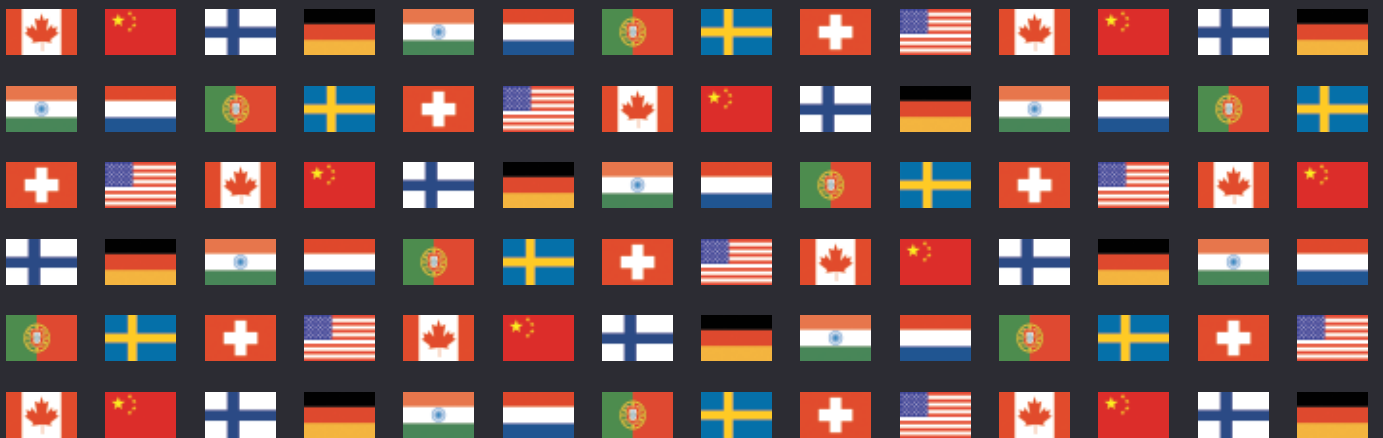


Distribution & Agency 2021

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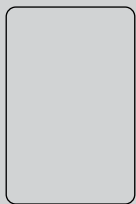
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Distribution & Agency 2021

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Lexology Getting The Deal Through is delighted to publish the seventh edition of *Distribution & Agency*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Netherlands, Portugal, Sweden and Switzerland..

Lexology Getting The Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.lexology.com/gtdt.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, David W Koch of Plave Koch, for his assistance with this volume.



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Turkey

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Moroğlu Arseven

DIRECT DISTRIBUTION

Ownership structures

- 1 | May a foreign supplier establish its own entity to import and distribute its products in your jurisdiction?

Yes. The intent of Foreign Direct Investment Law No. 4875 (FDI Law) is to encourage domestic investment by foreign suppliers. Article 3 of the FDI Law allows foreign suppliers to establish a domestic corporate entity the operations of which are regulated under Turkish Commercial Code No. 6102 (TCC) and Turkish Code of Obligations No. 6098 (TC). Under Turkish law, unless otherwise provided by applicable international treaties or agreements, or with respect to special applicable laws governing restricted goods, the domestic entity of a foreign supplier is treated like any other Turkish corporate entity.

- 2 | May a foreign supplier be a partial owner with a local company of the importer of its products?

Yes. Foreign and domestic investors are treated equally under the TCC. Accordingly, as would be the case for any Turkish corporate entity, as long as investments comply with applicable financial regulations and corporate laws, they are otherwise unrestricted.

- 3 | What types of business entities are best suited for an importer owned by a foreign supplier? How are they formed? What laws govern them?

Under Turkish law, a foreign supplier may establish its domestic operating entity as either a limited company (Ltd) or a joint stock company (AŞ). Both entities limit equity holder liability to the amount of invested capital. There is, however, a noteworthy distinction between the two corporate structures. Shareholders of limited companies, unlike those of joint stock companies, are liable for repayment public debts of the company if otherwise unrecoverable from liquidation of company assets.

The establishment of either corporate structure requires at least one shareholder in the form of a real or legal entity. The minimum capital required to establish a joint stock company is 50,000 Turkish lira. For limited companies the amount is significantly less at 10,000 lira. However, the minimum capital required to establish a joint stock company that adopts the registered capital system and is not publicly traded is 10,000 lira. Limited companies cannot adopt the registered capital system.

