Turkey

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Efficiency of process

Turkey's judicial system has been subject to continuous reforms to enhance its efficiency. The reforms have brought, among other things, significant technological and structural novelties. In particular, following the global trend that has arisen upon the emergence of COVID-19, Turkey has adopted significant reforms for more virtual, remote, and digitalised justice.

Before COVID-19, Turkey already offered significant online services to render justice in an effective, swift, accessible, and paperless manner. Within this scope, Turkey has implemented the National Judiciary Informatics System ("**UYAP**"), enabling courts and individuals to carry out procedural acts online. UYAP is an online network that ensures interconnection between all departments of the Ministry of Justice ("**Ministry**") including, courts, public prosecutors' offices, enforcement offices, and the central organisation. UYAP constitutes the main gateway where different actors of justice (lawyers, experts, judges, clerks, mediators, conciliators, execution offices, law enforcement officers) access the portals and systems specifically designed for their use, and where online services are made available.

At this point, it should be noted that as per Article 28/1-(d) of Turkey's Law on Protection of Personal Data No. 6698 ("**DP Law**"), the DP Law does not apply to the processing of personal data by judicial authorities or execution offices in relation to the investigation, prosecution, trial, or execution proceedings. One may argue that although judicial authorities and execution offices are exempted from the DP Law for their data processing with respect to judicial acts, the Ministry as an administrative body is not exempted from the DP Law. The fact that the Ministry only maintains the system facilitating data processing activities of judicial authorities, and that only the judicial authorities are those who are processing data over UYAP, the Ministry only fulfils the requirements that would be expected from the provision of the platform to the judicial authorities. As per Article 46/B of Presidential Decree No. 1, the Information Processing Office of the Ministry is responsible for ensuring the effective and efficient utilisation of the information system (UYAP in particular) by cooperating with judicial and execution authorities. UYAP is designed based on this provision, and the system is provided by the Ministry. However, all the data in UYAP are under the control of courts, and the Ministry, as a rule, has neither control over data nor access to it. Therefore, there is – except for providing the platform and storing the data on it – no further processing by the Ministry of the data processed by judicial and/or execution authorities. Even if the data processed by judicial and/or execution authorities were under the scope of the DP Law, the Ministry would not be considered anything more than the data processor for judicial and execution authorities. A data processor is defined under the DP Law as a natural or legal person processing data basing on the authority vested by the data controller. As processing activities by judicial authorities with respect to judicial acts are

outside the scope of the DP Law, judicial and execution authorities cannot be regarded as data controllers. Consequently, the Ministry cannot be classified as a data processor since it does not process data based on the authority vested by a data controller who processes the data under the DP Law.

UYAP eases the lives of every legal practitioner in Turkey, meaning lawyers are no longer required to physically visit the courthouse in order to:

- review court files appointed to them by their clients;
- submit petitions and take copies from documents submitted;
- deposit expenses and litigation costs with the court; and
- conduct asset research of debtors in insolvency cases.

UYAP has been consistently developed and supported through new features that enlarge its area of usage and improve its existing services. Accordingly, the last significant improvement was the launch of the possibility of virtual hearing.

Virtual hearing at the civil courts through UYAP has been on the agenda of the Ministry for a while. While it has been available at the criminal courts since 2012, it has since become urgent for civil matters as well due to the effects of COVID-19. Accordingly, the Ministry accelerated the process. The first trial was conducted in June 2020 by the Minister of Justice and the platform has been swiftly made available to lawyers, and its scope has been considerably extended throughout 2020 and 2021. Currently, virtual hearing is available in 679 civil courts in 33 cities and the number constantly increases. The long-term target of the Ministry is implementing e-hearings in all courts in Turkey.

It is fair to say that user experience as of the date of this publication is quite positive towards e-hearings. First impressions include: judges do not refuse requests for e-hearings that are submitted on time; the waiting period, which could reach up to two to three hours in a physical hearing, has been shortened; e-hearings are conducted in an atmosphere similar to that of a physical hearing room; it is easy to follow both the hearing minutes and the judge's actions; no major connection problems have been experienced; and audio and video quality is high.

The Judicial Reform Strategy of Turkey adopted in May 2019 also envisages a significant reform, that is the establishment of virtual enforcement offices. Enforcement offices have a very heavy workload in Turkey, and the number of pending enforcement proceedings exceeds 22 million. Due to this workload, a considerable budget is dedicated to operation of the enforcement offices. Therefore, a reform aiming to reduce this workload and budget and facilitate enforcement proceedings by limiting physical appearance of the parties and their lawyers at the enforcement offices was inevitable. COVID-19 was also an accelerator for this reform.

In fact, a step towards virtual enforcement offices was initially taken with the Central Execution Proceedings System ("*Merkezi Takip Sistemi*", or "**MTS**"), which became available on 1 June 2019. The scope of the MTS is limited to execution proceedings based on subscription agreements. Via MTS, execution proceedings without judgment can be initiated by the creditor's counsel and conducted online until the attachment phase.

