

# Highlights from Dispute Resolution

## *2023 winter, Turkey*



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### Introduction

Dear clients, friends and colleagues,

*As many of you know, several south eastern provinces of Turkey have been struck by two devastating earthquakes with a magnitude of 7.8 and 7.6 respectively on 6 February 2023. At least 15 million people have been immensely affected by this tragedy. We mourn together with our nation and it will take time to heal the wounds. Yet, we are confident that the affected region will recuperate and rise stronger than ever.*

*This newsletter aims to inform you of the top trends and developments in dispute resolution practice in Turkey. It was ready to be sent at the beginning of February; following the tragedy, we thought about not sending it but then decided to use it as a means of THANK YOU to all our foreign clients and friends who stood by us in one of the darkest days of the Turkish Republic.*

*We hope you will find our newsletter useful.*

2022 has been a vibrant year in every aspect. Although the social and economic impacts of the Covid-19 have started to wear away, a myriad of global and domestic financial turbulences influenced the legal trends in 2022. It is possible to experience such in dispute types as there has been a rise in hardship, insolvency and default related claims. Interest towards alternative means of dispute resolution is growing on its usual pace and 2022 was no different. To add such interest, United Nations Convention on International Settlement Agreements Resulting from Mediation entered into force in Turkey on 11 April 2022. Additionally, as a result of Covid-19, e-hearing system has been launched in the Turkish judiciary. The hopes are high that this system will enhance the time and cost efficiency. Consumer legislation has also undergone some radical changes in light of the global developments.

Numerous notable decisions have been rendered by the Court of Appeal and regional courts of appeal touching upon contradictory subjects as interpretation of good faith depending on different types of disputes, local courts' authority in modification/cancellation of injunctions in aid of arbitration, prohibition of contradictory behaviour, and violation of the right to a fair trial in arbitration proceedings.

There has been significant improvements in employment and tax case law as well. The Turkish Constitutional Court has handed down rulings concerning several different employee rights such as right to property, freedom of expression and right to privacy and freedom of expression. Tax courts rendered decisions on the use of secret comparable and regression analysis in transfer pricing inspections, annulment of special irregularity fines and security requirement for the stay of execution in tax disputes.

In this issue, we provide brief summaries on the

## Mandatory Mediation

As of 2018, application to mediation before initiating a lawsuit has become mandatory for certain type of disputes.

Pursuant to the law, employment disputes are subject to mandatory mediation. Following adoption of requirement in employment lawsuits, in 2019, commercial disputes with monetary claims has also become subject to mandatory mediation. The consumer disputes then followed in 2020.

Mediation is valued as a dispute resolution method due to its consensual, quick and confidential nature. A mediation process has to be finalized in maximum 6-8 weeks for commercial disputes and in 3-4 weeks for employment and consumer disputes. In case the mediation attempt fails, parties cannot rely on the opinions, proposals or statements regarding acceptance of a claim and the documents prepared for mediation as evidence/s in the lawsuit to follow. Application to mediation suspends running of statute of limitation periods applicable to the claim.

Mediation meetings are often held virtually. After the meeting, parties may sign the settlement/non-settlement minutes through their e-signature or by wet ink by circulating the minutes. In case of a successful mediation where the parties reach a

above decisions and developments transpired in 2022. Additionally, the issue includes insights on the disputes relating to environmental impact assessments and employee stock options.

Finally, by taking this opportunity, we are pleased to announce that our team of is growing even stronger by recent promotions of Dođuhan Uygun and Onur Çeliker as Counsel; and Can Yılmaz and Yavuz Şahin Şen as Senior Associates. We congratulate these senior members of our team in the high hopes they will continue to contribute to our team's success. Needless to say, a big thank you goes to our clients, who support us and have a priceless contribution in our team's expansion.

Please feel free to contact us if you need further information on recent trends and highlights in Turkish dispute resolution practice.

**Serdar Paksoy**  
**Simel Sarialiođlu**

settlement, the minutes signed by the mediator and the parties bear the effect of a final court decision.

