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Preface to the March 2021 Issue

The March 2021 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 outset, the Corporate Law section discusses The Amendments to the Communiqué on Article 376 of the Turkish Commercial Code No. 6102 with regards to possible avenues for companies in financial distress.

The Competition Law section brings forth summaries and analysis on several recent and prominent decisions of the Turkish Competition Board. These include the decisions in which the Board assessed discriminatory behaviors in vertical relationships, the attorney-client privilege with regards to documents obtained in on-site inspections and sanctions in a case of failure to provide requested information. Furthermore, three new decisions of the Turkish Competition Board are discussed in relation to the first utilizations of the recently introduced commitment mechanism in Turkish competition law enforcement.

The Employment Law section sheds light on the repercussions of a refusal to be vaccinated by an employee and the employer's avenues to act in such a case.

The Dispute Resolution section discusses the amended Rules of Arbitration by the International Chamber of Commerce, its aim and potential outcomes.

Finally, the Internet Law section discusses the possible non-compliance scenarios for social network providers as the recent amendments to Law on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts creates the obligation to appoint a representative in Turkey for some social network providers with a capacity to reach more than a million people a day. The section explains the 5-tiered sanction mechanism in case of non-compliance with the obligation, thus shedding light on what to come for social network providers if they do not appoint a local representative.

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

March 2021

Corporate Law

A Guide for Financially Distressed Companies

I. Introduction

Article 376 of the Turkish Commercial Code No. 6102 ("**TCC**") pertains to the loss of capital and insolvency circumstances in joint-stock and limited liability companies, as well as the measures that must be taken to improve their financial distress.

In order to further illustrate the practical implementation of the Article 376 provisions, on September 15, 2018 the Ministry of Trade had introduced the Communiqué on the Procedures and Principles as to the Implementation of Article 376 of the Turkish Commercial Code ("**Communiqué on Article 376**") and eliminated the legal uncertainties to a great extent. On December 26, 2020, the Ministry of Trade introduced a number of amendments and new provisions to the Communiqué on Article 376 ("**Amendments to the Communiqué on Article 376**") and clarified the remaining points of contention.

In this article, we will touch upon relevant rules, procedures and principles stipulated by Article 376 of the TCC and the Communiqué on Article 376, as amended, for ascertaining and improving the financial circumstances of joint-stock and limited liability companies.

II. Loss of At Least Half (1/2) of the Total of Company Share Capital and Legal Reserves (*Article 376/1*):

The Amendments to the Communiqué on Article 376 now defines and clarifies the calculation of this loss as: the amount of loss which is (i) equal to or more than one-half (1/2), and (ii) less than two-thirds (2/3) of the total sum of the share capital and legal reserve amounts. Previously, the Communiqué on Article 376 had not provided any specific definition on this matter and the calculation method was therefore subject to interpretation by the practitioners and the legal doctrine.

As for the obligations that arise in the event of such a case, the board of directors of the company must immediately invite the shareholders to a general assembly meeting to be convened, inform the shareholders on the company`s financial position and provide them with a list of possible recommended remedies to eliminate the financial distress, or at least alleviate it. If there is an upcoming general assembly meeting, this matter must be included in the agenda and discussed by the shareholders during that meeting.

The possible remedies that could be raised by the board are not *numerus clausus*; and thus, may include capital increases in cash or from company`s own resources *(e.g.,* undistributed profits), business solutions such as closing or downsizing certain divisions or branches, selling subsidiaries, adopting new and different marketing strategies, among many others. The general assembly may adopt the board`s recommendations as they are or with changes; or decide to implement wholly different remedies.

III. Loss of At Least Two-Thirds (2/3) of the Total of Company Share Capital and Legal Reserves (*Article 376/2*):

Article 376/2 has also been clarified by way of the Amendments to the Communiqué on Article 376, with respect to the amount of loss which is (i) equal to or (ii) more than two-thirds (2/3) of the

total sum of share capital and legal reserves.

As with the previous loss threshold criteria, in such a case, the board of directors should immediately convene the shareholders for a general assembly meeting and inform them about the financial status of the company. If there is an upcoming general assembly meeting, this matter must be included in the agenda and discussed by the shareholders during the meeting.

Nonetheless, the remedies available to improve the extensive financial distress addressed by Article 376/2 are limited, unlike the wide range of options made available under Article 376/1 where the losses are lower. The general assembly must adopt one of the following resolutions: (i) to decrease the share capital, (ii) to provide additional funds by shareholders to offset the capital loss of the company (*i.e.,* share capital completion), (iii) to increase the share capital, (iv) to decrease and increase the share capital simultaneously or (v) to increase and decrease the share capital simultaneously.

The following rules and principles have also been introduced with regard to the foregoing remedies of Article 376/2:

- **Share capital decrease:** Provided that at least half (1/2) of the sum of share capital and legal reserves is preserved in the equity, the share capital of the company may be reduced down to the minimum statutory amount of TRY 50,000 in joint-stock companies, and TRY 10,000 limited liability companies. Before the recent amendment, the Communiqué on Article 376 had allowed reduction of the share capital to an amount equal to one-third (1/3) of the original share capital.

- **Share capital completion:** Pursuant to the Communiqué on Article 376, the additional funds received from the shareholders to offset the capital deficit are maintained under a separate share capital completion fund account. The Amendments to the Communiqué has further stipulated that these funds are not capital contributions or shareholder loans, but are deemed as forfeited by the shareholders and can only be used to eliminate the loss.

- **Share capital increase:** At least half (1/2) of the total sum of the new share capital and legal reserves must be paid into the company, before the registration of the share capital increase with the trade registry, in order to ensure that such amount is preserved in the equity. Previously, the payment requirement had been limited to one-half (1/2) of the share capital only.

- **Simultaneous share capital decrease and increase:** For the increased part of the share capital, the relevant provisions of the TCC will apply. This means that the Communiqué on Article 376 no longer stipulates a particular payment ratio. Before the amendment, the Communiqué on Article 376 had required that one-fourth (1/4) of the increased part be paid before the share increase was registered with the trade registry.

- **Simultaneous share capital increase and decrease:** Provided that the increased part of the share capital is paid in its entirety, the share capital may be increased at the desired amount and decreased simultaneously; however, at the end of such transaction the equity amount must reach at least half (1/2) of the sum of new share capital and legal reserves. This remedy did not exist under the previous version of the Communiqué on Article 376

and it is a significant novelty for Turkish corporate law practice.

III. Financial Distress (Technical Bankruptcy) (*Article 376/3*):

If there are any indications that the liabilities of a company exceed its assets, the board of directors is obliged to initially prepare an interim balance sheet in order to ascertain whether that is the case. In the event that a company does fall under the circumstances described in Article 376/3, it could choose to implement one of the remedies explained in detail under the Section (II) above to remedy the situation. If the remedies are not implemented and the interim balance sheet does show the company is insolvent (*i.e.,* the assets are not sufficient to meet the creditors' receivables), then the board of directors must file for bankruptcy to the relevant court. Unless the court appointed experts can confirm that the creditors of the company, with total receivables that exceed the amount of the company`s asset deficit, have agreed to defer the recovery of their receivables until after all other creditors have been satisfied, this application will be deemed as notification of bankruptcy.

IV. Other Noteworthy Points

The amendments have also expanded the scope of Provisional Article 1 of the Communiqué on Article 376 pertaining to the temporary exceptions for calculating the financial position of a company. Consequently, until January 1, 2023, the following will not be required to be included in the company financial statements, except as footnotes: (i) all losses arising from currency fluctuations of non-performed debts in foreign currencies, (ii) lease expenses to accrue in 2020 and 2021, (iii) depreciation and amortization, (iv) half of the total personnel expenses.

V. Conclusion

In terms of the hierarchy of norms, although provisions of the Communiqué on Article 376 are widely criticized for going beyond what the law itself stipulates under TCC Article 376, a detailed secondary legislation on such a significant matter was an urgent need for the practitioners and commentators. In this regard, it could be inferred that the Communiqué on Article 376 meets its purpose. In addition, the Amendments to the Communiqué on Article 376 have greatly clarified the remaining question marks in practice, and also taken into consideration the adverse economic effects of COVID-19.

Banking and Finance Law

Changes to the Communiqué on Bank Fees Chargeable to Business Customers

The Central Bank of the Republic of Turkey ("**Central Bank**") amended the Communiqué on the Procedures and Principles Regarding the Bank Fees Chargeable to Business Customers ("**Communiqué**"), which was published in the Official Gazette dated December 31, 2020 and numbered 31351. In this article, we will focus on the changes to the bank fees chargeable to business customers introduced through amendments to the Communiqué.

I. What is New?

The amendment to the Communiqué mirrors the fees that banks can charge their business customers for the transactions made through the Central Bank`s new fund transfer system named Instant and

Continuous Fund Transfer System ("**FAST**"). FAST, which became operational on January 8, 2021, enables banking customers to instantly transfer their funds between accounts at different banks, 24/7 and banks to deliver the transaction results to the parties of the transaction instantly. Thanks to FAST it is now possible to make money transfers outside of the working hours and it enables banking customers to transfer money within seconds as well as receivers to use transferred funds instantly.

"Business customers" subject to this article are defined as "those Turkish residents (except for financial consumers) to whom the banks provide products and services" in the amendment.

After the amendments, the fees applicable to transactions carried out via FAST has become subject to the same rules as the transactions made through the electronic fund transfer system ("**EFT**").

In light of this, the maximum fees, applied to the transactions executed through FAST will be as follows:

For transaction amounts equal to or less than TRY 1,000.-:

- TRY 1 for transactions made through mobile, internet banking services and standing orders;
- TRY 2 for transactions made through ATMs;
- TRY 5 for transactions made through other channels.

