an access ban, and accordingly, found such interference to be arbitrary.

As for the legitimacy question, the Constitutional Court pointed out that interference could be deemed to have a legitimate aim if its purpose was the protection of values and interests under Article 26 of the Turkish Constitution. However, for the matter at hand, the aim of the decision was hardly discernible, and furthermore, as with the prior discussion of legality, it was not unproblematic. The Constitutional Court further discussed the legitimate aim within the scope of the necessity of a democratic society, and, referring to one of its recent decisions, stated that the ICTA should interfere with contents on the Internet only when it is necessary to protect the public interest by taking prompt action. The Constitutional Court also stated that interfering with the freedom of expression without proper justification and without consideration of the criteria determined by the Constitutional Court, would be considered to constitute a violation of Article 26 of the Constitution, and further declared that none of these criteria (nor the existence of a non-delayable condition) had been duly presented or fulfilled in the subject access ban decision at hand.

The Constitutional Court provided additional analysis on the contents of the Wikipedia articles that had resulted in the access ban decision, and clarified that all of the claims in these articles were based on international news articles, which, again, were all accessible through the Internet. The Constitutional Court noted that the contents included the public statements of well-known politicians, and emphasized that some of the claims had referenced no sources and even those that had been cited were questionable.

The Constitutional Court also observed that Wikimedia writers and editors had made significant changes in the relevant contents and removed the majority of the information that was not verified or corroborated. It further pointed out that the access ban decision not only violated Wikimedia's rights, but also the rights of the Wikipedia users in Turkey.

Consequently, the Constitutional Court determined that (i) the interference of the ICTA had been disproportionate, (ii) Article 26 of the Constitution had been violated, and (iii) the case should be sent to the first-instance court for a retrial, in order to remove the results of the violation of the right of freedom of expression and resolve the case by following the Constitutional Court's decision.

On the other hand, six out of the sixteen judges on the Constitutional Court disagreed with the majority decision, and issued a dissenting opinion which stated that certain things that are published on the Internet might violate personal rights, or cause or abet cyber-bullying, prostitution, child exploitation, fraud, racism and terrorism, and therefore, an access ban on some online content might be considered necessary and appropriate. In their dissenting opinion, the judges argued that since the content in the relevant Wikipedia articles indicated that Turkey was one of the countries which had initiated the civil war in Syria, and suggested that it had helped terrorist organizations and conducted petroleum trade with them, the access ban decision should be considered as necessary in a democratic society.

III. Reinstating Access to Wikipedia in Turkey

The ICTA lifted the access ban on Wikipedia on January 15, 2020, upon the order of the Ankara 1st Criminal Judgeship of Peace, per the Constitutional Court's decision. After more than two and a half years, access to Wikipedia has finally been reinstated in Turkey.

Wikimedia's case before the European Court of Human Rights, which had been initiated in May 2019 regarding this universal access ban in the absence of a decision by the Turkish Constitutional Court at the time, is currently still pending before the Court

Turkey Introduces Centralized Commercial Electronic Communication Management System

The Amendments to the Regulation on Commercial Communications and Commercial Electronic Messages ("**Amendment Regulation**")[39] has been published in the Official Gazette of January 4, 2020 to amend the Regulation on Commercial Communications and Commercial Electronic Messages ("**Regulation**"). The main aim of the Amendment Regulation is to introduce "commercial electronic communication management system" ("**IYS**") which refers to a centralized system that enables obtaining commercial electronic communication (*e.g.* promotional messages) approvals, use of right to reject such communications and managing complaint processes.

[39] *See* https://www.resmigazete.gov.tr/eskiler/2020/01/20200104-2.htm (Last accessed on March 19, 2020).

I. IYS System

According to the Amendment Regulation, the Ministry of Trade authorizes an institution for the establishment of IYS. The authorized institution prepares the technical infrastructure for the following: (i) registration of approval and rejection information on IYS, (ii) obtaining approval through IYS, (iii) the use of right to opt-out, (iv) receiving, reporting and management of commercial electronic communication complaints quickly and effectively and (v) the intermediary service providers' use of IYS. According to publicly available information, the authorized institution appears to be an institution named "Ileti Yonetim Sistemi" (https://iys.org.tr/).