According to the reports provided by the Ministry of Justice, between January 2019 and May 2022, 53% of the commercial disputes subject to mediation were resolved by effective settlement. In employment disputes, this rate was 58% for the period between January 2018 and May 2022 and 52% in consumer disputes between July 2020 and May 2022. Given the growing settlement rate, it is likely that different types of disputes, such as those arising from lease agreements, may become subject to mandatory mediation process.

On a final note, mediation is mandatory not only for Turkish parties but also foreign nationals. Recently, in a commercial dispute, where there the co-defendants were a Turkish and a foreign company, the claimant applied to mediation process only in respect of the Turkish company. Upon failure of the mediation attempt, the issue escalated to a full-fledged commercial case. Istanbul 6th Commercial Court dismissed the case in respect of the foreign company, which was one of the co-defendants, on the basis that the mandatory mediation application was not duly implemented.

**Deniz Baytekin**  
**Batuhan Uygun**

## Singapore Convention in Turkey

United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Convention") was signed by Turkey in 7 August 2019 entered into force on 11 April 2022. The Convention ensures enforceability of a settlement agreement reached upon a mediation process conducted for the resolution of international commercial disputes. Similar to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, which regulates the enforcement of foreign arbitral awards, the Convention aims to provide a mechanism for the cross-border enforcement of settlement agreements.

The Convention applies to all settlement agreements in relation to all kinds of commercial disputes resulting from mediation and concluded in writing by parties to resolve an international commercial dispute. A commercial dispute is deemed to have international character if (i) at least two parties to the settlement agreement have their places of business in different states or (ii) place of business of one of the parties and the place where the obligation arising out of the settlement agreement will be performed or the place most closely connected to the subject matter of the agreement are in different states.

## E-Hearing System

E-Hearing System, which enables participation in hearings by means of audio and video transmission in civil proceedings, has recently developed significantly and started to be effectively used in Turkish legal practice. Due to COVID-19 pandemic, important steps have been taken to expand the e-Hearing System and provide online access to more courts. According to the information on Ministry of Justice's website, the system has been implemented in 2609 courts around Turkey as of December, 2022.

In order for a hearing to be held electronically, one of the parties must make a request through National Judiciary Informatics System, known as UYAP in

The party seeking to enforce a settlement agreement falling under the scope of the Convention must meet certain procedural requirements. In this regard, the party requesting enforcement must submit to the competent authority of the relevant state a copy of the settlement agreement signed by the parties, evidence that the settlement agreement resulted from mediation, and the translation of the settlement agreement if the agreement is in a language other than the official language of the relevant state.

The competent authority of the relevant state may reject the request of an enforcement *ex officio* if the enforcement would be contrary to the relevant state's public policy or the subject matter of the dispute is not capable of settlement by mediation where the party seeks enforcement. The Convention aims at effective execution of settlement agreements. In this regard, ratification of the Convention by as many countries as possible would increase its effectiveness. According to United Nations' website, 55 countries have signed the Convention; however, 10 countries have it entered into force under their domestic law. Although European Union member states and United Kingdom are not parties to Convention, United States, China, India and Qatar, which are amongst Turkey's, most significant trade partners, have signed the Convention.

**Özge Mizrahi**  
**Pınar Noberi**

Turkish abbreviation, at least 2 days before the hearing. It is at the judge's discretion to accept or reject it. Only attorneys who submit a request from his/her own UYAP and whose request is accepted can attend the e-Hearing. The principals, witnesses and legal experts are also allowed to be heard and participated at the e-Hearing.

E-Hearing system is considered as an effective tool for certain issues caused by physical hearings. These benefits include not having to travel from one city to another, waiting long hours in the court house, be in a rush for having subsequent hearings in different court houses, which also save significant amount of time and transportation costs. From another perspective, e-Hearing also enables attorneys and/or principals, witnesses and experts having a disability to travel to attend the hearings.