For transaction amounts between TRY 1,000.- and TRY 50,000.-:

- TRY 2 for transactions made through mobile, internet banking services and standing orders;
- TRY 5 for transactions made through ATMs;
- TRY 10 for transactions made through other channels.

For transactions with amounts exceeding TRY 50,000.-:

- TRY 25 for transactions made through mobile, internet banking services and standing orders;
- TRY 50 for transactions made through ATMs; and
- TRY 100 for transactions made through other channels.

If the transactions via FAST are performed as "late transactions," as defined in the agreement executed between the bank and its customers *(provided that the transaction is made 90 minutes before the official closing time at the earliest)*, the foregoing maximum fee limits will be increased by 50%. Additionally, if the transactions via FAST are made outside the official business hours of the EFT payment system, the maximum fee limits will again be applied with an increase of 50%.

Lastly, the amendment stipulates that the maximum fees applied to (i) transactions made via the EFT and FAST payment systems, and (ii) banking document and information services, can be increased annually, by up to the annual consumer price index increase rate published by the Turkish Statistical Institute for the previous year. The increased fees are to be announced by the banks on their websites.

II. Conclusion

The Central Bank's new fund transfer system, FAST, has been put into operation very recently, to help Turkish banks to

meet the needs of their clients in the digital age. The introduction of this new service and the fees that the banks will be able to charge are thus reflected the relevant Communiqués.

Capital Markets Law

New Communiqué on Squeeze-Out and Sell-Out Rights in Publicly Held Joint-Stock Companies

The Turkish Capital Markets Board ("**CMB**") previously published the Draft Communiqué on Squeeze-Out and Sell-Out Rights on October 28, 2020 for public consultation and the new Communiqué No. II-27.3 on Squeeze-Out and Sell-Out Rights ("**Communiqué**") entered into force upon its publication on the Official Gazette numbered 31351 and dated December 31, 2020, abolishing the previous communiqué on the same matter. In this article, we will take a deep dive into the significant provisions of the Communiqué.

I. General Overview

The purpose of the Communiqué is to regulate the squeeze-out rights of the controlling shareholder(s) and the sell-out rights of the non-controlling shareholders in publicly held joint-stock companies ("**Company**").

The draft communiqué's most important changes had been the decrease of the squeeze-out and sell-out threshold from 98% to 95%, and the revised method of calculation for the squeeze-out and sell-out prices.

However, the published Communiqué maintained the threshold at 98%, in line with the former (abolished) version despite the reduced threshold proposed under the draft. In light of this, if the direct or indirect voting rights held by a shareholder, or by shareholders acting in concert, reach or exceed 98% of the Company's total voting rights, then squeeze-out and sell-out rights can be exercised.

On the other hand, the acquisition of shares by current shareholders through bonus issues and/or through capital contributions not restricted by pre-emptive rights; transfer of shares under inherited estates, share buybacks, and a freezing of voting rights shall not trigger the squeeze-out and sell-out rights.

In addition, per Article 5/14 of the Communiqué, the controlling shareholders will not be required to submit a mandatory tender offer, if the control of management in the Company is acquired simultaneously with the squeeze-out and sell-out rights being triggered.

II. The Procedure of Exercising Sell-Out and Squeeze Out Rights

Per Article 5/1 of the Communiqué, as soon as the voting rights held by controlling shareholders reach the 98% threshold (or if the controlling shareholder above the threshold acquires additional shares), such event must be disclosed to the public. A share price valuation report must be prepared within one month of disclosure, and a summary shared with the public. The non-controlling shareholders can apply to the Company in writing for the exercise of their sell-out rights within two months of the disclosure of the summary report.

Following the receipt of the sell-out applications, the controlling shareholders must pay the relevant share prices to the Company accounts, which the Company will then transfer to the shareholders who have exercised their sell-out rights, in the

following business day. The share transfer is deemed to be concluded on the day when the Company pays the share prices to the selling shareholders. It is worth mentioning that the Communiqué allows the shareholders to use their sell-out rights through investment institutions.

Under Article 5/6 of the Communiqué, the controlling shareholders requesting to exercise their squeeze-out rights, must apply to the Company within three business days, following the above two-month period for the exercise of sell-out rights. This application must also contain either a bank guarantee letter that covers the total amount for the shares to be squeezed-out, or documents proving that sufficient cash funds have been reserved in a bank account.

After receiving the application, the Company's board of directors must adopt a resolution within five business days, for the cancellation of shares held by non-controlling shareholders, and the issuance of new shares to be delivered to the controlling shareholders. Following the resolution, the board must apply to the CMB within ten business days, for the approval of issuance document. Companies whose shares are traded on the stock exchange must also apply to the stock exchange for deletion of their shares.

The controlling shareholder must transfer the total amount related to the exercise of squeeze-out right, to the accounts of the Company, within three business days after the approval of CMB. The Company must then apply to the trade registry for registration of the approved issuance document and its publication in the trade registry gazette, within three business days after the total price of the squeezed-out shares are paid into the Company accounts. The squeezed-out shares are deemed to be cancelled on the registration date.

In addition, the Company must carry out the necessary procedural steps for: the transfer of the payments to the accounts of the non-controlling shareholders, cancellation of their shares, and transferring the new shares to be issued to the controlling shareholders, once the controlling shareholders pay the total price for the squeeze-out right. These procedures must be undertaken through the Merkezi Kayıt Kuruluşu A.Ş. (the central depository for securities) if the Company's shares are traded in the stock market, or its shares are not traded but dematerialized; and if not, directly with the shareholders.

III. Calculation of Squeeze-Out and Sell-Out Prices

Squeeze-out and sell-out prices must be paid in Turkish lira and in cash. Article 6 of the Communiqué regulates the calculation of squeeze-out and sell-out prices. Unlike the abolished communiqué, Article 6 of the Communiqué stipulates that the calculation method will be same for squeeze-out and sell-out rights. Accordingly:

1. For Companies whose shares are being traded, the price shall be whichever is higher of the following:

(i) For Companies listed on the "Yıldız" Market; the average of the daily corrected weighted average prices for the last month *(six months for Companies listed on other markets and platforms)* before the disclosure of the triggering event of the squeeze-out and sell-out rights to the public and the value calculated in the valuation report; and

(ii) Mandatory tender offer price calculated in accordance with the mandatory tender offer regulations, if acquiring controlling shareholder position results in change of management control simultaneously.

2. For Companies whose shares are not being traded, the price shall be whichever is higher of the following:

(i) The value determined in the valuation report; and

(ii) Mandatory tender offer price calculated in accordance with the mandatory tender offer regulations, if acquiring the controlling shareholder position would also simultaneously result in a change of management control.

IV. Transition Period

As a transition period, the abolished communiqué on squeeze-out and sell-out rights will apply to calculation of the exercise price of the sell-out and squeeze-out rights in cases where the public disclosure required for sell-out and squeeze-out rights had been made before entry into force of the new Communiqué (*i.e.,* December 31, 2020).

V. Conclusion

Due to the recent amendments made to the Capital Markets Law and demands of the market, the CMB published the new secondary legislation on squeeze-out and sell-out rights in publicly held joint-stock companies. Despite the proposed reduced figure in the communiqué draft published by the CMB for public consultation, the official Communiqué did not change the squeeze-out and sell-out threshold and retained it as 98%. Therefore, the most significant novelty of the new Communiqué is the change of calculation method for the squeeze-out and sell-out prices.

Competition Law / Antitrust Law

The Board Keeps Supplier-Dealer Relations Under the Spotlight

The Turkish Competition Board ("**Board**") published its reasoned decision [1] concerning the preliminary investigation initiated upon the complaints received from Samuklar Motorlu Araçlar Madencilik İnş. San. ve Tic. Ltd. Şti.'s (**"Samuklar"**), which had been a dealer for Brisa Bridgestone Sabancı Lastik San. ve Tic. A.Ş. (**"Brisa"**) until 2017, for the sale of automobile tires and other products.

In its application, Samuklar alleged that (i) Brisa engaged in discriminatory behavior against Samuklar by way of applying different discount rates, terms, support on investments, expenses, advertisement and marketing etc., (ii) dealers were only able to make certain discounts in their sales, (iii) only certain dealers determined by Brisa were allowed to make sales to fleet customers, and thus, Brisa prevented other dealers from selling to fleet customers, and (iv) certain tire coating companies sold their tire coating products solely to Brisa and Brisa offers relevant products, as the sole supplier in the market. Samuklar claimed that Brisa abused its dominant position by way of preventing Samuklar from continuing its commercial activities through discriminatory practices in favor of one of its other dealers, Alkam Lojistik Otomotiv San. ve Tic. A.Ş. (**"Alkam"**), by offering different discounts, terms, investment supports, contributions to

[1] The Board's *Brisa* decision dated July 24, 2020 and numbered 20-35/455-202.

expenses, support for advertisement and marketing, etc.

In its assessment on the allegations, the Board first set forth that the mere existence of a vertical agreement between Alkam and Brisa containing more favorable terms compared to Samuklar's agreement with Brisa would not be sufficient to characterize Brisa's conduct as discriminatory under Article 4 of Law No. 4054 on the Protection of Competition (**"Law No. 4054"**), which prohibits anti-competitive agreements between undertakings. It was stated that there should also be a meeting of minds between the undertakings (in this case, Brisa and Alkam) to discriminate against another undertaking (*e.g.*, Samuklar). The Board concluded that there are no findings proving such meeting of minds.