For joint stock companies, the TCC requires a quarter of total share capital to be paid in before registering the corporation; and the remaining three-quarters paid in not later than 24 months following registration. For limited companies, the TCC requires only that subscribed capital is paid in not later than 24 months after registration.

Both corporate forms required notarised articles of incorporation for establishment. In addition, an application together with a complete

set of incorporation documents must be submitted to the Commercial Registry. Thereafter, the establishment of the new entity will be announced in the Turkish Commercial Registry Gazette.

Restrictions

- 4 | Does your jurisdiction restrict foreign businesses from operating in the jurisdiction, or limit foreign investment in or ownership of domestic business entities?

Domestic and foreign investors have identical rights and obligations under the TCC and the Turkish Code of Obligations (TCO). Furthermore, the FDI Law imposes upon foreign entities no limitations on participation in Turkey's various industrial and business sectors.

Equity interests

- 5 | May the foreign supplier own an equity interest in the local entity that distributes its products?

Yes. Domestic and foreign investors have identical rights and obligations under the TCC and TCO. Furthermore, the FDI Law imposes upon foreign entities no limitations on investment in Turkey's various industrial and business sectors.

Tax considerations

- 6 | What are the tax considerations for foreign suppliers and for the formation of an importer owned by a foreign supplier? What taxes are applicable to foreign businesses and individuals that operate in your jurisdiction or own interests in local businesses?

Personal and corporate income taxes are applicable to foreign individuals and business entities. Turkey's tax schemes are separately codified; Income Taxation Law No. 193 (Income Tax Law) governs personal, and corporate is governed by Corporate Tax Law No. 5520 (Corporate Tax Law). Taxable income in general includes commercial earnings, agricultural earnings, wages and salaries, self-employment earnings, and revenue derived both from real property and chattel.

For the period 2018-2020, the corporate tax rate was 22 per cent on net earnings adjusted for exemptions and deductions including certain prior-year losses carried forward. Domestic corporate entities are taxed on globally derived income, whereas foreign entities are taxed solely on domestically derived income.

Treaties and international agreements to which Turkey is signatory address the issue of multijurisdictional tax liability and withholding of capital gains of foreign shareholders of Turkish companies.

LOCAL DISTRIBUTORS AND COMMERCIAL AGENTS

Distribution relationships

7 | What alternative distribution relationships are available to a supplier?

A distributor is a reseller of manufactured goods. A commercial agent is a manufacturer's authorised direct salesperson charged with facilitating sales on behalf of the manufacturer. Turkish Commercial Code (TCC) articles 102-123 regulate commercial agencies and distributorships alike. Distributors and commercial agents are independent contractors and not employees of the manufacturer or principal.

An agent is a fiduciary of the principal; its activities are strictly governed by the principal under the terms the agency agreement. In carrying out its charge, it must act in accord with the duties of care and loyalty. An agent must be compensated by the principal, may demand therefrom commission on sales closed and compensation for extraordinary expenses incurred in performing the agency. However, a distributor controls its operations and transactions with end-buyers.

Unlike distributors and commercial agents, marketing agents are employees of the manufacturer or principal strictly governed by thereby under the terms of a marketing agency agreement. A marketing agency agreement is a unique category of employment contracts treated *sui generis* under the Turkish Code of Obligations (TCO) article 448; allowed flexibility in compensation terms since marketing agency compensation may include both a fixed wage and contingent premiums.

Franchise agreements are not specifically governed by statute, but by a well-developed body of extant case law that provides, *inter alia*, that TCO article 448 applies to franchise contracts. A franchisee is a qualifiedly independent enterprise licensed by a franchisor to facilitate within a particular region sales of a franchisor's products. A franchisee must pay regular royalties to the franchisor and adhere strictly to the terms of the franchise agreement.

A licence agreement may be ancillary to a distribution contract, or a stand-alone production or production and distribution contract between manufacturers' licence agreements are regulated under Industrial Property Law No. 6769.

Domestic and foreign entities may collectively form a joint venture to facilitate distribution of goods or delivery of services under the terms of a joint venture agreement. Joint ventures are regulated under TCO article 448 and generally structured as simple partnerships; however, they may be incorporated independently or participate in an existing limited company.