On the other hand, according to the information on the website of the Ministry, in order to participate in e-Hearing, certain technical requirements such as a minimum 8 MBit non-common use internet connection should be met. As a result of these requirements, interruptions may occur due to technical issues during e-Hearings.

In the event of declaration of a waiver, acceptance or settlement that leads to closure of the proceeding in the e-Hearing, a new hearing date will have to be set by the court. In addition, where a party, its attorney or another attendee is required to put their signature,

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## Commercial Disputes

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In recent years, the Turkish courts rendered some landmark decisions on debated issues of Turkish law and also cemented their long standing views on certain topics. Those rendered by the General Assembly of Civil Chambers deserve particular attention as they have superior guidance over all levels of civil courts in Turkey. We provide highlights from some of the decisions below.

- In a dispute between a depositor and the bank, the depositor argued that the default interest granted to him does not compensate the devaluation of the money over the years due to high inflation rates and thus claimed compensation for the excess damage. The General Assembly of Civil Chambers stated in its decision dated 29.03.2022 that to make such a claim, the excess damage should be proven with concrete facts. Loss of the purchasing power of the money due to economic downturns and inflation alone is not sufficient to assume the existence and thus prove such damage.

- There has been diverging decisions from different civil chambers of the Regional Court of Appeal regarding the authority having jurisdiction to lift a preliminary injunction granted by a state court. The divergence stems from the difference between the Turkish International Arbitration Law, which applies to international arbitrations seated in Turkey and the Turkish Code of Civil Procedure, which applies to the domestic arbitrations. Recently, 6th Civil Chamber of Court of Appeal decided that Turkish courts can hear interim injunction requests that are

the court will electronically submit the hearing minutes signed with the secure electronic signature to the courthouse where the remote hearing took place.

While significant investment was already being made by Turkish judiciary in technology and training to facilitate the conduct of virtual hearings, the COVID-19 pandemic has undoubtedly accelerated this process. Accordingly, we expect the usage of e-Hearing to become widespread and that the technical and legislative issues be resolved in near future.

### Özge Mizrahi

sought in aid of international arbitrations and the objections made to such injunctions should be made to the same court, not the arbitral tribunal.

- In an appellate review of the request for the recognition and enforcement of an arbitral award, the Court of Appeal focused on the significance of the right to a fair trial and the right to be heard under Turkish law and their correlation with Turkish public policy. In this respect, the Court stated that a party's right to be heard cannot be violated on the pretext of a trade secret. If a document is to be restricted from a party on the basis of a trade secret, reasonable legal and factual grounds for such decision should be provided and the proportionality between the right to be heard and a trade secret should be preserved. In the matter subject to the award, the claimant refused to share certain financial reports claiming that they contained trade secrets. The Tribunal ordered the claimant to share redacted versions for attorneys' eyes only so the defendant itself was prevented from reviewing the reports. The defendant was also prevented from cross examining the experts who prepared the reports and the Tribunal made references to such reports when rendering the award. All these considered, the Court of Appeal concluded that the defendant's right to be heard was restricted and this breached the public policy, therefore the enforcement of the award should be dismissed on the ground of public policy. In the dissenting vote, it was stated that the decision of the Tribunal on providing a restricted examination on the reports does not violate the right to a fair trial and the right to be heard, given that the Tribunal provided reasonable justification for its decision.

- In 2015, the Court of Appeal handed down an important decision stating that a jurisdiction clause must designate the foreign court “precisely”. In this respect, the Court concluded that the reference to “the English courts” in a jurisdiction clause was not precise enough to meet the conditions and dismissed the case due to lack of jurisdiction. The Court maintained its stance in a decision rendered in 2018 and deemed a jurisdiction clause invalid as it was referring to “the United States Courts”, not a specific court. In 2021, the Court of Appeal found that a jurisdiction clause designating the “Washington Courts” is sufficiently precise. Although non-binding, such precedents set an important guidance to all civil courts in Turkey. Thus, when designating a foreign court, parties should consider drafting the jurisdiction clause by reference to a specific city/region/state of the foreign country to the best possible extent to avoid risk of invalidity.