Currently, IYS is available for registration applications of service providers.[40] The applications for registration should be made through the application forms provided on the website of IYS.[41]

II. Registration Requirement

The Amendment Regulation stipulates that real persons and legal entities which are willing to send commercial electronic communications must register with the IYS and that commercial electronic communications cannot be sent to the recipients who do not have consent on IYS. Furthermore, service providers notify the opt-out notifications to IYS within three (3) days. Moreover, the recipients may use their right to reject commercial electronic communications through IYS.

[40] *See* https://iys.org.tr/hizmet-saglayici/basvuru/nasil-yapilir (last accessed on March 19, 2020).
[41] *See* https://iys.org.tr/hizmet-saglayici/basvuru/nasil-yapilir (last accessed on March 19, 2020).

III. Commercial Electronic Communication Approvals

All commercial electronic communication approvals obtained within the scope of the Regulation will be transferred to IYS until June 1, 2020. As of this deadline, IYS notifies the recipients that (i) their approvals are uploaded on IYS, (ii) they have the right to check these approvals until September 1, 2020 and (iii) the approvals will be deemed valid, if recipients do not check these approvals within the specified time period and (iv) recipients may opt-out receiving commercial electronic communications through the IYS. The recipients may check the approvals on IYS until September 1, 2020 and the commercial electronic communications sent as of September 1, 2020 will be considered as approved communications. That said, the Ministry of Trade has the authority to postpone the foregoing deadlines for three (3) months.

Telecommunications Law

The Draft Regulation on Establishment and Management of the Public Mobile Warning System

The Draft Regulation on Establishment and Management of the Public Mobile Warning System ("**Draft Regulation**") has been published on the Information and Communication Technologies Authority's ("**ICTA**") website on January 14, 2020.

The Draft Regulation which is based on certain articles of the Electronic Communications Law No. 5809 ("**ECL**") is mainly about the establishment and management of the systems which provide users to get notifications in certain geographical areas, in cases of disaster and emergency and where there is a threat of public order, national security and national cyber security.

I. The Methods of Sending Notifications

The Draft Regulation provides definitions on certain terms which will be used for these notifications. CMAS ("**Commercial Mobile Alarm System**") is defined as the system which provides users who have a device with the necessary technical specifications in order to receive a notification in case of a disaster; the announcement before the call is defined as the voice record which is played to the subscriber before the call of mobile electronic communication network; CBS ("**Cell Broadcast System**") is defined as the technology which provides all users in a certain area to deliver a text message. With this recent regulation, users who are in certain geographical areas will receive notifications at least through one of these methods or SMS ("**Short Message Service**").

The public mobile warning system will be established with the coordination of ICTA.

II. Liabilities of the Operators

The Draft Regulation defines the term "operator" as the company that provides mobile electronic communication service or provides mobile electronic communication network and operates its infrastructure within the scope of an authorization.

The operators are obligated to establish and operate the technical infrastructure in order to send the notifications through CMAS, CBS, SMS and the announcement before the call, which are sent to them by the public mobile warning system within three months following the Draft Regulation's effective date. The Draft

Regulation also states that these notifications should be send within the scope of this Draft Regulation and within the defined terms and performance criteria; and fully and free of charge.

According to the Draft Regulation, the operators cannot use the CBS capacity and the announcement before the call method for the purposes other than the ones stated in the Draft Regulation. If the SMS capacity which is established for the public warning system is used for commercial purposes, the operator takes measurements to restrict the maximum number of messages to be sent and the number of subscribers in a certain period of time to use the capacity controllably.

III. The Requirements in terms of CMAS

The Draft Regulation states that the notification to be made by CMAS will be made in three (3) categories: (i) state-level announcements, (ii) the warnings regarding life threats and (iii) the announcements of loss or smuggle. These notifications will be automatically sent to all users and the notifications should be at least 160 and up to 360 characters long. The Draft Regulation also states that it is under the users' discretion to receive the notifications under the categories (ii) and (iii); however, rejecting state-level announcement is not allowed. Per the Draft Regulation, voice alert, visual alert, vibration alert etc. methods will be used to facilitate disabled and elderly subscribers to receive notifications.