Legislation and regulators

8 | What laws and government agencies regulate the relationship between a supplier and its distributor, agent or other representative? Are there industry self-regulatory constraints or other restrictions that may govern the distribution relationship?

Commercial agency agreements are governed by TCC articles 102 and 123. Marketing agreements are governed by TCO articles 448 and 460. Licence agreements are regulated under Industrial Property Law No. 6769. Joint venture agreements are regulated under TCO article 620, *et seq*, and, if the joint venture is incorporated, applicable articles of the TCC.

Notably, a business relationship of a kind between two vertically aligned, potential competitors implicates the Code on Protection of Competition (Competition Code) and its related government communications. Even though joint venture parties tend to hail from various sectors, they are nevertheless subject to Competition Code restrictions on horizontal coordination detrimental to competition. Marketing agreements, like all employment contracts, are regulated under the Labour Code.

Contract termination

9 | Are there any restrictions on a supplier's right to terminate a distribution relationship without cause if permitted by contract? Is any specific cause required to terminate a distribution relationship? Do the answers differ for a decision not to renew the distribution relationship when the contract term expires?

A termination notice is a unilateral declaration that summarily ends a relationship memorialised in a contract. The non-terminating party to a contract may initiate legal action for wrongful termination.

TCC article 121 provides that a commercial agency agreement of an indefinite term may be terminated upon three months' written notice. Unlike agency agreements, termination notice for distribution and franchise agreements are not regulated under any regulation in Turkish law. When some scholars are of the view that written notice of three months may be equally applicable to distribution and franchise agreements; some others are of the view that six months' written notice regulated under TCO article 640 for ordinary partnerships shall be applied. In any case, while determining a fair notice period for distribution and franchise agreements the duration of contract, nature of business and investment made by the parties must be considered provided; however, that vertical distribution agreements in the automotive sector, due to their complexity and consumer implications, may be terminated upon two years' written notice.

10 | Is any mandatory compensation or indemnity required to be paid in the event of a termination without cause or otherwise?

Article 122 of the TCC requires a principal or manufacturer must pay fair portfolio compensation to a terminated agent if the principal will continue the customer relationships produced by the agent and from which, considering the value of the customer portfolios, the principal is likely to derive significant, continuing economic benefit to the detriment of the terminated agent that will incur an equivalent economic loss in the form of lost commissions and other related compensation. The foregoing is equally applicable to contractual relationships involving the granting of exclusive distribution rights, exclusive regional franchises and exclusive licences.

Under TCC article 122/2, fair portfolio compensation is the average of annual commissions and other payments received by the agent for the five years immediately preceding termination; or, for an agency contract in force for less than five years, the entire period preceding termination. Notably, an agent may not claim portfolio compensation where the agent terminates the agreement without cause, or the principal terminates with cause. The right of an agent with grounds to pursue portfolio damages is absolute under TCC article 122/4.

Under TCC article 121/4, if an agency contract is terminated without cause or on less than required notice, the non-terminating party may seek damages for non-completion of business. Notably, where an agency agreement is duly terminated, unfinished business that would otherwise have inured to the benefit of the agent, distributor or franchisee, may be pursued thereby as a claim for damages.

Transfer of rights or ownership

11 | Will your jurisdiction enforce a distribution contract provision prohibiting or restricting the transfer of the distribution rights to the supplier's products, all or part of the ownership of the distributor or agent, or the distributor or agent's business to a third party?

Like any commercial agreement, a distribution contract, or particular obligations thereunder, may be transferred to a third party if the terms

of the contract allow, and, if not, then upon consent of the non-transferring party.

Notably, transfer of contractual distribution rights that are subject to marketing authorisations or permits (eg, pharmaceuticals, medical devices, liquid natural gas, crude oil and electricity) is subject to additional requirements even if specifically allowed by the contract itself; is subject to the review and approval of competent regulatory authorities.

Such transfers may be accomplished in the case of a sole proprietorship by transferring the entire enterprise, or, in the case of closely held and publicly traded companies by transferring all shares; provided, however, that, in the case of regulated closely held and publicly traded companies, should such a transfer constitute a change in control it is subject to the approval of the competent regulatory authority – eg, the Energy Market Regulatory Authority for change in control of electricity distributor. Similarly, transfer of a sole proprietorship, closely held or publicly traded company, functioning as a commercial agent facilitating the execution of insurance policies or other agreements on behalf of an insurance company are subject to specific insurance regulations and associated regulatory authority approvals.