- The Turkish Commercial Code requires exclusivity, inter alia, for a distributor to be entitled to a portfolio compensation in the event of termination of a distribution relationship. As per the well-established case law, the exclusivity can be presumed based on the

de facto relationship between the distributor and the principal even if the written agreement is silent on the exclusivity or stipulates that the distributorship granted is not exclusive. In a dispute before the Istanbul Commercial Court, the claimant sought portfolio compensation by claiming that it had acted as the exclusive distributor of the defendant for Konya region of Turkey. The defendant argued that the distributorship contract exactly stated that the claimant’s distribution right was not exclusive. To challenge such contractual provision, the claimant alleged that there was no other distributor for the defendant in Konya region, so that de facto exclusivity was established. However, the defendant was able to prove that its products the defendant’s products were distributed by another dealer – for a short period - in the same region. That fact alone was satisfactory for the court to conclude that there was no de facto exclusivity and dismiss the portfolio compensation claim.

**Doğuhan Uygun**  
**Can Yılmaz**  
**Deniz Baytekin**

## **An Overview to Court Of Appeal’s Recent Precedents on Principle of Good Faith**

Principle of good faith stipulated under Article 2 of the Turkish Civil Code is an instrument that the judges frequently resort to and has played a prominent role in the case law of the Turkish Court of Appeal. This development of principle requires every person to act in good faith in the exercise of rights and performance of obligations. The principle is referred to in some disputes where implementation of applicable contractual terms and legal provisions result in just and fair consequence.

Within the context of the principle of good faith, recent decisions of the Court of Appeal deal with, among others, construction disputes, disputes arising from banking services, distributorship disputes, shareholder disputes and arbitral award set aside proceedings.

The principle of good faith may vary based on the specifics of the dispute. In a dispute arising from a construction contract, the Court held that the

municipality which involves in promotional activities of the construction project along with the contractor should be liable for claims arising from non-performance based on trust liability even though it is not a party to the contract. The Court, in this decision gave effect to the principle of good faith on the basis of the trust created in the eyes of the claimant that it supports and contributes to the project.

In another decision in 2022, the Court stated that contractual obligations are not limited to performance obligations, and whenever a social contact occurs between persons, i.e., whenever the parties come together to conclude a contract, the principle of good faith imposes duties for protection of each party. Such duties include the duty of care, protection, disclosure, warning and the duty to provide information and consultation to the counterparty. In that regard, the Court stated that parties are liable for losses occurring due to misleading information provided by the branch manager of the counterparty.

In a decision in 2020, the Court stated that, should a party continue to perform an agreement without a reservation despite consistent failure of the counterparty to perform its obligations, a trust would

be created on the counterparty that no claim will be raised due to such failure. The Court held that a claim after being silent for several years would constitute contradictory behaviour which finds no protection under the principle of good faith. Similarly, in a decision dated 2021, the Court emphasized that remaining silent against execution of a general assembly resolution without any objection or action for years and requesting a declaratory relief on nullity of the same resolution would be against the principle of good faith.

Finally, in a decision dated 2018 rendered in an annulment lawsuit, the Court concluded that if the claimant raised no objection as to the impartiality of the arbitrator during the arbitral proceedings and made no assertions to that effect despite the arbitrator's inquiry on parties' objections and

statements against the arbitral proceedings, bringing such claims against the impartiality of the arbitrator only at the annulment stage is contrary to principle of good faith.

The principle of good faith serves an important legal provision to provide equity while the persons or entities attempt to exercise their rights arising from the law or a contract. The Court of Appeal, accordingly, considers the principle while applying the legal rule or contracts terms and, in case where justice and equity requires, have this principle prevail the codified law or contracts between the parties.

**Yavuz Şahin Şen**  
**Eren Beşpınar**

## Recent Developments in Turkish Consumer Law

The Turkish Parliament has made several radical changes to consumer protection legislation in recent years to harmonize the local regulations with global developments. We briefly explain below the significant amendments made to consumer protection legislation in 2022 and decisions of the Court of Appeal that have recently shaped the consumer law practice.