The Board further added that Article 6 of Law No. 4054, which prohibits the abuse of dominant position, would only be violated in case "*different conditions are put forward for the same or equivalent rights or obligations*" with respect to customers with an "*equal status*." To determine whether Samuklar and Alkam had equal status, the Board examined the purchase amounts of Samuklar and Alkam from Brisa, along with the data on other dealers in the same region and concluded that Alkam purchased and paid significantly more than Samuklar. Therefore, the difference between the purchase volumes of dealers is considered by the Board as a factor indicating the absence of equal status between the customers in terms of competition law. In addition, the Board determined that discount rates, premiums and investment support provided by Brisa to dealers differ depending on the purchase volume and the purchase amount. It also underlined that while Alkam operates as a wholesale dealer, Samuklar had been operating as a retail dealer, which is considered by the Board as the underlying reason for Brisa's offering different conditions to Samuklar and Alkam. Accordingly, the Board stated that wholesale dealers purchase larger quantities of products and thus, need more support due to storage and logistics expenses, as well as the relatively higher risks that they face in collection of revenues compared to the retailer dealers. Consequently, the Board held that Samuklar and Alkam do not have an equal status in the eyes of Brisa and noted that even under the assumption that Samuklar and Alkam do have an equal status, there is no evidence proving that Brisa engaged in discriminatory behavior against its dealers and that the Sales Promotion System announced by Brisa annually was applied in a non-discriminatory manner.

The Board also evaluated the allegation that dealers were only allowed to make a certain level of discount, in light of the Communiqué No. 2017/3 on Block Exemption on Vertical Agreements in the Motor Vehicles Sector (**"Communiqué No. 2017/3"**), since the tires constitute "spare parts" for motor vehicles. The Board underlined that dealers should be free to determine their resale prices as per Article 6(a) of Communiqué No. 2017/3 and determining the maximum discount a dealer can apply to recommended prices may indirectly lead to resale price maintenance. That being said, by examining the findings obtained during the preliminary investigation, including Brisa's dealership agreements and price circulars, the Board concluded that Brisa only shares recommended resale prices and does not dictate any discount on its dealers and that there is no evidence to support the presence of direct or indirect resale price maintenance.

As for the allegation that only certain dealers are allowed to make sales to fleet customers, the Board examined Brisa's dealership agreements and the data on dealers' sales to fleet customers, and found no indication of a restriction.

On the other hand, the Board analyzed the allegation concerning Brisa being the sole supplier in coated tires (since certain tire coating companies allegedly sell only to Brisa), in terms of exclusive supply obligations. However, it stated that companies referred by Samuklar in its allegation are dealers which purchase coating products, coating machines and other materials etc. from Brisa and produce coated tires. The Board found that, contrary to the allegations, relevant dealers do not sell any coated tires to Brisa and the only commercial relationship on that front relates to Brisa's supply of coating materials and relevant services to these companies and that Brisa does not purchase or distribute coated tires. Accordingly, the Board concluded that the complainant's allegation does not reflect the reality as to Brisa's activities related to coating and cannot be evaluated within the scope of exclusive supply obligations.

The Board also reviewed whether Brisa is the single supplier for coating materials. In this regard, the Board examined Brisa's franchise agreements with its dealers. The Board held that the clause requiring dealers to purchase coating raw materials only from authorized points is reasonable for maintaining a certain level of standard in the franchise system. The Board also underlined that relevant franchise agreements do not include any restriction on customers and/or regions. Accordingly, the Board found the complainant's allegations are baseless and concluded that Brisa does not have a dominant position in coating materials.

As a result, the Board decided not to initiate a full-fledged investigation against Brisa. The Board's Brisa decision is noteworthy as it reinforces the Board's approach towards analysis of vertical relationships as well as discriminatory behaviors under competition law.

A Recent Assessment of the Board on Attorney-Client Privilege

In its recently published *Çiçeksepeti* decision, [2] the Board assessed whether certain documents collected by the case handlers during the onsite inspection are within the scope of attorney-client privilege principle.

The Board launched a full-fledged investigation against Çiçeksepeti İnternet Hizmetleri A.Ş. (**"Çiçeksepeti"**) on June 4, 2020 (20-27/335-M). Within the scope of the investigation, the case handlers collected certain documents during the onsite inspection they carried out at the premises of Çiçeksepeti. Çiçeksepeti alleged that a three-page document among the acquired correspondence and files fell within the scope of attorney-client privilege. Thus, the document was collected in a sealed envelope in order for the Board to decide on the relevant matter.

The Board referred to its previous decisional practice about the evaluation of attorney-client privilege and stated that first of all it should be determined whether the attorney is in employment of the undertaking (if there is an employment relationship between the undertaking and the attorney, the Board rejects the return of the requested documents). If a document includes correspondence between the undertaking and an independent attorney (who is not an employee of the

[2] The Board's *Çiçeksepeti* decision dated July 2, 2020 and numbered 20-32/405-186.

undertaking), the Board then evaluates whether the document is related to the undertaking's use of its right of defense.

To put its two-staged cumulative approach/test into further context, the Board then referred to its relatively recent decisions on the application of attorney-client privilege principles before examining the merits of the case. To that end, in terms of the first criteria, the Board stated that in its *Huawei* decision, [3] it rejected the request for the return of the document collected during the onsite inspection since the relevant documents concerned a correspondence between the undertaking and its in-house counsel/attorney. The Board decided that the documents fell outside the attorney-client privilege since they did not include correspondence between an undertaking and an independent attorney. With regard to the second criteria, the Board underlined its *Warner Bros* decision, [4] where the sixteen-page document collected during the on-site inspection was indeed correspondence with an independent attorney but as it pre-dated the initiation of the preliminary investigation, such document was not directly related to the exercise of defense rights. Therefore, the Board still resolved that the document would fall outside the attorney-client privilege.

In this respect, the Turkish Competition Authority (**"Authority"**) requested information from Çiçeksepeti on whether the attorney mentioned in the relevant three-page document is an independent attorney. Çiçeksepeti acknowledged that the attorney is an employee of Çiçeksepeti and submitted copies of their employment documents such as the social security declaration and recent payslip. In line with Çiçeksepeti's responses, the Board decided that the document cannot be considered as an independent attorney correspondence, and thus falls outside attorney-client privilege. In this respect, the Board rejected the request for the return of the three-page document collected during the onsite inspection. This is in keeping with the Board`s similar assessments where it decided that documents would not be considered within the scope of the attorney-client privilege principle if there is an employment relationship between the investigated undertaking and the relevant attorney.[5] To that end, this recent decision further bolsters the settled approach of the Board regarding the assessment of the two criteria for the attorney-client privilege.

Trailblazing Cases of the Commitment Mechanism in Turkish Competition Law Regime: The Board's Arslan Nakliyat, Havaş and TSM/OSEM Decisions Lead the Way

Turkish competition law regime recently adopted a new commitment mechanism with the Law No. 7246 Amending the Law on the Protection of Competition ("**Law No. 7246**") that entered into force on June 24, 2020.[6] As per Article 43 of the Law No. 4054, relevant undertakings or associations of undertakings may now offer commitments to eliminate the competition law concerns of the Authority, except for cases of explicit infringements and hard-core restrictions.

[3] The Board's *Huawei* decision dated November 14, 2019 and numbered 19-40/670-288.
[4] The Board's *Warner Bros* decision dated January 17, 2019 and numbered 19-04/36-14.
[5] The Board's *Dow* decision dated December 2, 2015 and numbered 15-42/690-259; The Board's *Sanofi* decision dated April 20, 2009 and numbered 09-16/374-88; The Board's *CNR* decision dated October 13, 2009 and numbered 09-46/1154-290.
[6] The Law No. 7246 entered into force by being published in the Official Gazette dated 24.06.2020 and numbered 31165.

That said, the secondary legislation setting out the procedural details of the newly introduced commitment mechanism has yet to be adopted by the Authority. On November 27, 2020, the Authority published the Draft Communiqué on Commitments Offered during Preliminary Investigations and Investigations on Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance ("**Draft Communiqué**") for public consultation,[7] which sets out the procedural details of the commitment mechanism. Therefore, how the new commitment mechanism would be implemented by the Authority in practice remains to be seen.

This article aims to provide insight as to the recent cases of the Board, where we see the first examples of the commitment mechanism being employed based on the amendment in Law no. 4054, and to delve into the procedural tracks that were followed by the Authority and the relevant undertakings in these trailblazing cases, before the relevant Communiqué is yet officially published.

I. First Commitment Cases in Turkish Competition Board's Decisional Practice

1. Arslan Nakliyat Decision

The first publicly available and reasoned decision of the Authority that delved into the commitment mechanism was *Arslan Nakliyat.*[8] The Board has initiated a full-fledged investigation against the Association of Aegean Container Transporters (the "**Association**"), which Arslan Nakliyat is a member of, in order to determine whether the members of the Association had violated Article 4 of Law No. 4054 by fixing prices and allocating customers within the scope of container transportation activities in the İzmir city center and neighboring districts.

While *Arslan Nakliyat* does not provide a substantive analysis or a detailed insight as regards the merits of the commitment mechanism, it highlights a crucial procedural aspect of the commitment process. In that context, the Board stated that the set of commitments offered by Arslan Nakliyat cannot be accepted due to the fact that the commitment package had been offered to the Board after the investigation period was over. Accordingly, the Board explained that Article 43 of the Law No. 4054 explicitly allows for the Board to assess and accept commitments offered within the "preliminary investigation or investigation period" and as Arslan Nakliyat has submitted its commitment package to the Authority after it has submitted its third written defense (*i.e.*, after the investigation period was over), its commitment package was inadmissible by the Board.

In the absence of a concrete guidance as to the procedural rules to be abided by in commitment applications, guidance provided by Arslan Nakliyat is an invaluable case which highlights the procedural deadline (by the end of the investigation period *i.e.,* before the third written defense is submitted to the Authority).