The operator broadcasts the notifications sent by the authorized user through the CMAS method, to be sent to the users, within one (1) minute, following the completion of all approval processes in the notification approval process.

IV. The Requirements in terms of SMS

Notifications to be made by SMS method within the scope of the public mobile alert system can be made on the basis of the selected geographical region, province, district and area. The Draft Regulation also provides a formula to calculate the time of which the operators are required to send the notifications by SMS.

V. The Requirements in terms of the Announcement before the Call

According to the Draft Regulation, announcement content before the call is uploaded to the public mobile warning system in the format determined by ICTA, by the relevant authorized user. Per the Draft Regulation, the information about how long the recorded announcement will be applied by the operator and the number of consecutive calls of a subscriber to be played within this period are entered into the public mobile warning system by the relevant authorized user. Authorized user is defined as the representative of the institution and organization who is authorized to determine the notifications within the scope of the Draft Regulation.

The Draft Regulation states that the operators should prepare their systems before the call method within one hour after all approval processes in the notification approval process are completed and the content of the announcement should be up to fifteen (15) seconds.

VI. The Requirements in terms of CBS

The operator should broadcast the notifications to be sent by CBS method to the users within one (1) minute, after all approval processes in the notification approval process are completed,

independent of the geographical area notified by the authorized user.

VII. Administrative Sanctions

The Draft Regulation states that if the operator fails to comply with the articles of the regulation, the Regulation of Administrative Sanctions of ICTA will be applied.

VIII. The Enforcement of the Draft Regulation

The Draft Regulation was published on the ICTA's official website for fifteen (15) days on for public consultation of the relevant public institutions and organizations and legal entities. The period to submit the public consultations ended on January 29, 2020. The Draft Regulation has not been published in the Official Gazette and thus, has not entered into force as of the date of this article.

Anti-Dumping Law

Update on Trade Defense Cases in Turkey during the First Half of 2020

The authority to initiate dumping or subsidy examinations, upon complaint or, where necessary, *ex officio*, has been given to the Ministry of Trade ("**Ministry**"). Within the scope of this authority, the Ministry announces its decisions with the communiqués published on the Official Gazette. During the first half of 2020, the Ministry has initiated and completed a number of expiry reviews, anti-dumping investigations, and anti-circumvention investigations, and extended the temporary suspension of the duties against the USA with regard to the imports of unbleached kraft papers.

Below is a summary of of the trade defense cases of the first half of 2020:

- *Communiqué No. 2019/33 dated January 4, 2020 concerning imports of instantaneous gas water heaters originating from the People's Republic of China:*

The Ministry announced its decision upon the completion of the expiry review in relation to the current dumping measures on imports of instantaneous gas water heaters classified under the CN Code 8419.11.00.00.00 originating from People's Republic of China. Accordingly, the Ministry decided to continue to apply the anti-dumping duty at a rate of 59.65% on imports of instantaneous gas water heaters originating from People's Republic of China, with the exception of four companies for which the Ministry decided to apply anti-dumping duties at rates differentiating between 20.12% and 53.41%.

- *Communiqué No. 2019/34 dated January 4, 2020 concerning the imports of unsupported aluminum folios originating from the People's Republic of China:*

The Ministry announced its decision upon the completion of the expiry review in relation to the current dumping measures on imports of products classified as "*rolled and unsupported aluminum leaves and strips with a maximum width of 0.2 millimeters and with no further processing*" under the CN Code 7607.11 and "*others*" under the CN Code 7607.19 originating from People's Republic of China. Accordingly, the Ministry decided to continue to apply the anti-dumping duty at a rate of 22%.