### 1- Legal Developments in Consumer Protection Legislation

#### a. Amendments made to Consumer Protection Law

Significant amendments have been made in the Consumer Protection Law numbered 6502, which entered into force on 1 October 2022. With those amendments:

- The responsibilities of the intermediary service providers have been specifically determined.
- Refurbished products have been defined as the goods offered for the resale after improvement in their hardware, software or physical features. At least one-year warranty has been provided for refurbished products starting from the date of their delivery to the consumer.
- Manufacturers and importers are required to register their after-sales service stations with the system to be established by the Ministry of Commerce.

- The Advertisement Board has been authorized to block access regarding the broadcast, part, section where the violation occurred in the internet.

#### b. Guideline on Advertisements and Commercial Practices with Price Information and Discounted Sales

The Advertisement Board has published the Guideline on Advertisements and Commercial Practices with Price Information and Discounted Sales. The Guideline aims to guide all advertisement sector including advertisers, intermediary service providers, advertising agencies and other platforms regarding the advertising of price information and discounted sales. The Guideline holds advertisers and intermediary service providers responsible for price displays, discounted sales announcements, stock notifications commercial applications in any media. Advertisers, advertising agencies and platforms are individually obliged to comply with the Guideline, which sheds light on commercial and trade regulations for enhancing the consumer protection.

#### c. Amendments in the Regulation on Distance Contracts

The Regulation on Distance Contracts has been amended to align with the amendments made to the Consumer Protection Law. In this regard, regulations were made to expand the scope of responsibilities of suppliers and sellers to protect the rights of consumers. In addition, limitations have been imposed on consumers' withdrawal right in order to balance the relationship between the seller and the consumer. The inclusion of the term

“intermediary service provider” under the Regulation has been considered as a significant amendment. The Regulation further defines the systems used by intermediary service providers as “platform”.

#### d. New Regulation on Consumer Arbitration Committees

The Consumer Arbitration Committees Regulation has entered into force and abrogated the former regulation on consumer arbitration committees. The New Regulation aims to provide broader opportunities to consumers regarding objection proceedings and to shorten the decision-making period. It also encourages the consumers to resolve their disputes before Consumer Arbitration Committees without resorting to judicial proceedings before Consumer Courts.

#### 2- Recent Decisions of the Court of Appeal on Consumer Law

- In a decision dated 15 November 2021, the Court of Appeal ruled that the intermediary service providers could not be held liable from the content provided by the service providers through the electronic platform or any defect in goods or services subject to aforementioned contents. The Court stated that intermediary service providers are not under the obligation

to control whether the content provided by service providers comply with the provisions of relevant legislation.

- In a decision dated 18 March 2022, the Court of Appeal emphasized that right of the consumer to request a refund by withdrawing from the contract or a reduction in the price of the product proportionate to defect cannot be exercised against manufacturer or importer. It was ruled that only the right to request free repair or replacement of the product could be exercised against the manufacturer or importer. With this decision, it is approved by the Court of Appeal that a request regarding full or partial refund should be directed to the seller since it is the party to the sale contract.
- In a decision dated 17 January 2022, the Court of Appeal ruled that if the consumer has not made a damage notice upon delivery of a product, there would be a presumption in favour of the carrier that the product was delivered duly and in accordance with the contract, and therefore, the burden of proof to prove the contrary shall fall on the consumer.