2. Havaş Decision

In *Havaş* [9] the Board evaluated the commitments offered by Havaalanı Yer Hizmetleri A.Ş. ("**Havaş***"*) within the scope of the investigation conducted

[7] See https://www.rekabet.gov.tr/tr/Guncel/taahhut-tebligi-taslagi-kamuoyu-gorusune-d715c559af30eb11812300505694b4c6 (Last accessed on January 25, 2021)

[8] The Board's *Arslan Nakliyat* decision dated July 28, 2020 and numbered 20-36/485-212.

[9] The Board's *Havaş* decision dated November 5, 2020 and numbered 20-48/655-287.

against Havaş, MNG Havayolları ve Taşımacılık A.Ş. ("**MNG**"), S Sistem Lojistik Hizmetler A.Ş. ("**S Sistem**") and Türk Hava Yolları A.O. ("**Turkish Airlines**") operating in the field of bonded temporary storage or warehouse services at airports. According to the Board's announcement dated November 6, 2020,[10] Havaş's commitment package is the first that was accepted by the Board.

On July 24, 2020, the Board has launched a full-fledged investigation against the relevant undertakings in order to determine whether Article 6 of the Law No. 4054 (prohibiting the abuse of dominance) had been violated or not. On October 7, 2020, Havaş submitted its application for commencing the process for commitment. Following Havaş's application for commitment mechanism, a meeting was scheduled for October 13, 2020 at the premises of the Authority within the scope of the commitment discussions. At this meeting, which was held with the attendance of Havaş representatives and the case handlers, the case handlers conveyed the competition concerns pertaining to the subject matter of the case. Following the meeting, Havaş submitted its commitment package to the Authority on October 19, 2020. The Board granted its decision on November 5, 2020.

In terms of timing, the Authority has performed in a tremendous pace. The case handlers held a discussion meeting within six (6) days following Havaş's application for commitment was submitted to the Authority, and later, reviewed the commitments offered by Havaş and prepared a report (*i.e.*, the information note) regarding their assessments in eight (8) days. Considering that the Board rendered its decision within approximately one month after the commitment application was submitted, and the case handlers' effective use of time, *Havaş* may be considered as a testament to the time and cost efficiency that can be achieved by the commitment mechanism for the Authority and other stakeholders.

In terms of the merits of the case, *Havaş* does not delve into the competition law concerns at stake within the scope of the investigation. However, the Board briefly explains that the transfer fees imposed by bonded temporary storage or warehouse service providers to customers for switching to other service providers (*i.e.,* warehouse switching fees) did restrict the customers' capabilities to switch (*i.e.,* procure from) alternative suppliers. In order to eliminate the competition law concerns stemming from warehouse switching fees, Havaş committed to terminate the fee practice in question and also covenanted not to implement any other fees to the same effect.

As the commitment proposed by Havaş was deemed suitable and sufficient to eliminate the competition law concerns, the Board decided to accept this commitment. In this respect, the Board concluded that the ongoing investigation has been ultimately terminated for Havaş. It is worth noting that the investigation is still on-going for Turkish Airlines, MNG and S Sistem.

3. TSB/OSEM Decision

The Board has launched a full-fledged investigation [11] against Türkiye Sigorta, Reasürans ve Emeklilik Şirketleri Birliği (Turkish Insurance, Reinsurance and

[10] See https://www.rekabet.gov.tr/tr/Guncel/rekabet-hukukunda-yeni-bir-donem-taahhut-5ca6e0b74220eb11812200505694b4c6 (Last accessed on January 25, 2021)

[11] Decision of the Board dated 29.08.2019 and numbered 19-30/453-M.

Pension Companies Association, ("**TSB**") and OSEM Sertifikasyon A.Ş. ("**OSEM**") in order to assess the allegations on whether (i) OSEM restricted competition through its standard setting and certification services for damage repair centers and equivalent parts suppliers, as well as its conduct regarding the purchase of bulk spare parts and (ii) OSEM's damage management system namely, Osem Portal, would make the competitively sensitive information transparent.

According to the Board's announcements dated January 11, 2021[12] and January 12, 2021,[13] the Board's *TSB/OSEM* decision is the second example of the application of the commitment mechanism.

Although the Board did not made the content of the commitments publicly available, the Board indicated that it accepted the commitments offered by TSB and OSEM with respect to upholding principles of equal treatment and transparency, and decided that the ongoing investigation against these two undertakings shall be terminated. It is noteworthy that similarly with *Havaş* decision, the Board has rendered its decision in a short period of time. The Board has evaluated and decided on the commitments in fifteen (15) days after the final submission of the commitments.

III. Conclusion

Until the Draft Communiqué is finalized through public consultation process and enters into force, the Board's *Arslan Nakliyat*, *Havaş* and *TSB/OSEM* decisions may function as concrete examples that may shed light on the application of the commitment mechanism. These cases are now the milestones forming the initial examples of the Board's decisional practice on that front.

Incomplete and Late Responses to Information Request Results in Not One, but Two Separate Sanctions for Third Party

The Competition Board initiated an investigation (with its decisions dated May 7, 2020 and numbered 20-23/299-M and June 18, 2020 and numbered 20-29/378-M) against a number of undertakings operating in the anti-viral face mask industry, based on the allegations concerning excessive price increases for the anti-viral face masks during the COVID-19 outbreak ("**Face Mask Investigation**").

Having analyzed all the information submitted by the investigated parties, as well as the relevant third parties, the Board concluded that there is no need to impose monetary fines to the relevant undertakings and referred the matter to the Ministry of Treasury and Finance and the Unfair Price Assessment Board.[14]

However, the Board's recently published reasoned decisions reveal that the Board imposed an administrative monetary fine to a third party, for failure to provide the requested information in full, within the requisite period of time.

Article 14 of Law No. 4054 provides that the Board may request any information it deems necessary from all public

[12] See https://www.rekabet.gov.tr/tr/Guncel/turkiye-sigorta-reasurans-ve-emeklilik-s-30868ee30d54eb11812700505694b4c6 (Last accessed on January 25, 2021)

[13] See https://www.rekabet.gov.tr/tr/Guncel/taahhut-muessesesi-uygulanmaya-devam-edi-8fee2335a854eb11812700505694b4c6 (Last accessed on January 25, 2021)

[14] See the Board's short decision announcement: https://www.rekabet.gov.tr/Dosya/nihai-karar-aciklamalari-tefhim-duyurulari/maske-nihai-karar-internet-duyurusu-20210105115424831-pdf (accessed on February 1, 2021).

institutions and organizations, undertakings and associations of undertakings while carrying out the duties assigned by this Law. Such authorities, undertakings and associations of undertakings are obliged to provide the requested information within the period to be determined by the Board. Accordingly, in the Face Mask Investigation, the Authority adopted its usual practice and requested information from third parties - including various face-mask manufacturers, importers, and fabric suppliers, as well as public authorities. One of the information requests was directed to Apex Teknik Tekstil ve Sağlık Ürünleri San. Tic. Ltd. Şti. (**"Apex"**), a face-mask and fabric manufacturer.

The Authority initially considered Apex only as a fabric manufacturer and requested Apex to provide information on its sales and customer lists as well as technical information on the fabrics and explanations on recent official and legal developments in the sector in light of the COVID-19 outbreak. The information request was sent electronically and in hard copy. Apex initially responded the information request electronically by noting that although the envelope of the information request was addressed to them, the hard copy letter contained therein did not refer to their entity and consequently, the request was not put into action. Therefore, the Authority reissued the information request (first set of information) to the entity on a later date – on June 3, 2020. In the meantime, within scope of information collated during the investigation, the Authority realized that Apex was also a manufacturer of face masks and therefore requested a separate set of information (second set of information) from the company, on June 17, 2020.

Responses to both sets of information requests were provided by *Apex* but only after the deadlines set by the Authority (on June 23, 2020) despite several reminders by the Authority through e-mail messages or telephone calls. The Authority set two separate deadlines for submission of first set of information and initially, one deadline for submission of the second set of information; however Apex missed the relevant deadlines. As a result, in its first decision, the Authority imposed (i) an administrative monetary fine of 0.1% of Apex's 2019 gross annual income for being late in providing the first set of information related to fabrics, and (ii) a daily administrative monetary fine of 0.05% of Apex's 2019 gross annual income for a period of 12 days for failure to provide the full and complete information within scope of the first and second sets of information requested, on time (Apex I decision).[15] Subsequent to the analysis of the information submitted, the Authority found that the information provided especially in relation to face-mask production activities in response to the second set of information request, was inadequate. The Authority continued to ask for submission of the missing information – which consisted of a breakdown of face-mask production data. On this note, with its request on June 24, 2020, the Authority ordered Apex to provide the full and complete information before the newly set deadline (July 8, 2020) and noted that the entity would face a daily administrative fine for each day of delay over the deadline [16] (Apex II Decision). Indeed, despite extended discussions with Apex and the Authority`s efforts to clarify or explain its requests, Apex refused to provide the relevant information based on

[15] The Board's *Apex I* decision dated July 2, 2020 and numbered 20-32/410-187.
[16] The Board's *Apex II* decision dated July 17, 2020 and numbered 20-34/451-199.

the requested breakdowns and was found to be unwilling to cooperate with the Authority - especially when compared to other players in the market who provided relevant information in the requested/similar format and content.

Accordingly, the Authority imposed a daily administrative monetary fine of 0.05% of Apex's 2019 gross annual income, for a delay period of 30 days, due to its failure to comply (Apex III decision).[17] When setting the duration for the daily fine, the Authority calculated the number of days delayed by counting from the day following the deadline (July 9, 2020) until the date the investigation report of the case handlers was completed (August 7, 2020). Consequent to the completion of the investigation report, the Authority decided that it no longer needed the information and documents requested from Apex and thus, did not decide to wait further until Apex would provide the full and accurate information within scope of the investigation.