REGULATION OF THE DISTRIBUTION RELATIONSHIP

Confidentiality agreements

- 12 | Are there limitations on the extent to which your jurisdiction will enforce confidentiality provisions in distribution agreements?

Turkish law does not specifically address distribution contract confidentiality provisions. However, distributors are bound vis-à-vis their suppliers by the fiduciary duties of care and loyalty which, by their very nature, include the obligation to maintain appropriate confidentiality. Provided, however, that contractual confidentiality provisions, as well as stand-alone confidentiality and non-disclosure agreements not in conflict with applicable law are strictly enforced by Turkish courts.

Competing products

- 13 | Are restrictions on the distribution of competing products in distribution agreements enforceable, either during the term of the relationship or afterwards?

The Turkish Commercial Code (TCC) prohibits distributors from distributing products that compete with those they distribute during the term of an existing contract; and thereafter pursuant to TCC article 123, if agreed to and memorialised in a separate non-competition agreement; provided, however, that the duration of the restriction cannot exceed two years from the termination date of the initial distribution contract nor expand the geographical territory, customer base, or type of goods specified in the initial distribution contract. Furthermore, a supplier must reasonably compensate the distributor during the post-termination restrictive period.

TCC article 104 prohibits agents from distributing products or providing services that compete with those distributed or provided during the term of an existing contract; provided, however, that a contractual prohibition on competition for an uncertain duration or in excess of five years is voidable under Turkish non-competition law.

Non-compete provisions and stand-alone agreements are excisable or voidable, respectively, if violative of TCC article 123.

Prices

- 14 | May a supplier control the prices at which its distribution partner resells its products? If not, how are these restrictions enforced?

Block Exemption Communiqué on Vertical Agreements No. 2002/2, article 4, titled Restrictions Excluding Agreements from the Scope of Block Exemption (Block Communiqué), prohibits as anticompetitive price controls imposed by suppliers on their distributors. Violations of the Block Communiqué are subject to an administrative fine of up to 10 per cent of the offending supplier's annual gross income for the prior fiscal year as determined by the Competition Board; if this is impossible to calculate, then for the nearest calculable fiscal year.

- 15 | May a supplier influence resale prices in other ways, such as suggesting resale prices, establishing a minimum advertised price policy, announcing it will not deal with customers who do not follow its pricing policy, or otherwise?

Suppliers may provide non-binding pricing recommendations to distributors. Recommendations may include minimum and maximum advertised pricing. A supplier with a market share exceeding 40 per cent that refuses to contract with or threatens to hinder the business of a distributor refusing price controls may be subject to prosecution under anticompetition laws.

- 16 | May a distribution contract specify that the supplier's price to the distributor will be no higher than its lowest price to other customers?

Turkish anticompetition law does not address most favoured customer (MFC) clauses. The Turkish Competition Authority (TCA) in its Guidelines on Vertical Agreements recognises the potential of MFC clauses to positively impact competition. MFC clauses are not considered anticompetitive under the Block Communiqué provided the beneficiary's market share does not exceed 40 per cent and the clause does not contravene other applicable law.

- 17 | Are there restrictions on a seller's ability to charge different prices to different customers, based on location, type of customer, quantities purchased, or otherwise?

A seller may charge different consumers different prices for the same goods.

Geographic and customer restrictions

- 18 | May a supplier restrict the geographic areas or categories of customers to which its distribution partner resells? Are exclusive territories permitted? Is there a distinction between active sales efforts and passive sales that are not actively solicited, and how are those terms defined?

In accordance with the Block Communiqué, supplier and the reseller can agree to geographic and customer base limitations; however, there are restrictions on active sales within an exclusive region or vis-à-vis an exclusive customer base assigned to a reseller by a supplier. Indeed, the targeting of one reseller's exclusive territory or customer base by another reseller via establishing a presence, engaging in email and other campaigns, is prohibited. There is no prohibition on sales realised passively from the exclusive customers or territory of another.

19 | If geographic and customer restrictions are prohibited, how is this enforced?