**Onur Çeliker**  
**Özge Mizrahi**  
**İrem Sabuncu**

## Employment Disputes

The Labour Law has brought many new developments in 2022 as an area of law that shows rapid and continuous development. We would like to shed light on the important developments regarding Turkish Labour Law below:

### The Turkish Constitutional Court's New Approach to Employee Rights

Employment disputes may interfere with some fundamental rights and freedoms regulated under the Turkish Constitution. There has been a significant increase in the number of individual applications made by the employees to the Constitutional Court in recent years. The Constitutional Court previously interpreted the employment disputes rather in favour of employers and evaluated the termination of employment contracts within the scope of the employer's right to management. However, in recent years, the

Constitutional Court interprets the fundamental rights and freedoms of employees broadly and is mostly in tendency to approve the individual applications filed by the employees. We also see that the Constitutional Court frequently refers to the judgements of the European Court of Human Rights (“ECHR”) in its decisions on employment disputes and establishes decisions in line with ECHR's judgements. We provide below a summary of some of the interesting decisions of the High Court.

#### • *Right to Property*

In a decision dated 22 February 2022, the Constitutional Court established a leading precedent evaluating the link between the overtime salary and employee's right to property. As per the said decision, the consent provided by an employee to perform overtime does not mean his waiver from the overtime pay. It is in compliance with Labour Law to decide that the overtime pay is included in the main salary paid to an employee. Even if the employee's consent is given



to overtime work without demanding overtime pay, the overtime work performed in violation of the mandatory provisions cannot be accepted within the scope of this consent. In that regard, the consent obtained as part of his employment contract should be accepted as valid only for the first year. Therefore, failure to obtain annual overtime consent from the employee and non-payment of the overtime pay for works performed after the first year caused the violation of the right to property regulated under Article 35 of the Turkish Constitution. [Turkish Constitutional Court, Application No.2019/1450, Decision Date: 22 February 2022]

- *Freedom of Expression*

In a decision dated 7 April 2021, the Constitutional Court established precedent by ruling that an employee's sharing of workplace photos in a Whatsapp group should be evaluated within the scope of the employee's freedom of expression. In the disputed case, the employment contract was terminated immediately and for just cause by the employer because the employee shared some private photos of the workplace with his colleagues in the Whatsapp group. The Court of Appeal, in the appeal review of the employee's reinstatement case, held that the employee had breached the duty of loyalty, as the employee's conduct resulted in the disclosure of a workplace secret.

The employee filed an individual application to the Constitutional Court following the finalization of the decision rejecting the reinstatement claim. The Constitutional Court held that the Court of Appeal had failed to make an adequate assessment as to which aspects of the employee's conduct constituted a breach of his duty of loyalty to the employer and whether the termination of the employment contract was a compulsory and last resort. The Constitutional Court also stated in its decision that an effective judicial review is required to determine whether a fair balance has been struck between the employee's freedom of expression and the duty of his loyalty to the employer. Therefore, the Constitutional Court ruled that the freedom of expression regulated under Article 26 of the Turkish Constitution was violated on the grounds that the

arguments set forth in the Court of Appeal's decision could not be considered as relevant and sufficient for the interference with the employee's right to freedom of expression.

### Employee Stock Option Disputes

Unlike other jurisdictions, stock option plans are not clearly regulated under Turkish legislation. However, since it has become a growing trend among the companies operating in technology sector (mostly start-up companies), there has been a steady increase in the number of employment disputes before Turkish labour courts, where employees, in particular senior executives, claiming stock option receivables in different forms.

Companies increasingly incentivize employees to stay in and demonstrate higher performance. This is often made through stock options or in other forms generally tied to companies exit scenarios. Generally Turkish subsidiaries of international companies tend to adopt international policies in Turkey without adjusting applicable law, dispute resolution mechanism and other conditions, which may not be applicable under Turkish law. When an employee working in Turkey files a lawsuit with the request for the payment of such receivables, Turkish courts assume jurisdiction and resolve dispute under Turkish law. In these cases, international policies designed to set out conditions globally may be rendered ineffective, if not invalid. It has been observed especially before first instance courts that decisions are ruled on the sole basis of Turkish law, disregarding the international policies. There may be exceptions if employees are informed and such information is evidenced by a signed policy or in any event an accessible employee online platform.

Given that the stock option disputes remain untested before the Court of Appeal, employment agreements should be prepared with utmost caution while adopting international policies to Turkish law.