Face Mask Investigation ended with a plot twist. Whilst the parties to the investigation did not face any fines, Apex, which was not even a party to the investigation faced not one but two sets of sanctions for merely failing to provide full and accurate information within the requested time.

Apex brought an annulment lawsuit before the 18th Administrative Court of Ankara and requested stay of execution of the Board's Apex III decision. The lawsuit itself is ongoing however Apex's stay of execution request has been dismissed by the 18th Administrative Court of Ankara, [18] and so did their appeal before the 8th Administrative Chamber of Ankara Regional Administrative Court.[19]

We are yet to see how the case will play out in the end. However, the Board has yet again underlined the significance of compliance to competition rules at all fronts – on substantial and procedural grounds – in its Apex decisions.

Lately, an increasing number of undertakings are fined for failing to provide information, timely, [20] or accurately.[21] Currently, the Apex decisions stand out as the most recent examples of the Authority's firm and consistent stance against failure to meet procedural requirements attached to information requests in competition law investigations.

Employment Law

Employee's Refusal to be Vaccinated for COVID-19 and the Employer's Options in terms of Termination of Employment with Just Cause.

As the COVID-19 pandemic continues to spread around the world, we have been witnessing the effects of the pandemic on various areas of law such as real estate law, commercial law, employment law, etc. The launch of COVID-19 vaccines has brought another significant legal issue regarding the right to refuse to be vaccinated. Under this article, the topic of vaccination will be evaluated from the aspect of whether such refusal could allow the employer to terminate employment of

[17] The Board's *Apex III* decision dated August 20, 2020 and numbered 20-38/528-236.
[18] Ankara 18th Administrative Court's Decision dated November 12, 2020, Case No:2020/1695.
[19] 8th Administrative Chamber of Ankara Regional Administrative Court's Decision dated December 10, 2020 numbered 2020/720.
[20] The Board's *Anı* decision dated February 13, 2019 and numbered 19-07/86-36; *DVS Doğalgaz* decision dated June 20, 2019 and numbered 19-22/354-160, *Türk Eczacıları Birliği* decision dated 07.11.2019 and numbered 19-38/582-248; *Çerkezköy Kuyumculuk* decision dated January 2, 2020 and numbered 20-01/1-1.
[21] The Board's *Adiyaman* decision dated July 3, 2017 and numbered 17-20/310-136; *Türk Telekomünikasyon* decision dated 16-15/255-110 and numbered May 3, 2016.

the ones refusing vaccination in accordance with their obligation to preserve the health of other employees in the workplace, as per Occupational Health and Safety Law No. 6331.

In a nutshell, the Occupational Health and Safety Law obligates employers to take all the measures necessary for the safety and health of their employees. This includes providing an environment where employees can work without facing the risk of exposure to a disease.

According to Article 4 of Occupational Health and Safety Law "*the employer shall have a duty to ensure the safety and health of workers in every aspect related to the work. In this respect, the employer shall;*

a) take the measures necessary for the safety and health protection of workers, including prevention of occupational risks and provision of information and training, as well as provision of the necessary organization and means and shall ensure that these measures are adjusted by taking account of changing circumstances, and aim to improve existing situations."

In cases where there is an employee refusing to be vaccinated, one can argue that allowing this employee to remain in the workplace would be a breach of the employer's above obligations. There is however a constitutional aspect to this as well. Indeed, the right to personal integrity, corporeal and spiritual existence of the individual is a constitutionally protected right, and stipulated as such under Article 17 of Constitution of the Republic of Turkey:

"Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence. The corporeal integrity of an individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent. No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity…"

Given that the relevant law, *i.e.,* Public Health Law No. 1593, does not oblige the citizens to have COVID-19 vaccination, forcing the employees to get the vaccine, and terminating employment in case of refusal would be a clear breach of that constitutional right. Surely the employers can still make an argument based on their obligation for the protection of health at the workplace, and more specifically, the health of other employees; but when there is a constitutional right on the other hand, allowing the employees to face consequences (*i.e.,* dismissal) if they were to refuse a vaccination that even the law itself does not deem as obligatory, might be seen as going against the innate approach of labor courts to protect employees. However, even under these circumstances, employers' obligation regarding occupational health and safety will continue, and employers would be held liable to provide a safe working environment to those who refuse to work physically at the workplace due to valid reasons (*e.g.* presence of employees refusing to be vaccinated). Otherwise, such employees' right to live would be violated. We have yet to see how the labor courts would interpret the situation if this ever were to be a dispute.

Dispute Resolution

New 2021 ICC Rules: A Road to Efficiency and Transparency

The International Chamber of Commerce ("**ICC**") formally launched its amended

Rules of Arbitration, 2021 ("**2021 Rules**"), by an online conference on 1 December 2020. It was stated that the main purpose for the changes was to regulate and modernize the long-standing practices of the Council and the Secretariat, and to increase efficiency, flexibility, and transparency. The new version of the rules entered into force on 1 January 2021 and applies to cases to be registered from this date onwards. In this study, changes brought by the 2021 Rules will be further evaluated below, based on the purpose that the amendments are planned to serve.

1. Increasing Efficiency

Articles 7 and 10 of the 2017 ICC rules were amended by the new 2021 Rules, and changes were introduced on the joinder of parties and consolidation of arbitration proceedings. This change shows the willingness and commitment of the ICC to make the rules suitable for disputes involving multiple parties and multiple contracts.

(i) Consolidation: Previously, Article 10 of the 2017 rules was silent about whether consolidation of arbitration proceedings was allowed only in the circumstance where each of the claims in the arbitrations arise from the same arbitration agreement, or if the dispute was arising from different contracts that contain identical arbitration agreements. Now with the amended Article 10(b), the scope of the consolidation is expanded as it permits the consolidation of cases involving different parties but taking its roots from the arbitration agreements. In addition, Article 10(c) of the new rules expands the consolidation scope even further by allowing consolidation where same parties' claims arise from different arbitration agreements if the ICC court finds that those agreements are "compatible" and that the dispute arises in connection with the same legal relationship. Therefore, consolidation will be possible for two or more arbitration proceedings, if the conditions under Article 10(c) are met.

(ii) Joinder: Pursuant to the 2017 Rules, it was a challenging task for the parties to adjoin an additional party after the consolidation of the tribunal. It was necessary for all parties to agree to the joinder if this request was made after the appointment of the tribunal. Now, with the implementation of the new Article 7(5), the tribunal is permitted to decide upon a joinder of additional parties after the appointment of the arbitrator, without obtaining consent of all relevant parties. Certainly, the additional party is still obliged to accept the constitution of the tribunal and agree to the terms of reference, but the consent of the other party is not required. Nevertheless, the ICC Court still has the discretion to consider relevant factors such as possible conflicts of interest, the timing, the *prima facie* jurisdiction of the arbitral tribunal on the joinder, the effect of the joinder on tribunal proceedings, cost and time efficiency. The tribunal will be able to decide on the joinder after considering these relevant circumstances surrounding the arbitral proceedings. It is expected that these amendments will bring flexibility to the proceedings especially with multi-party and complex multi- contract disputes.

(iii) Green and Remote Arbitration: Even before the COVID-19 pandemic there have been talks regarding digitalization of the arbitration procedure due to the very high amounts of paper and ink used during the proceedings. In addition to this environmental issue, with the COVID-19 the ICC was faced to overcome the challenges brought by it such

as social distancing rules. As consequence of these issues, new rules were implemented which provide for greater flexibility by increasing the use of technology. Pursuant to new Article 22(2), the tribunal "shall" have the duty to efficiently manage the proceedings, which gives an increased duty to the tribunal compared to the previous Rules. According to Article 26(1) "*The arbitral tribunal may decide, after consulting the parties, and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication*." Previously, tribunals had the discretion to conduct hearings remotely but with the amendment of Article 26(1), it is now certain that the both type of hearings are deemed to be equivalent and the tribunals do not favor any type of hearing over another. Another amendment is also made regarding the method for submission of documents. Pursuant to Article 3(1) of the 2017 Rules, all petitions, correspondence, and attachments submitted by the parties were to be submitted in one copy for each party, each arbitrator, and the Secretariat. With the 2021 Rules, the statement "in one copy" has been removed from the paragraph and the amended Article 3(1) now provides that all these documents "shall be sent" to all parties, all arbitrators, and the Secretariat, and that the Secretariat shall be copied on communication from the tribunal. Thus, it is envisaged that all these documents will be sent electronically, in a shift away from paper filings.

(iv) New threshold for Expedited Procedure and Emergency Arbitration: The Expedited Procedure was included in the ICC Rules for the first time in 2017. According to the ICC's statistics for 2019, the serial arbitration procedure is an important jurisdiction procedure that has been implemented 146 times by the end of 2019 since it was added to the ICC Arbitration Rules in March 2017. The aim of this procedure was to achieve fast, efficient, and low-cost trials in cases where the claim amount was under USD 2 million. As this procedure was highly successful and popular among the ICC practitioners, the 2021 Rules increased the automatic threshold from USD 2 million to USD 3 million with Article 1(2) of Appendix VI. This newly introduced threshold shall apply to cases with an arbitration agreement date of on or after January 1, 2021, in the same vein with all the other 2021 Rules.

As the threshold for expedited procedure is increased, this will inevitably improve efficiency as the number of cases that reach this threshold would be higher, and therefore a greater number of cases would be solved in a faster and cost-efficient manner.

2. Transparency and Due Process

The 2021 Rules introduce numerous significant new provisions regarding the independence, impartiality, and conflicts of interests of the Arbitral Tribunal.