- *Communiqué No. 2019/35 dated January 7, 2020 concerning the imports of pocket gas lighters and plastic gas canisters originating from People's Republic of China:*

The Ministry announced its decision upon the completion of the expiry review in relation to the current dumping measures on imports of the following originated from the People's Republic of China (i) non-refillable pocket gas lighters classified under the CN Code 9613.10.00.00.00, (ii) only refillable pocket gas lighters with plastic casing and electrical ignition system classified under the CN Code 9613.20.00.00.11, (iii) refillable pocket gas lighters (with other ignition systems) classified under the CN Code 9613.20.00.00.19 and (iv) plastic gas canisters (with or without gas) under the CN Code 9613.90.00.00.11 . Accordingly, the Ministry decided to continue to apply the anti-dumping duty of 0.05 USD per unit on imports of (i) non-refillable pocket gas lighters, (ii) only refillable pocket gas lighters with plastic casing and electrical ignition system and (iii) refillable pocket gas lighters (with other ignition systems) originating from the People's Republic of China, and of 0.02 USD per unit on imports of plastic gas canisters (with or without gas) originating from the People's Republic of China.

- *Communiqué No. 2019/36 dated January 4, 2020 concerning imports of laminated parquet originating from Federal Republic of Germany and People's Republic of China:*

The Ministry announced its decision upon the completion of the expiry review in relation to the current dumping measures on imports of laminated parquet classified under the CN Codes 4411.13.90.00.11, 4411.14.90.00.11, 4411.92.90.00.11 and 4411.93.90.00.11 originating from the Federal Republic of Germany and the People's Republic of China. Accordingly, the Ministry decided to continue to apply an anti-dumping duty of (i) 1.05 USD/m^2 on imports originating from Federal Republic of Germany, with the exception of five companies for which the Ministry decided to apply anti-dumping duties differentiating between 0 USD/m^2 and 0.53 USD/m^2, and (ii) 2.40 USD/m^2 on imports originating from People's Republic of China, with the exception of five companies for which the Ministry decided to apply an anti-dumping duty of 1.60 USD/m^2.

- *Communiqué No. 2019/37 dated January 4, 2020 concerning the imports of woven fabrics of synthetic filament yarn (for garments) originating from the People's Republic of China, the Republic of Korea, Malaysia, the Kingdom of Thailand and Chinese Taipei:*

The Ministry initiated an expiry review in relation to the current dumping measures on imports of woven fabrics of synthetic filament yarn (for garments) under the CN Code 5407 originating from People's Republic of China, Republic of Korea, Malaysia, Kingdom of Thailand and Chinese Taipei. The current dumping measures vary between (i) 2.33% and 21.13% for products with a weight of 110g/m^2 and less, and (ii) 7.76% and 70.44% for products with a weight of more than 110g/m^2.

- *Communiqué No. 2019/38 dated January 4, 2020 concerning the imports of woven fabrics of synthetic filament yarn (for garments) originating from Malaysia:*

Currently, as per the Communiqué No. 2013/10, anti-dumping duties are imposed to the imports of woven fabrics of synthetic filament yarn (for garments) under the CN Code 54.07 originating from Malaysia. The duties imposed are (i) 4.78% for products with a weight of 110g/m^2 and less, and (ii) 15.93% for products with a weight of more than 110g/m^2, with the exception of one company for which the Ministry decided to apply an anti-dumping duty of (i) 2.33% for products with a weight of 110g/m^2 and less, and (ii) 7.76% for products with a weight of more than 110g/m^2. With the Communiqué No. 2019/38 dated January 4, 2020, the Ministry initiated an anti-circumvention investigation regarding the imports of woven fabrics of synthetic filament yarn (for garments) originating from Malaysia.

- *Communiqué No. 2020/2 dated March 20, 2020 concerning the imports of products classified as "other hoeing machines" originating from People's Republic of China:*

Currently, anti-dumping duties are imposed on the imports of products classified as "other hoeing machines" under the CN Code 8432.29.90.00.19 originating from the People's Republic of China as per the Communiqué No. 2015/6 varying between 49.49% and 92.25%. With the Communiqué No. 2020/2 dated March 20, 2020, the Ministry initiated an expiry review regarding the imports of products classified as "*other hoeing machines*" originating from People's Republic of China.