**Onur Çeliker**  
**Deniz Baytekin**  
**Osman Pepeoğlu**



## Tax Disputes

After the Tax Amnesty Law No. 7326 entered into force on 9 June 2021, several tax inspections had been finalized by the Turkish Tax Authority. These inspections were conducted against companies mainly operating in energy, alcoholic beverages, chemicals, automotive and transportation sectors. After the completion of the inspections; assessments of corporate tax, corporate withholding tax, VAT as well as the tax loss penalty and special irregularity fine were imposed on inspected companies. We provide below a summary of the recent tax court decisions which deserve attention.

### TP Disputes

- *The use of secret comparable in TP Inspections*

In recent years, Turkish tax administration conducted several TP inspections particularly focused on the alcoholic beverages and energy markets. In one of these inspections; the tax inspection report alleged that the prices of products purchased by the local alcoholic beverages company from its foreign related party was higher than the fair market price. In another inspection, the local energy company was criticized based on the allegation that the prices applicable to the sale/purchase of electricity with foreign related parties did not comply with the arm's length principle. In these TP inspections, the tax administration used secret comparable while assessing the arm's length range of inspected companies. Upon completion of such inspections; the tax administration imposed corporate tax, withholding tax and tax penalties on inspected companies as there was a disguised profit distribution through TP between them and their related parties. As per the previous decisions of Turkish tax courts, the use of secret comparable in tax inspection reports is contrary to Turkish tax laws and OECD TP Guidelines since it is not possible to make a comparability analysis regarding the secret comparable.

Turkish tax courts preserved their stance and in numerous decisions decided that tax assessments arising out of the TP inspections conducted with secret comparable should be cancelled. The Courts have radically strengthened their position on secret comparable and also ruled that the secret comparable violates the equality of arms principle resulting from the right to fair trial which is protected

under the Turkish Constitution and Article 6 of the European Convention of Human Rights. In one of the decisions, a tax court referred to Hentrich v. France judgement dated 22 September 1994 (*application no. 13616/88*) and emphasized the ruling *“one of the requirements of a fair trial is equality of arms, which implies that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”*.

### **The use of regression analysis in TP inspections**

In the TP inspection conducted against the Turkish subsidiary of a foreign energy company, the Turkish Tax Authority used the method called *“regression analysis”* which is a set of statistical processes for estimating the relationships between a dependent variable and one or more independent variables.

The Tax Authority used the analysis as a TP method in order to determine the arm's length price between the local energy company and the mother company. By using this method, Tax Authority determined that the purchase and sale prices applied in electricity trade between the local energy company and the mother company are not in compliance with the arm's length principle. Neither the Turkish Corporate Tax Law nor the OECD TP Guidelines regulate the *regression analysis* as a TP method. In that regard, the regression analysis should not be considered as a TP method which can be used to establish whether the conditions imposed in the commercial or financial relations between associated are consistent with the arm's length principle.

Therefore, the local subsidiary filed lawsuits for the cancellation of the corporate and withholding taxes as well as the penalty imposed by the Tax Authority due to the TP allegation based on the regression analysis. The Tax Court rendered a landmark decision stating that since the regression analysis is a method used for the determination of cause and effect relationship in statistics and econometrics, it cannot be used as a TP method to determine the arm's length price. Consequently, the Tax Court held that the tax base determined through the regression analysis is hypothetical and lack of concrete findings and the tax/penalty assessments should be cancelled.

### **Annulment of Special Irregularity Fines**

In a recent dispute in relation to a special irregularity fine, Tax Authority imposed special irregularity fines

on an alcoholic beverages company on the grounds that the company was liable for the counterfeit stamps on its products, which purportedly were stamps of relevant regulatory authority. The products in question were found in liquor shops that are not in any way linked to the company. Thus, the company filed a lawsuit for cancellation of the fines on the grounds that it could not be held liable for actions of unrelated third parties over which the

company has no control. The Tax Court verified the company's defences and decided that the special irregularity fines had to be cancelled. This is a landmark decision for the alcoholic beverages market as it constitutes an important precedent for potential inspections.