(i) Disclosure of Third Party Funding: The absence of detailed regulations regarding third-party financing had been an issue that brought criticism to the ICC. The 2021 ICC Rules aimed at making the arbitration proceedings more transparent, by introducing an Article that would put an end to the arguments regarding especially the issue of disclosure of the third party funding. Article 11.7 states that "*in order to assist prospective arbitrators and arbitrators in complying with their duties under Articles 11(2) and*

11(3), each party must promptly inform the Secretariat, the arbitral tribunal and the other parties, of the existence and identity of any non-party which has entered into an arrangement for the funding of claims or defenses and under which it has an economic interest in the outcome of the arbitration." The future will show whether other funding agreements, such as insurance coverage, will also be deemed to fall under this obligation.

(ii) Limiting Changes to Party Representation: Another change that seeks to increase the transparency of the proceedings appears in Article 17. With the first paragraph of this Article, now each party is required to rapidly inform the Secretariat, the tribunal, and other parties of any changes in its representation. Moreover, in the second paragraph it is stated that the tribunal has the authority to "*take any measure necessary to avoid a conflict of interest of an arbitrator arising from a change in party representation, including the exclusion of new party representatives from participating in whole or in part in the arbitral proceedings.*" This change aims to prevent any disruption that may occur in the proceedings by a change of counsel.

(iii) Arbitral Appointments: Another significant change with the 2021 Rules is the new authority granted to the ICC Court in terms of the establishment of the arbitral tribunal, with the Article 12(9). According to this Article, in exceptional cases, the Court will be able to determine all members of the arbitral tribunal, even if a different arbitrator appointment procedure is prescribed in the arbitration agreement, in order to avoid the risk of a party being treated unequally or unfairly, that may affect the validity of the arbitral award. This provision aims to further ensure fairness and equality, and to prevent a challenge that may arise in a later stage in regard of the enforcement of the award. It can be argued that this change may also bring controversy, as it is not clear how the court will use its discretion regarding matter and as it may seem that the court has given a power that may limit the right of the parties to nominate their arbitrator. A further addition was also made to strengthen party equality: According to Article 13(6) where the arbitration agreement arises from an international agreement, the arbitrators cannot be of the same nationality as any of the parties, unless otherwise agreed by the parties.

3. Additional Changes

Numerous other significant amendments were also made, which can be listed as follows.

- The 2021 Rules incorporated a new concept called "Additional Award" concept in the third paragraph of Article 36. According to the article, the parties may submit a request to the Secretariat for an additional award regarding the claims that the arbitral tribunal did not address in the final award, within 30 days from the day they received the notification of the final award. In this context, the definition of "arbitration award" in Article 2 has been expanded to include this new concept of additional decision.

- Amendments to Article 5(1) brought clarity on the time limit given for submission of documents. Article 5(1) states that *"Within 30 days from receipt of the Request from the Secretariat, the respondent shall submit an Answer*".

- New Article 43 confirms that any claims arising out of or in connection with the ICC Court's administration of arbitration shall be governed by French

law and resolved by the Tribunal Judiciaire de Paris.

- According to Article 29(6)(c), emergency arbitration shall not apply if the arbitration is based on an arbitration agreement that under a treaty.

4. Conclusion

The 2021 ICC Rules has reached its aims to achieve transparency and efficiency by introducing numerous new articles and amendments which were stated above. This is not unexpected given the flexibility of arbitration and its continuous evolution over the historical process. Considering the effect of ICC Rules on other institutional arbitration rules, it can be foreseen that similar innovations and approaches may be adapted by other institutional arbitration rules in the future.

Data Protection Law

Recent Decisions of the Turkish Data Protection Board

The Turkish Data Protection Board ("**Board**") has recently published summaries of several important decisions on certain matters of public interest, which may constitute precedents for future cases.

Decision on the Failure to Fulfill the Obligation Regarding Processing of Personal Data 2020/765[22]

The Board recently published a decision summary (2020/765) regarding a bank which failed to follow the instructions given by the Board.

The Board stated in the decision that this bank has not responded the data subject's application within the scope of Article 11 of the Law No. 6698 on Protection of Personal Data ("**Law No. 6698**") within the 30-day period, and that the privacy notice document at the relevant bank's website is not in accordance with the Communiqué on Procedures and Principles on Fulfilling the Obligation to Inform ("**Communique**") published by the Board. Upon the data subject's complaint to the Board, Board requested the Bank to revise its privacy notice document in accordance with the Communique and send its defense statement pertaining to the matter. Following the Bank's statement and documents received from the Bank on the matter, the Board decided that the Board's request for revision of the privacy notice had not been fulfilled.

The Board also noted that the same general privacy notice text was used for the consumer loan applications and credit card applications, that these are not specific to the processing activity of the products in question and stated that the privacy notice documents in question violated Article 5/1/h of the Communiqué due to failure to provide details of the personal data processing terms.

Consequently, the Board decided to impose an administrative fine of TRY 120,000 to the Bank for the violation of Article 15/5 of the Law No 6698.

The Principle Decision Regarding Sending Third Party's Personal Data to Data Subjects Contact Channels[23]

The Board's principle decision [24] of December 22, 2020 with number 2020/966

[22] See https://kvkk.gov.tr/Icerik/6844/2020-765 (Last accessed on February 23, 2021)

[23] See https://kvkk.gov.tr/Icerik/6858/2020-966 (Last accessed on February 23, 2021)

[24] Principle decision which is regulated under Article 15 of the Law No. 6698 is the decision issued by the Board wherein it is determined that the infringement is widespread. Prior to taking the principle decision, the Board may also receive the opinions of the relevant institutions and organizations, if needed.

was published in the Official Gazette on January 15, 2021. This decision is with regard to infringements involving third parties' personal data sent to emails or numbers of other persons, due to the data subject providing wrong contact information to data controllers, which may result in which certain correspondence containing personal data being sent to third parties other than the relevant subjects.

The Board stated that according to Article 4 of the Law No. 6698, personal data must only be processed in accordance with the law and other regulations and must follow the principles set forth under Article 4/2. Among these, the principle of keeping personal data accurate and up-to-date where necessary is an important condition for protecting the fundamental rights and freedoms of the data subjects. Therefore, in order to ensure that personal data are kept accurate and, up-to-date where necessary, the sources from which personal data are obtained must be detectable, accurate, kept open for any updates. In order to ensure these, the data controller must take reasonable measures such as sending confirmation request messages to data subject's phone numbers or e-mail addresses for processing.

The Board also stated that data controllers have the obligation to prevent unlawful accessing or processing of personal data, as per Article 12 of the Law No. 6698. Therefore, data controllers have to take all necessary technical and administrative measures to ensure the appropriate level of security.

Consequently, the Board stated that, data controllers should ensure that they implement any necessary measures to prevent sending documents such as bank statements, invoices etc. containing personal data of third parties, via contact channels such as message texts, e-mail address etc. in accordance with the Article 12/1 of the Law No. 6698.

Decision Regarding the Data Breach Notification of a Company Operating in the Health Sector[25]

The Board recently published a decision summary with number 2020/787 regarding a data breach notification made by a company operating in health sector. In the decision the Board detailed the information and documents shared with the Data Protection Authority ("**DPA**") by the data controller regarding the data breach, the data controller`s data management processes and security measures in place.

Under its data breach notification the data controller submitted the following information on the breach to the DPA:

(i) the start and end date of the breach,

(ii) the reason and the consequences of the breach

(iii) the type of personal data subject to the breach,

(iv) the number of people affected from the breach,

(v) how soon the data subjects will be notified about the breach in question.

The Board's decision also indicated that the data controller's personnel had participated in periodic security trainings and newly joined personnel also received training during their orientation in accordance with the ISO27001 procedures, and that the data controller submitted all the documents pertaining to these trainings along with the data breach notification. The Board further elaborated on the data

[25] See https://kvkk.gov.tr/Icerik/6860/2020-787 (Last accessed on February 23, 2021)

controller's technical and administrative measures before and after the data breach, in detail.

By taking into consideration the documents and information received from the data controller, the Board concluded the following:

(i) The data breach was not caused due to the lack of measures on part of the data controller but due to a commonly used application, and that the data controller would have been unable to intervene in this incident,

(ii) The data controller noticed the violation in a short time,

(iii) Personal data affected by the breach could be easily obtained from sole trader's seal and public sources,

(iv) The data controller stated that it will notify the data subjects affected by the breach within three working days,

(v) The risk of the breach to have negative consequences for the persons concerned was low, and

(vi) The data controller has taken reasonable technical and administrative measures.

Consequently, the Board decided that, once the data controller evinced to the DPA that the data subjects who are affected by the breach were duly notified of the breach, there was no further action needed to be taken within the scope of Article 12 of the Law No. 6698 regarding the data breach notification in question.

This decision of the Board sheds light on what documents and information are considered relevant by the Board and the approach of the Board regarding data breach notifications.

In addition to the foregoing decisions of the Board, the DPA also published the below announcement which became a hot topic in Turkey.

The Turkish DPA's Announcement on WhatsApp[26]

The DPA recently published an announcement regarding WhatsApp's change to its privacy policy. According to the announcement, the DPA has *ex officio* initiated an investigation against WhatsApp.

WhatsApp announced that it was updating its Privacy Policy and required the users to provide their consents for the changes, which were to take effect on February 8, 2021. In the consent form, WhatsApp indicated the key changes as *"WhatsApp's service and how we process your data", "How businesses can use Facebook hosted services to store and manage their WhatsApp chats", "How we partner with Facebook to offer integrations across the Facebook Company Products."* WhatsApp consent script also indicated that the users would need to accept these updates to continue using WhatsApp after February 8, 2021.

This caused general privacy concerns across the country as well as other parts of the world and many users switched to other IM applications. The updated version of the policy that would be effective as of February 8, 2021 included Facebook as an information sharing party to the entirety of the privacy policy and explained several processes further and in more detail compared to previous versions.