Complaints may be brought before the TCA, or, absent a complaint, the TCA may of its own volition initiate an investigation. The TCA may levy civil fines for violations of the Block Communiqué of between 0.5-3 per cent of the offending party's prior year's total turnover. Also, those who suffered a loss due to breach of the prohibitions prescribed in the Communiqué 2002/2 may seek compensation from the breaching party before civil courts.

Online sales

20 | May a supplier restrict or prohibit e-commerce sales by its distribution partners?

The Guidelines on Vertical Agreements consider online sales under the rubric of passive sales that a supplier is prohibited from restricting.

21 | May a distributor or agent restrict a supplier's sales through e-commerce intermediaries into the distribution partner's territory? May it require the supplier to obtain reports of such sales by territory and a payment of 'invasion fees' or similar amounts to the distribution partner?

Restrictions imposed by a reseller that are inconsistent with Competition Law article 5, are subject to excision from the distribution contract. Turkish law does not address supplier reporting, however, such requirements may be agreed to in the distribution contract.

Refusal to deal

22 | Under what circumstances may a supplier refuse to deal with particular customers? May a supplier restrict its distributor's ability to deal with particular customers?

The supplier and end-customer relationship is remote and mediated by the reseller whose customers, pursuant to the Block Communiqué are not subject to supplier's approval.

Competition concerns

23 | Under what circumstances might a distribution or agency agreement be deemed a reportable transaction under merger control rules and require clearance by the competition authority? What standards would be used to evaluate such a transaction?

A distribution, agency, or franchise contract effecting a legal or de facto change in control of the supplier is reportable to the TCA and requires approval of the Competition Board under article 7 of Communiqué 2010/4.

24 | Do your jurisdiction's antitrust or competition laws constrain the relationship between suppliers and their distribution partners in any other ways? How are any such laws enforced and by which agencies? Can private parties bring actions under antitrust or competition laws? What remedies are available?

Turkish antitrust prohibits arrangements that intend to or result in a restraint on competition. The TCA is the competent regulatory authority in matters of anticompetition. The TCA may levy fines for anticompetition infractions. Private parties may pursue matters implicating anticompetition in accordance with Law No. 4054, article 57, et seq.

Parallel imports

25 | Are there ways in which a distributor or agent can prevent parallel or 'grey market' imports into its territory of the supplier's products?

Turkey has adopted the doctrine of territorial exhaustion of intellectual property rights. Accordingly, neither a distributor nor an agent can prevent grey market importation of legally obtained, conforming supplier goods.

Advertising

26 | What restrictions exist on the ability of a supplier or distributor to advertise and market the products it sells? May a supplier pass all or part of its cost of advertising on to its distribution partners or require them to share in its cost of advertising?

As an independent operator, the distributor, as a rule, has to bear all marketing, advertising and distribution costs as a reflection of the debt of increasing the product's version. TCC article 55 and certain additional consumer regulations regulate supplier advertising. Supplier advertisements violative of consumer protection or anticompetition laws are prohibited.

(A distribution contract may contain agreed-upon terms governing apportionment of advertising costs.)

Intellectual property

27 | How may a supplier safeguard its intellectual property from infringement by its distribution partners and by third parties? Are technology transfer agreements common?

Turkish intellectual property laws prohibit unauthorised use of intellectual property, including trade secrets and know-how, and materials trademarked, patented or copyrighted. The TCC also provides certain protections applicable to trade secrets and know-how.

Technology-transfer agreements are commonplace in Turkey.

Consumer protection

28 | What consumer protection laws are relevant to a supplier or distributor?

Under Law on Protection of Consumers No. 6502 (LCP), suppliers and distributors are jointly liable for defective goods sold.

In a case of defective goods, a consumer may under LCP article 11:

- return the defective goods to distributor for a full refund;
- keep the goods and receive a proportionate refund from distributor;
- demand from distributor at no cost a repair of the defective goods, provided repairs do not exceed the purchase price; and
- demand at no cost a substantially identical, non-defective replacement from distributor or supplier.

In the case of defective services performed by a provider that is not the supplier, the consumer may:

- demand reperformance by service provider; and
- request a full or proportionate refund from service provider.

Product recalls

29 Briefly describe any legal requirements regarding recalls of distributed products. May the distribution agreement delineate which party is responsible for carrying out and bearing the cost of a recall?