- *Communiqué No. 2020/3 dated March 26, 2020 concerning the imports of knives and cutting blades only in food disposals, mixers and vegetable press under the CN Code 8509.40 originating from People's Republic of China:*

The Ministry initiated an expiry review in relation to the current dumping measures on imports of "*knives and cutting blades only in food disposals, mixers and vegetable press under the CN Code 8509.40*" under the CN Code 8208.30.00.00.00 originating from People's Republic of China.

- *Communiqué No. 2020/4 dated March 20, 2020 concerning the imports of yarns out of synthetic and artificial discontinuous fiber (staple fiber yarn) originating from the Kingdom of Cambodia:*

Currently, anti-dumping duties are imposed on the imports of products classified as "*yarns out of synthetic and artificial discontinuous fiber (staple fiber yarn)*" under the CN Codes 55.08, 55.09, 55.10, 55.11 (excluding the CN Codes 5509.52, 5509.61, 5509.91 and 5510.20) originating from the People's Republic of China, Indonesia, India, Malaysia, Pakistan, the Kingdom of Thailand and Vietnam as per the Communiqués No. 2015/8 and 2014/2. The expiry review initiated by the Ministry is still ongoing. After the completion of anti-circumvention investigations, the Ministry decided to include the Chinese Taipei and Bangladesh (see Communiqués No. 2016/22 and 2018/38 respectively). With the Communiqué No. 2020/4 dated March 20, 2020, the Ministry initiated an anti-circumvention investigation regarding the imports of "*yarns out of synthetic and artificial discontinuous fiber (staple fiber yarn)*" originating from Cambodia.

- *Communiqué No. 2020/5 dated March 6, 2020 concerning the imports of unbleached kraft papers originating from the United States of America:*

Currently, anti-dumping duties are imposed on the imports of unbleached kraft papers classified under the CN Codes 4804.11.11.10.00, 4804.11.15.10.00, 4804.11.90.10.11 and 4804.11.90.10.12 originating from the United States of America as per the Communiqué No. 2015/28 and the Communiqué No. 2017/1. With the Communiqué No. 2019/19 dated June 7, 2019, the Ministry had announced its decision regarding the temporary suspension of the definitive anti-dumping measures imposed on the imports of unbleached kraft papers originating from the United States of America for a period of nine (9) months. With the Communiqué No. 2020/5 dated March 6, 2020, the Ministry announced its decision regarding the extension of the temporary suspension of the definitive anti-dumping measures imposed on the imports of unbleached kraft papers originating from the United States of America for a period of one (1) year as of March 7, 2020.

- *Communiqué No. 2020/6 dated April 8, 2020 concerning the imports of coagula artificial leathers originating from People's Republic of China:*

Currently, anti-dumping duties at 1.9 USD per kg are imposed on the imports of "*coagula artificial leathers*" classified under the CN Codes 5603.14 and 8208.30.00.00.00 originating from the People's Republic of China. The duties were initially imposed by the Communiqué No. 2009/12 and extended for five more years with the Communiqué No. 2015/9 in 2015 after an expiry review. With the Communiqué No. 2020/6 dated April 8, 2020, the Ministry again initiated an expiry review in relation to the current dumping measures.

- *Communiqué No. 2020/7 dated April 14, 2020 concerning the imports of cereal spoon formula originating from Republic of Croatia:*

With the Communiqué No. 2020/7 dated April 14, 2020, the Ministry initiated an anti-dumping investigation regarding the imports of "*baby food with cereals*" classified under the CN Code 1901.10.00.19.00 originating from the Republic of Croatia.