In its announcement regarding the initiation of an investigation against

[26] See https://kvkk.gov.tr/Icerik/6856/WHATSAPP-UYGULAMASI-HAKKINDA-KAMUOYU-DUYURUSU (Last accessed on February 23, 2021)

WhatsApp Inc., the DPA also provided explanations with regard to regulatory conditions of personal data processing, the rules applied to explicit consent and cross-border personal data transfers, and its preliminary assessment on WhatsApp's update of its privacy policy.

The announcement sets forth that an explicit consent must be informed, freely given and specific to a certain subject. Furthermore, an explicit consent must contain an affirmative declaration of intent and the data subject must be provided a right to withdraw its explicit consent. On the other hand, with regard to the imposition of explicit consent as a pre-requisite of a contract/service, the DPA refers to the Board decision numbered 2018/19 wherein it was decided that the imposition of explicit consent as a pre-requisite of a contract or service would jeopardize the validity of explicit consent, and also constitute an abuse of right by the data controller. The DPA states that data subjects should be provided with the option to consent to certain personal data processing operations which require explicit consent, and that each explicit consent should be obtained separately. The DPA also refers to the conditions for cross-border transfer under the Law No. 6698.

In the announcement the DPA notes that, WhatsApp had sent a notification to its users to get their consent to the changes to processing of their personal data and transfer to third parties residing abroad, by indicating that if they do not consent, they would not be able to use the app and that their accounts would be deleted. Furthermore, the Privacy Policy that this WhatsApp notification linked to, was deemed to be unclear as to the transferee parties and transfer purposes.

In light of the foregoing, DPA has *ex officio* initiated an investigation against WhatsApp to assess (i) whether the consent required by WhatsApp violates the requirement to be freely given, (ii) whether allowing app use based on the condition of transfer to third party residing abroad, is violating the personal data processing principles under Article 4 of the Law No. 6698, (iii) whether WhatsApp Inc.'s update causes imposition of explicit consent as a pre-requisite of a contract/service and (iv) whether WhatsApp Inc.'s transfer of personal data to data controllers residing abroad violates Article 9 of Law No. 6698.

Internet Law

Possible Outcomes of Non-Compliance with Obligation to Appoint and Name a Representative per Law No. 5651

The Law No. 7253 on the Amendment to the Law on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts, published on the Official Gazette of July 31, 2020, introduced certain obligations on social network providers, defined as real persons or legal entities that enable users to create, view or share content such as text, images, sound, location for social interaction purposes on the internet medium.

Among these amendments to the Law No. 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts ("**Law No. 5651**"), Additional Article 4 requires those foreign based social network providers which receive more than one million hits per day from Turkey, to appoint at least one person as their representative in Turkey, who will be

capable of responding to the requests, notifications or notices that will be sent by the Information Communications and Technologies Authority ("**ICTA**"), Access Providers Union, judicial or administrative authorities, and to fulfill other obligations provided under the law.

The Additional Article 4 of Law No. 5651, also sets forth that those social network providers that fail to appoint a representative and report their name to the authorities, shall be faced with a 5-tiered sanction mechanism that would be applied based on the duration of the breach: (i) administrative monetary fine of TRY 10 (ten) million (*in case the obligation is not fulfilled within 30 days as of the notification of breach*), (ii) additional administrative monetary fine of TRY 30 (thirty) million (*in case the obligation is not fulfilled within 30 days of the notification of the initial fine*), (iii) prohibiting real or corporate tax payers residing in Turkey, to place new advertisements with the social network provider (*in case the obligation is not fulfilled within 30 days as of the second fine*), (iv) bandwidth throttling up to 50% (*in case the obligation is not fulfilled within 3 months as of the advertisement ban decision*) and (v) bandwidth throttling up to 90% (*in case the obligation is not fulfilled within 30 days as of the first bandwidth throttling*).

Since the amendments and obligations came into effect, several social network providers have either appointed a legal representative in Turkey or announced that they will appoint one. For the remaining social network providers, the advertisement ban decisions were published in the Official Gazette on January 19, 2021 ("**Advertisement Ban Decisions**") [27] that prohibited Turkish resident taxpayers from placing advertisements on these social network providers, entering into new advertising agreements, or transferring money for placing the advertisements, as a result of their failure to comply with the obligation to appoint and declare a representative per Law No. 5651. However, the implementation and the consequences of these advertisement ban decisions in practice are yet to be seen, although certain insights may be gained by interpreting the relevant provisions of Law No. 5651 and ICTA`s Procedures and Principles on Social Network Providers ("**Procedures**").

The Advertisement Ban and its Implementation

According to the Procedures which were published in the Official Gazette on October 2, 2020, the President of ICTA ("**President**") has the authority to render a decision on an advertisement ban which prohibits the real and legal entities that are tax residents in Turkey to place new advertisements on the relevant social network provider and transfer funds for the payment of same.

As demonstrated in the Advertisement Ban Decisions, the Procedures explicitly state that the advertisement ban decision given by the President will be sent to the Official Gazette for publication. The underlying reason of this provision is likely the fact that advertisement ban does not merely affect social network providers but also the real persons and legal entities that are tax residents in Turkey wishing to place new advertisements to social network providers and to be able to notify these persons of the advertisement ban decision rendered by

[27] See https://www.resmigazete.gov.tr/ilanlar/eskiilanlar/2021/01/20210119-4-1.pdf (last accessed on January 27, 2020)

ICTA, especially since it will not be possible for ICTA to determine and identify each and every existing and potential customer to place advertisements with the social network provider.

Furthermore, the wordings of the relevant provisions indicate that placing new advertisements and transferring money *in this regard* to the relevant social network provider in breach, will be prohibited. Therefore, one might conclude that (i) the prohibition to enter into agreements and money transfer should be limited to the *advertisement services* between the relevant entity and the social network provider and (ii) the previous advertisements and former agreements will not be within the scope of the advertisement ban. However, ICTA's own interpretation will only be apparent once ICTA starts implementing the advertisement ban on social network providers.

The Procedures also state that the issues regarding the implementation of the advertisement ban decision will be monitored by the relevant public institutions and organizations. Although, the Law No. 5651 and Procedures do not clearly specify which public institutions and organizations will be deemed relevant, the Advertisement Board (established under the Ministry of Trade) may be authorized to examine these commercial advertisements *ex officio,* or upon application of consumers, as such is the first institution that comes to mind considering the scope of its duties and authorities.

Bandwidth Throttling and Other Possible Outcomes of Non-Compliance with Advertisement Ban

The Additional Article 4 of Law No. 5651 does not provide any insight on the penalties and/or sanctions that the tax resident real persons or legal entities in Turkey, or the social network providers could face in the event of non-compliance with the rules set forth with regards to the advertisement ban.

However, Article 27 of the Turkish Code of Obligations stipulates that contracts in breach of mandatory rules of the law will be deemed null and void. Therefore, entering into a new agreement with these social network providers for advertisement services might be considered to be in breach of mandatory rules under Law No.5651, and could render these new agreements null and void.

On the other hand, it is still not clear whether placing an advertisement on a social network provider who fails to appoint a legal representative will have consequences in terms of advertisement law or other regulations. However, the Advertisement Ban Decisions state that in order to ensure enforcement of the advertisement ban decision and to detect any violations, the matter shall be monitored and the necessary actions per the relevant legislation (*including the Turkish Code of Obligations, Turkish Commercial Code, Turkish Criminal Code, Law on Misdemeanors, Consumer Protection Law, Law on the Prevention of Laundering Proceeds of Crime, Law on the Prevention of Financing Terrorism, Law on the Procedure for Collection of Public Receivables, Tax Procedure Law and other tax laws, Law on the Protection of Competition, Law of Banking, Law on Debit and Credit Cards, Law on Financial*

Leasing, Factoring and Financing Companies, Law on the Central Bank of Republic of Turkey, Law on Payment and Payment Instruments Agreement Systems, Payment Services and Electronic Money Institutions), to be taken by the relevant public institutions and organizations.

In terms of the social network provider, there is already another step envisaged within the 5-tiered mechanism in case they fail to fulfill their obligation within 3 months as of the advertisement ban decision. Accordingly, the relevant social network provider will be subject to bandwidth throttling up to 50%, and in case the obligation is not fulfilled within 30 days of this sanction, then bandwidth throttling will be increased to 90%.

Telecommunications Law

Turkey has introduced its national eSIM technology: but why is it important?

Turkey has introduced the new domestic and national eSIM technology on December 24, 2020.[28] The Minister and the Deputy Minister of Transport and Infrastructure, and the President of The Information Technologies and Communication Authority ("**ICTA**") presented the new technology to the public.

eSIM is a technology that can be summarized as an embedded SIM. eSIM has many advantages for consumers such as enabling switching networks easily without swapping SIM cards, as well as allowing for a temporary switch to another network instead of using dual SIM cards.[29] However, this is not all: eSIM is also an important milestone in connectivity, as IoT devices can gain great benefits from it[30] via the recent 5G technology and it is already being effectively used in connected cars.[31]

ICTA has published two decisions in this matter before, one in the beginning of 2018 and the other in the beginning of 2019 related to e-SIM technologies. Both decisions have brought fundamental changes especially as to requirements envisaged for SIM cards in motor vehicle e-Call systems and data localization.