As per the Law on Product Safety and Technical Regulations No. 7223, manufacturers, authorised representatives, importers, distributors or any other real or legal person who has responsibility for the manufacture, placing on the market or putting into service the products within the scope of the relevant technical regulation are prohibited from knowingly, negligently or recklessly bringing defective or unsafe goods to market as the economic operator. If it is understood that the product is risky and other measures taken are insufficient to eliminate the risk, the economic operator shall recall the product of its free will or upon the request of the authorised institution. All costs associated with recalling the product shall be borne by the economic operator who recalled the product.

Warranties

30 To what extent may a supplier limit the warranties it provides to its distribution partners and to what extent can both limit the warranties provided to their downstream customers?

Distributors are free to agree to supplier representation and warranty limitations, other than for gross negligence, and same are generally enforceable under Turkish law. Since downstream customers are not party to the distribution contract their rights cannot be limited thereby.

Data transfers

31 Are there restrictions on the exchange of information between a supplier and its distribution partners about the customers and end users of their products? Who owns such information and what data protection or privacy regulations are applicable?

Under Turkish Data Protection Law No. 6698 (DP Law), personal data is defined as any information relating to an identified or identifiable person.

In principle, the data controller or owner, which is defined as the real or legal entity who determines the purposes for which, and how personal data is processed, will be the supplier. Yet, if the distribution partners will decide how the personal data of supplier's customer or employees should be processed the distribution partners will also be treated as a data controller. Therefore, it is essential to determine a supplier and its distribution partners' position according to specific processes. If the supplier and its distribution partners will jointly determine on personal data processes, then both will be count as a joint data controller. The critical point is that the concept of the joint controller was not regulated under the DP Law.

The following key rules need to be followed in all data processing activities by data controllers:

- the data subject has given his or her explicit consent;
- it is explicitly permitted by law;
- it is mandatory for the protection of life or to prevent the physical injury of a person, where that person is physically or legally incapable of providing his or her consent;
- processing of personal data belonging to the parties to a contract is necessary provided that it is directly related to execution or performance of that contract;
- it is mandatory for the data controller to fulfil its legal obligations;
- the personal data was publicised previously by the data subject himself or herself;
- it is mandatory for the establishment, exercise, or protection of certain rights; and

- it is vital to the legitimate interests of the data controller, provided, however, that the fundamental rights and freedoms of the data subject are not compromised.

The above-mentioned legal grounds for processing personal data within Turkey apply when processing or transfer is international. Pursuant to article 9 of the DP Law, cross-border data transfers shall be based upon the data subject giving his or her explicit consent or the cross-border transfer being based on one of legal basis stipulated under the following grounds:

- The receiving country must be accepted as safe with an adequate level of data protection by the Turkish Data Protection Board (Board), or
- If the level of data security is not adequate, then the data transferor in Turkey and data receiver abroad (data controller or processor) must execute a written undertaking letter (the minimum content of which is already determined by the Board) and seek the approval of the Board for the data transfer.

The list of the countries with an adequate level of protection has yet to be published by the Board, which leads to considering all countries as unsafe in terms of data transfers. Therefore, at this stage, there are two statutory ways for the data controller to transfer personal data abroad; obtaining the explicit consent of the data subject or a written undertaking must be executed between the data transferor and data receiver, and the approval of the Board must be obtained for the data transfer.

Currently, the Board published standard terms for the transfer on its website and requires that the written undertaking be executed between the data transferor and the data receiver includes such terms at least. These are the essential clauses that must be included in contracts for transferring personal data to countries that Turkey deems to not provide adequate protection. The minimum clauses include separate provisions for transfers to data controllers, compared to data processors. The minimum content envisaged by the Board is quite similar to the Standard Clauses in the EU.

32 What requirements apply to suppliers and their distribution partners with respect to protecting the security of customer data they hold?

Under the DP Law, data controllers are obligated to prevent unlawful processing, unlawful access to personal data, and ensure retention of personal data.

A data controller must take all necessary technical and organisational measures to provide appropriate data security to fulfil the obligations hereinabove. Unlike the General Data Protection Regulation, the rights and obligations of data processors are not specifically regulated by the DP Law, still, they are under obligation to ensure data security jointly with data controllers. Within this framework, data processors shall comply with the instructions of the data controller while processing personal data transferred to them, and not disclose such personal data, nor use such data for purposes other than the processing purpose determined by the data controller. These obligations shall continue even after the end of their term as a data processor.