- *Communiqué No. 2020/8 dated May 22, 2020 concerning imports of laminated parquet originating from the Federal Republic of Germany and the People's Republic of China:*

The Ministry announced its decision upon the completion of the expiry review in relation to current dumping measures on imports of yarns out of synthetic and artificial discontinuous fiber (staple fiber yarn) classified under the CN Codes 55.08, 55.09 (except 5509.52, 5509.61 and 5509.91), 55.10 (except 5510.20) and 55.11 originating from the People's Republic of China, the Republic of Indonesia, Malaysia, the Islamic Republic of Pakistan, the Kingdom of Thailand and the Socialist Republic of Vietnam. Accordingly, the Ministry decided to continue to apply an anti-dumping duty of (i) 0.80 USD/kg on imports originating from China, with the exception of one company for which the Ministry decided to apply anti-dumping duty of 0.49 USD/kg; (ii) 0.39 USD/kg on imports originating from India, with the exception of one company for which the Ministry decided to apply anti-dumping duty of 0.29 USD/kg; (iii) 0.40 USD/kg on imports originating from Indonesia, with the exception of

twelve companies for which the Ministry decided to apply anti-dumping duties differentiating between 0.23 USD/kg and 0.25 USD/kg; (iv) at a rate of 18.32% on imports originating from Malaysia, with the exception of two companies for which the Ministry decided to apply anti-dumping duties at rates differentiating between 11.26% and 17.03%; (v) at a rate of 12.18% on imports originating from Pakistan, with the exception of three companies for which the Ministry decided to apply anti-dumping duties at rates differentiating between 6.62% and 10.02%; (vi) at a rate of 20.24% on imports originating from Thailand, with the exception of two companies for which the Ministry decided to apply anti-dumping duties at rates differentiating between 7.79% and 14.02%; and (vi) at a rate of 26.25% on imports originating from Vietnam, with the exception of ten companies for which the Ministry decided to apply anti-dumping duties at rates differentiating between 19.48% and 23.91%.

- *Communiqué No. 2020/9 dated May 22, 2020 concerning imports of synthetic or artificial discontinuous fiber (staple fiber yarn) originating from the Republic of Indonesia:*

The Ministry announced its decision upon the completion of the anti-dumping investigation regarding the imports of synthetic or artificial discontinuous fiber (staple fiber yarn) classified under the CN Codes 55.08, 55.09 (except 5509.52, 5509.61 and 5509.91), 55.10 (except 5510.20) and 55.11 from two companies located in the Indonesia. Accordingly, the Ministry decided to apply anti-dumping duties to one company at a rate of 3.62% and the other at a rate of 5.03%.

White Collar Irregularities

Statement by the OECD Working Group on Bribery

Gradually leaving off the disruption in global health behind, worldwide, individuals and firms are getting ready to contemplate how to cope with the emerging economic fragility post COVID-19. Even though the economic recession tied to COVID-19 outbreak has not yet matured, as most businesses slowly begin to ramp up their operations, forecasts about economic cessations will become clearer; thus, paving the way to improved and responsive regulations for protection of the environments that are ripe for corruption.

Organization for Economic Cooperation and Development ("**OECD**") has issued a general statement[42] calling on all countries around the globe to respect the rule of law, ensure integrity in public procurement, transparency, the effective protection of whistleblowers, and press freedom to fight all forms of corruption under the Anti-Bribery Convention on April 22, 2020 ("**Statement**").

The OECD Anti-Bribery Convention [43] ("**Convention**") has been in force since 1997 focusing on combatting political and corporate corruption by imposing sanctions and preventive measures against acts of bribery in international business transactions of the member countries. As one of the 44 member countries of OECD who have ratified and agreed to be bound by the Convention, Turkey is also required to implement laws and regulations that

[42] *See* https://www.oecd.org/corruption/the-global-response-to-the-coronavirus-pandemic-must-not-be-undermined-by-bribery.htm (Last accessed on June 18, 2020).
[43] *See* http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (Last accessed on June 18, 2020).

conform to the Convention, and provide systematic assessment on the efficiency of the regulatory measures enacted to prevent and prosecute bribery.

Given that most countries have different legal systems and structures, the Convention does not mandate that signatory countries use uniform measures to implement its standards. Instead, the Convention seeks a consistency in results. To ensure the effective implementation of the Convention, signatory countries adopted an ongoing monitoring process based on the OECD's peer review principles.[44]

The OECD Working Group on Bribery in International Business Transactions ("**Working Group**") is responsible for monitoring the implementation and enforcement of the Convention as well as addressing critical issues around low level enforcement practices. During the spurt in COVID-19 cases, the Working Group was not able to conduct on-site visits and in-person interviews to monitor how authorities had handled transnational bribery claims. Furthermore, due to the commercial downturn and nature of the crisis calling for urgent attention, the risk for bribery and corruption has increased, requiring this binding Statement be published.