**Onur Çeliker**  
**Deniz Baytekin**  
**Eren Beşpınar**

## Compliance & Investigations

### The Turkish Constitutional Court Rendered Two Landmark Decisions on Workplace Monitoring of Employee Communication Tools

Collecting evidence is one of the critical points of any investigation. Setting the standards on evidence gathering, the Turkish Constitutional Court rendered two decisions in 2022 reiterating its consistent line of decisions that employers cannot rely on evidence, if such evidence is collected in a way to violate employees' right to privacy.

The first of the said decisions deals with dismissal of an employee by a private company on account of WhatsApp messages being defamatory, that the employee exchanged with his friends on a company computer. The Constitutional Court set out that monitoring must have a legitimate purpose and be proportionate to its ends with reference to the precedents. The Constitutional Court held that the employer failed to show legitimate reasons justifying the interference citing that there was no evidence that the employee's expectations to privacy were respected or that the employee was informed in advance of the possibility of monitoring.

The Court noted that the monitoring of the employee's WhatsApp messages without giving any prior reminder that this might be undertaken was against his reasonable expectation for the protection of his right to privacy and freedom of communication. Moreover, the Constitutional Court added that an employer should have anticipated that an employee working with such expectation may make personal communications via the company computer. Another determination in the decision was that WhatsApp messages are commonly accepted

as private and the company failed to show that these were obtained lawfully or that a justification was present for the monitoring of these messages.

In the second decision, the Constitutional Court decided that an employer cannot rely on the correspondence retrieved from a former employee's work mobile phone as a justification for termination of another employee's employment. The Constitutional Court found that both the examination of the employee's work mobile phone and the termination due to the ensuing findings violated the employee's right to privacy and freedom of communication. The decision noted that the managerial authority is limited to execution of the works, maintaining order and safety at the workplace. Accordingly, employers are required to act within the confines of their authority also while conducting inspections on employee devices allocated to them.

These decisions send out a clear message that employees' right to privacy must be respected at the times when employers feel the urge to monitor employee devices. Employers should convey likelihood of monitoring in certain circumstances to employees and should still respect, in case of monitoring, employee's right to privacy.

### New Communiqué Introduced Politically Exposed Persons to the Turkish Anti-Money Laundering Legislation

The Turkish Financial Crimes Investigation Board published the General Communiqué No: 21 on 17 November 2022 in the Official Gazette, which was followed by the Implementation Guidance on 25 November 2022. The Communiqué introduced the notion of Politically Exposed Persons to the Turkish legislation and defined such Persons as "[H]igh-level

real persons to whom an important public duty has been entrusted by election or appointment in Turkey or in a foreign country and the members of the board of directors and senior executives of international organizations and other persons who have an equivalent duty". This is a significant step towards strengthening the national anti-money laundering legislation in accordance with the recommendations of the Financial Action Task Force, to which Turkey is a member and bringing additional compliance obligations upon the obliged parties.

Another important aspect of this legislation is that it applies to all financial institutions, designated non-financial businesses, and crypto asset service providers. These institutions are required by the Communiqué to take enhanced measures on Politically Exposed Persons and they may be subject to penalties arising from the Law No. 5549 on the Prevention of Laundering Proceeds of Crime should they fail to comply with the provisions of the Communiqué.

### **Principle Decision of the Board of Ethics for Public Officials Solidified the Key Principles of Ethical Conduct for Local Government Public Officials**

The Board of Ethics for Public Officials has announced a principle decision dated 18 October 2022, setting out the "Local Government Public Officials Principles of Ethical Conduct". Accordingly, transparency, accountability, rule of law, effective and efficient use of public resources, avoiding conflicts of interest, providing public services justly and equally, not accepting gifts and benefits, privacy of information, respect to human rights are enumerated among the main principles that the local government officials should observe. This decision may be considered as a declaration of intent that Turkey will fight against corruption more effectively.

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