Considering the importance of special categories of personal data, and the need to secure it accordingly, the Board, in one of its rulings, introduced additional data security safeguards for data controllers dealing with special categories of personal data.

Employment issues

- 33 | May a supplier approve or reject the individuals who manage the distribution partner's business, or terminate the relationship if not satisfied with the management?

Except as specified in the underlying contract or in the case of a subcontract, the distributor's managerial staff is not subject to supplier approval. Dissatisfaction with the distributor may be grounds for termination of the distribution contract. Courts will examine the totality of the circumstances of each case and make a determination of cause accordingly.

- 34 | Are there circumstances under which a distributor or agent, or its employees, would be treated as an employee of the supplier, and what are the consequences of such treatment? How can a supplier protect against responsibility for potential violations of labour and employment laws by its distribution partners?

Pursuant to the TCC, except in the case of a subcontract, neither distribution nor agency agreements establish an employer-employee relationship between parties. However, pursuant to Labour Law No. 4857, a distributor or agent may be considered a de facto employee of supplier based upon the number of hours spent under the supplier's direction or in the supplier's place of business. Courts will determine whether such a relationship exists based upon the totality of the circumstances of each case.

Commission payments

- 35 | Is the payment of commission to a commercial agent regulated?

Under TCC article 113/1, commercial agents are entitled to commissions on new customer transactions facilitated by the agent, and transactions with customers within the agent's exclusive territory even if not facilitated by the agent; and on transactions concluded after the expiration of the agency contract provided that the transaction is attributable primarily to the agent's efforts during the term of the contract and closed within a reasonable period after expiration; or the customer order was placed before expiration of the agency contract.

Good faith and fair dealing

- 36 | What good faith and fair dealing requirements apply to distribution relationships?

Article 2 of the Turkish Civil Code imposes a general requirement of good faith in all matters of civil life.

TCC article 109 requires that in discharging its contractual duties an agent protects the interests of the principal. In addition, TCC article 104 provides that, unless otherwise agreed to between the parties, an agent may not represent competing suppliers in a single territory. Finally, as per the reference made by article 102/2 of the TCC the provisions of contract of mandate are applied to agency agreements by comparison. The contract of mandate is regulated between articles 502 and 514 of the TCO. Article 508 the TCO sets forth that the proxy is entitled to account for all transactions conducted upon his or her client's request. Based on this, the agent is also entitled to answer and account for in details for all transactions conducted for and on behalf of his or her client.

Registration of agreements

- 37 | Are there laws requiring that distribution agreements or intellectual property licence agreements be registered with or approved by any government agency?

There are no such requirements in Turkish law.

Anti-corruption rules

- 38 | To what extent are anti-bribery or anti-corruption laws applicable to relationships between suppliers and their distribution partners?

Under Turkish law, only natural persons may be criminally charged (see, article 38 of the Constitution of the Republic of Turkey; see also article 20 of the TCC). Legal entities are not subject to criminal prosecution. Natural persons engaging in criminal activity on behalf of a legal entity are subject personally to criminal prosecution. A legal entity is subject to significant civil fines in connection with criminal conduct of natural persons acting on its behalf.

Article 43/A of the Turkish Misdemeanour Law provides that if a natural person, who is an organ or representative of a legal entity, or acts on behalf of a legal entity, commits a criminal act, including, among others, bribery, and from that criminal act the legal entity derives an economic benefit, then that legal entity is subject to a fine of up to 2 million lira for each instance of criminality.

Prohibited and mandatory contractual provisions

- 39 | Are there any other restrictions on provisions in distribution contracts or limitations on their enforceability? Are there any mandatory provisions? Are there any provisions that local law will deem included even if absent?

Restrictions on competition may not extend beyond two years following the expiration or termination of a distribution contract. Mandatory termination notice periods are implied if not explicit in the contract. The basic obligations of the principal vis-à-vis the reseller under TCC article 120 are implied if not explicit in the contract. The right to portfolio compensation under TCC article 122/4 is implied if not explicit in the contract.

GOVERNING LAW AND CHOICE OF FORUM

Choice of law

- 40 | Are there restrictions on the parties' contractual choice of a country's law to govern a distribution contract?