Although in general, public statements issued by the Working Group address a specific country's implementation procedure, this particular Statement serves as the first announcement to be made on a general matter that is binding upon all signatories. This in fact, shows the severity of the matter, as it turns out that many cases of foreign bribery have been detected in the health industry and corporate world during the COVID-19 era.

"*As countries struggle to gather the health and pharmaceutical products needed to fight the COVID-19 epidemic, it is a priority that all actors respect the rule of law and transparency to ensure the most efficient and effective distribution of the products (...)*" OECD Secretary-General Angel Gurría said in the Statement, highlighting the importance of transparency in public procurement, effective protection of whistleblowers and press freedom.

The Statement further urges the member countries to remain actively engaged in anti-corruption efforts, and to collaborate with each other to win over weakened corruptive practices. As highlighted in the Statement, Working Group will examine the possible impact and consequences of the COVID-19 pandemic on foreign bribery, as well as solutions to help countries strengthen their anti-bribery systems whereas governments are expected to not neglect their anti-corruption implementation efforts in this regard.

As economic activities continue, corporate integrity standards and anti-corruption compliance will gain more importance in maintaining an ethically strong culture. Even though most companies have not started operating at full power yet, reporting and detecting misconduct at any stage will be vital for a decent structure.

Healthcare Law

Turkish Medicine and Medical Devices Agency Updates Guidelines for Scientific Meetings and Educational Activities

The Turkish Medicine and Medical Devices Agency ("**Agency**") of the

[44] *See* http://www.oecd.org/berlin/41366005.pdf (Last accessed on June 18, 2020).

Ministry of Health issued an announcement on April 27, 2020 updating the Guidelines for Scientific Meetings and Educational Activities based on the Regulation on the Sale, Advertising and Promotion of Medical Devices ("**Guidelines**").[45] In brief, the Guidelines have been updated to include provisions regarding online meetings and seminars as well. With the announcement of the new Guidelines, the previous guidelines for scientific meetings and educational activities have been repealed.

Accordingly, several provisions along with the current regulations in the Guidelines can be summarized as follows:

- The Guidelines introduce a new term called "*web-based meeting*" which is defined as online seminars, video conferences or meetings that can be observed through the network.

Medical device sales centers must notify the Agency regarding any scientific and educational meetings to be organized or sponsored before and after the meetings.

- Medical device sales centers must complete their pre-meeting notification applications electronically through the Agency's Electronic Application System at least (15) days before the meeting.
- Relevant applications to the Agency must contain information on meeting schedule, website address that the meeting announcement is made, meeting place, the association organizing the meeting, a list of the potential participants, cost items and any other information pertaining to the meeting.
- Agency will reply the electronic applications within ten (10) business days from the receipt date of application. If the Agency does not reply to an electronic application, the application is deemed approved. If there is a deficiency in the application, the Agency must notify the deficiencies to the applicants to be completed electronically within five (5) business days. All changes regarding the participants are reported to the Agency prior to the beginning date of the meeting.
- Medical device sales centers are not obligated to notify the Agency for web-based meetings if they did not supply any technical equipment (devices, equipment, software, etc.) and/or make any value transfers.
- Medical device centers must also make post-meeting notifications to the Agency one (1) month at the latest following the scientific meeting or educational activity.
- Post meeting notifications to the Agency must include a list of participants, cost items and any other information on the events (including information provided to the Agency during the pre-meeting notification). These notifications on web-based meetings will be made in accordance with the rules applicable to educational activities.

[45] The Guidelines can be accessed at https://titck.gov.tr/storage/Archive/2020/announcement/Klavuzmetni_f1bc4536-4bdb-4f0c-ba98-de62c4bbddce.pdf (Last accessed on May 25, 2020).

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.

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