The first decision[32] related to e-Call services in motor vehicles. The decision indicated that it is mandatory for the SIM cards, eSIMs or modules having SIM card properties etc. to be procured from operators licensed to provide mobile electronic communication in Turkey, or to be programmable to allow them to be controlled by such operators. Moreover, per the decision, the eCall in vehicles, along with servers that will provide the communication system allowing for value added services, are to be located in Turkey and personal data in such systems cannot be transferred abroad without explicit consent. In fact, this very decision caused

[28] See https://www.btk.gov.tr/haberler/yerli-ve-milli-esim-teknolojisi-kamuoyuna-tanitildi (Last accessed on January 26, 2021)

[29] See *"A Guide To eSIMS"*, Emma Lunn, at https://www.forbes.com/uk/advisor/mobile-phones/esims/ (Last accessed on January 26, 2021)

[30] See "How eSIM is changing the IoT landscape", Silva, Luis C G, at https://www.information-age.com/how-esim-changing-iot-landscape-123490899/ (Last accessed on January 26, 2021)

[31] See https://telecoms.com/506320/telcos-eye-3bn-esim-opportunity-from-connected-cars/ (Last accessed on January 26, 2021)

[32] See ICTA's decision no. 2018/DK-YED/27 at https://www.btk.gov.tr/uploads/boarddecisions/112-tabanli-arac-ici-acil-cagri-sistemi-e-call/027-05-112-tabanli-arac-ici-acil-cagri-sistemi-e-call-22-01-2018.pdf (Last accessed on January 26, 2021)

BMW to cease all ConnectedDrive services in Turkey as of June 30, 2019.[33]

With the second decision[34] dated February 12, 2019, the localization requirements are no longer limited to eCall services only, and encompass all eSIM applications. Per the decision, all infrastructure, system and storage units including equipment and software related to eSIM platform in GSMA standards, shall be established in Turkey, by a licensed local operator (or by a third party to be appointed by such local operators, but liability remaining with the local operator). The decision also states that all data should be kept within Turkish borders. Moreover, where the devices manufactured to be used in Turkey or imported to the country have remotely programmable SIM (eUICC, eSIM/embedded SIM etc.) technologies, their relevant modules are expected to be programmable only by local mobile operators and only local mobile operator profiles may be installed, if such modules are used within Turkey.

On the announcement on December 24, 2020, Adil Karaismailoğlu, the Minister of Transport and Infrastructure, stated that the new domestic eSIM technology has been established with national resources and by using up-to-date technology; will have a wide range of uses, from smartphones, wearable technologies, machine-to-machine communication to many industrial products. In his speech, Karaismailoğlu emphasizes that the eSIM application is *"100% domestic and national"* and *"Turkey's sensitive data will be completely in Turkey's control."*

When evaluated with ICTA's decisions, this announcement can be an indicator that Turkey is following a localization-heavy approach for eSIM technologies. ICTA's and Ministry's approach in eSIM localization may create further localization obligations as the technology advances and expands along with 5G. Foreign machine or vehicle manufacturers, or technology companies planning to use eSIM and 5G technologies may have to face localization obligations and work with local operators, if they want to trade or operate in Turkish market. At this stage, there is no specific legislation regulating eSIM technologies, other than ICTA's guiding decisions on the matter but legislative expectations lean towards localization.

White Collar Irregularities

Turkey Introduces KYC Requirements for Independent Attorneys

Under Turkish laws, the main legislation pertaining to anti-money laundering is the Law No. 5549 on Prevention of Laundering Proceeds of Crime ("**Law No. 5549**"). The Law No. 5549 defines the "obligated parties" (*e.g.,* investment companies, finance companies, payment companies, factoring companies) and sets out their duties and obligations to prevent financial crimes. The obligated parties are required to take the specific measures such as customer identification, suspicious transaction reporting; conduct employee training and internal controls; implement control and risk management systems and undertake periodical reporting. If they fail to meet these requirements, as per Law No. 5549, the obligated parties might be faced with administrative fines from the Financial Crimes Investigation Board ("**MASAK**"), the competent authority to enforce Law No. 5549.

[33] See BMW's announcement at https://www.bmw.com.tr/tr/topics/offers-and-services/connecteddrive-for-users/connecteddrive-bilgilendirme.html (Last accessed on January 26, 2021)
[34] See ICTA's decision no. 2019/DK-TED/053 at https://www.btk.gov.tr/uploads/boarddecisions/uzaktan-programlanabilir-sim-teknolojileri-esim/053-2019-web.pdf (Last accessed on January 27, 2021)

Further, in parallel with Law 5549, the Regulation on Measures to Prevent Laundering of Proceeds of Crime and Financing of Terrorism ("**Regulation**") also adopts certain measures in combatting against the financing of terrorism, in addition to the measures for prevention of money laundering. The Regulation particularly sets forth measures such as customer due diligence, procedures for reporting of suspicious transactions, provision of information and documents, disclosure to customs administration.

In line with the foregoing legislative framework, the Law Proposal on Preventing the Proliferation of Financing Weapons of Mass Destruction[35] ("**Law**") which brings several significant amendments to the Law No. 5549 has been accepted by the Grand National Assembly of Turkey and was published in the Official Gazette on December 31, 2020.[36] One of its most remarkable amendments is the expansion of the Know Your Client (KYC) requirements to independent attorneys, by way of including them among the "obligated parties."[37]

1. Scope in terms of Independent Attorneys

With the recent amendment, independent attorneys will be deemed an "obligated party" and thus, required to conduct KYC checks before the following transactions:

- The sale and purchase of real estate,

- Establishment and cancellation of limited rights in rem,

- Incorporation, merger, management, assignment and liquidation of companies, foundations and associations; and financial transactions with respect to such,

- Management of bank accounts, securities investment and all sorts of accounts; as well as the assets therein.

The foregoing scope excludes (i) the information obtained with respect to first paragraph of Article 35 of the Attorney Law No. 1136 (*i.e.,* judicial procedures) and (ii) information obtained under professional services conducted within the scope of alternative dispute resolution methods. The foregoing will also be applicable to the extent that it does not violate any other laws in terms of the right to defense.

2. KYC Obligations

The persons included in the definition of "obligated parties" must identify the persons carrying out the transactions and beneficiaries of said transactions to be conducted by or through the obligated parties, before the transactions are conducted.

In that regard, the independent attorneys will be obliged to confirm their clients' identities (i) for permanent business relationships,[38] (ii) for cases that require suspicious transaction reporting, or (iii) if there is a suspicion on the accuracy or the

[35] See https://www2.tbmm.gov.tr/d27/2/2-3261.pdf (Last accessed on February 23, 2021)

[36] See https://www.resmigazete.gov.tr/eskiler/2020/12/20201231M5-19.htm (Last accessed on February 23, 2021)

[37] Prior to the addition of "independent attorneys" into scope, the obligated parties were defined as "*banking, insurance, individual pension, capital markets, money lending and other financial services, and postal service and transportation, lotteries and bets; those who deal with exchange, real estate, precious stones and metals, jewelry, all kinds of transportation vehicles, construction machines, historical artifacts, art works, antiques or intermediaries in these operations; notaries, sports clubs and those operating in other fields determined by the President.*" (Article 2/d of the Law No. 5549)

[38] Article 3/1(i) of the Regulation on Measures regarding Prevention of Laundering of Crime Revenues and Financing of Terrorism defines permanent business relationships as "*business relationship that is established between obligated parties and their customers through services such as opening an account, lending loan, issuing credit cards, safe-deposit boxes, financing, factoring or financial leasing, life insurance and private pension, and that is permanent in nature.*"

sufficiency of the previously obtained customer information. None of these three circumstances are subject to a monetary threshold. MASAK will probably determine what would constitute a "permanent business relationship" with respect to independent attorneys, through its guidelines.

For instance, an independent attorney conducting a transaction regarding purchase of a real estate will be obliged to conduct a KYC check, if such transaction requires suspicious transaction reporting, regardless of the amount of the transaction.

In terms of monetary thresholds, (i) if the amount of the electronic transfer or the sum of more than one correlative transaction exceeds TRY 2,000 or (ii) if the transaction amount or the sum of more than one correlative transaction exceeds TRY 20,000, the independent attorney will be obliged to confirm the client's identity, as well.

For instance, an independent attorney will be obliged to do a KYC check regarding the incorporation of a company, where the amount of funds transferred exceed TRY 20,000 (which is the case in most of the incorporation transactions). The amount to be taken into consideration here would be the transaction amount (and not the attorney expenses to be paid to the independent attorney), but again, this will likely be further explained through the guidance of MASAK.

3. Reporting of Suspicious Activities

Independent attorneys, as obligated parties are also under the obligation to report suspicious activities and transactions to MASAK.

A suspicious transaction is the case where there is any information, suspicion or reasonable grounds to suspect that the asset, (for which the transactions are carried out, or attempted to be carried out under, or through the obligated parties) has been acquired through illegal ways or used for illegal purposes, and as such, used for terrorist activities or by terrorist organizations, terrorists or those who finance terrorism (Article 27/1 of the Regulation).

4. Content, Verification and Retention

Information to be obtained for KYC and the verification of such information varies depending on the nature of the person concerned, such as real persons, legal entities registered in trade registries, legal entities resident abroad etc. For instance, *name, surname, birth place and date, parents' name, nationality, Turkish ID number for Turkish citizens, identity document type and number* will be obtained from real persons to fulfill the identification obligation. As for legal entities, *trade name, trade registry number, field of activity, company address, contact information, as well as the authorized representative's name, surname, place and date of birth, nationality, specimen signature, identity document type and number, along with Turkish ID number and parents` names for Turkish citizens* will be obtained. The information to be collected should also be verified, *e.g.,* by checking the legally acceptable identity documents or trade registry records, as applicable, based on the type of the person concerned.

Independent attorneys should keep the documents on customer identification for eight (8) years as of the last transaction date and should present them to authorized bodies, upon request.

5. Sanctions

In case of failure to fulfill the obligation on client identification, non-compliance may be subject to an administrative fine of TRY 30,000. Failure to comply with the obligation to report suspicious transactions may be subject to an administrative fine of TRY 50,000, with the new amendment. Before the amendment, both of these fines were TRY 5,000 (subject to annual increases based on re-evaluation rates published each year).

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