No. Article 24/1 of the International Private and Procedural Law (IPPL) No. 5718 permits contractual choice of law provisions.

Choice of forum

- 41 | Are there restrictions on the parties' contractual choice of courts or arbitration tribunals, whether within or outside your jurisdiction, to resolve contractual disputes?

Under article 17 of the Turkish Code of Civil Procedure, only public legal entities and merchants – as defined by TCC articles 12, 15 and 16 – are allowed to execute jurisdiction agreements. Unless otherwise stipulated by the parties, the lawsuit can be filed only in the court determined in the agreement.

Jurisdiction agreements, where allowable, must be written and signed by the parties, and recite specifically the name of the court or other tribunal with jurisdiction. Article 47 of the IPPL provides that in the case of a contractual dispute involving an element of foreign law, an agreement specifying jurisdiction of a non-Turkish court is binding.

The International Arbitration Law No. 4686 outlines principles and procedures regarding international arbitration processes where a foreign element exists and Turkey is the seat of arbitration. Accordingly, the parties can either agree the arbitration rules to be applied or determine these by referring to international or institutional arbitration rules. If a matter subject to binding arbitration is filed with a court of otherwise competent jurisdiction, a party may in a preliminary objection include a plea for transfer of the matter to the contractually specified arbitration forum.

Litigation

- 42 | What courts, procedures and remedies are available to suppliers and distribution partners to resolve disputes? Are foreign businesses restricted in their ability to make use of these courts and procedures? Can they expect fair treatment? To what extent can a litigant require disclosure of documents or testimony from an adverse party? What are the advantages and disadvantages to a foreign business of resolving disputes in your country's courts?

The commercial courts of Turkey are the courts of first instance in contract disputes. Initial appeals may be filed in the Court of Appeal, and final appeals in the Court of Cassation.

Under Turkish law, except where there is an applicable treaty, including the Hague Convention, or a stand-alone international reciprocity agreement, foreign real persons and legal entities who file a lawsuit, participate in an ongoing lawsuit or commence an execution procedure in Turkey must post a bond in an amount determined by the court. In practice, courts tend to set the bond at 15–20 per cent of total damages claimed. Failure to post bond is grounds for summary dismissal by the court *ex officio*.

A litigant may petition the court for production of the opposing party's documents, evidence, and witnesses. Petitioner should plead the necessity and relevance of the requested production. It is within the discretion of the court to grant the relief requested. Litigation and adjudication of international disputes in Turkish courts generally requires three to four years.

Alternative dispute resolution

- 43 | Will an agreement to mediate or arbitrate disputes be enforced in your jurisdiction? Are there any limitations on the terms of an agreement to arbitrate? What are the advantages and disadvantages for a foreign business of resolving disputes by arbitration in a dispute with a business partner in your country?

Arbitration of international disputes is commonplace in Turkey and governed by the Turkish International Arbitration Law enacted in 2001. Most commercial disputes – except those arising in a pending bankruptcy case and proceedings *in rem* – are generally eligible for arbitration. Turkey is signatory to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), the Geneva Convention on International Commercial Arbitration (1961), and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

For a foreign party, arbitration may provide certain flexibility unavailable in the courts of Turkey (eg, proceeding in the foreign party's native language) and other potential benefits, including quicker resolution, lower cost, selection of specialist arbitrators, confidentiality of proceedings, and international recognition and enforceability of decisions.

UPDATE AND TRENDS

Key developments

- 44 | Are there any proposals for new legislation or regulation, or to revise existing legislation or regulation? Are there any other current developments or trends that should be noted?

There are no updates at this time.

Coronavirus

- 45 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

Law No. 7244 on Reducing the Economic and Social Effects of New Coronavirus (covid-19) and Amendment of Certain Laws published in Official Gazette No. 31102, on 17 April 2020, implements certain measures intended to reduce the economic impact of the pandemic.

Presidential Decree No. 3323, published in the Official Gazette on 23 December 2020, implements rent support measures applicable to tradesmen, craftsmen and sole proprietors whose commercial activities are negatively impacted by the pandemic as determined by the Communiqué on the Grant Support Program and Implementation Principles Due to Coronavirus, published in the Official Gazette dated 24 December, No. 31344.

Additional materials and pandemic-related updates are available by clicking this link to [MA | COVID-19 Corner](#).

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