Another remarkable reform for digitalisation of justice was the implementation of e-service. The gradual transfer of all services to e-service began in 2016, with the requirement of e-service for certain taxpayers. Over the years, the implementation of e-service became prevalent and as of 1 January 2019, it became mandatory in Turkey to make notifications to certain parties including lawyers registered to the Bar, registered mediators, and experts via the National Electronic Services System established by the Turkish Post. The Electronic

Services Regulation was published in Official Gazette No. 30617 on 6 December 2018. It is undeniable that the requirement of e-service of documents has achieved a great deal since it simplified the service of any public document including judicial documents.

On the administrative and regulatory front, the Turkish competition regime's digitalisation process also bore fruit. June 2020 brought amendments to Law No. 4054 on the Protection of Competition and the new text allows on-the-spot inspections (i.e. dawn raids) to also cover the digital assets of a company concerned. The Turkish Competition Authority was already able to examine company servers, devices of personnel used in conducting their work duties (e.g. computers, mobile phones, tablets, etc.) and correspondence made via applications such as WhatsApp, Telegram, etc. However, the legal basis of this inspection power has been strengthened by clarifying the wording in the relevant provision of the law. Following this, the Competition Authority published its Guidelines on the Examination of Digital Data during On-site Inspections ("**Guidelines**") to resolve questions that might arise in practice in relation to the review and collection of digital data in the course of on-site inspections. The remarkable points of the Guidelines include: (i) the possibility of the examination of portable communication devices such as personal mobile phones, based on the scope of their usage; (ii) the use of forensic software and hardware tools during on-site inspections; and (iii) the continuation of inspections at the headquarters of the Competition Authority.

According to the Guidelines, information systems such as servers, desktop computers/laptops, portable devices that belong to the undertaking, and all storage media, e.g. CD, DVD, USB, external hard discs, backup files, and cloud services can be subject to examination by the staff of the Competition Authority. Whilst assessing whether a portable communication device can be subject to examination, it does not take into account the ownership of the device, but instead its area of usage. Accordingly, to assess whether the device contains any digital data that belong to the undertaking, a swift review will be conducted. In particular, portable communication devices that are found to be solely used for personal purposes will not be subject to inspection. On the other hand, devices found to contain data that belong to the undertaking can be inspected via forensic tools. During the inspection, in addition to the search tools available within the systems of the undertaking, forensic software and hardware tools that allow for a comprehensive search concerning digital data can also be used. The Guidelines bring a parallel approach with the European rules by introducing forensic IT tools. In addition, if deemed necessary, any digital data to be examined can be copied to a separate data storage unit as a whole or partially with forensic tools. Upon confirming their originality by calculating hash values, this data can be transferred to and, after indexing, examined on the computers of the Competition Authority staff with forensic tools.

Undertakings under competition law inspection have the duty to refrain from interfering with the data and the environments where the data is kept. In addition, it is explained that the undertaking is obligated to aid the examination concerning their information systems during the inspection. Accordingly, the undertaking, for example, is obligated to provide information concerning the software and hardware of the information technologies used, assign administrative permissions, grant remote access to employees' email accounts, isolate computers and servers from the network, restrict access to corporate accounts of users, and recover backup commercial data when needed.

The Guidelines, excluding the examination of digital data seized from mobile phones, envisage that if deemed necessary, the examination can continue at the forensic information laboratory located on the premises of the Competition Authority. If it is decided that the

examination will continue on the premises of the Competition Authority, the necessary digital data, upon calculating and comparing the hash values, will be transported to three separate data storage units, two of which will be taken by the Competition Authority staff in sealed envelopes. The undertaking concerned will receive a written invitation to send an authorised representative to represent the undertaking during the breaking of the seal of the envelope and the continuing examination at the forensics information laboratory.

Trade secret statements made both during the competition inspections conducted on the premises of the undertaking and at the headquarters of the Competition Authority concerning digital data considered to be evidence will be evaluated under Communiqué No. 2010/3 on the Regulation of the Right of Access to the File and Protection of Trade Secrets. Copied data will benefit from attorney-client privilege where the correspondence was made between an impartial/independent attorney (with whom the undertaking does not have a labour contract – i.e. in-house attorneys do not trigger such privilege) and client with the aim of using the right to defence. Correspondence that is not directly related to the right of defence, especially correspondence made to aid a competition violation or to cover a continuous violation or a violation that will take place in the future, will not benefit from attorney-client privilege nor from the benefit of this protection. Therefore, attorney-client privilege has limited protection in competition law proceedings, being applicable only to the extent there is an ongoing investigation in which case an investigatee can resort to right to defence.

Apart from those digitalisation efforts, Turkey also introduced significant amendments to the Code of Civil Procedure No. 6100 ("**CCP**") in order to propose solutions to the issues faced in application of the CCP along with some significant reforms in July 2020. The amendments include measures to render the proceedings more swiftly by introducing more precise rules for document production and prohibition of amendment/expansion of the claim and defence.

Within the scope of structural reforms, in July 2016, Turkey introduced regional courts of justice, a new appellate layer aiming to ease the Court of Cassation's workload. The new layer turns the Court of Cassation into a superior court that focuses on establishing case law rather than reviewing the material facts of the conflict, which the regional courts of justice are expected to manage.

Introducing regional courts of justice has sped up the appeal process as well. Decisions by courts of first instance for monetary matters over TRY 5,880 (approximately USD 680) can be appealed to regional courts of justice. Likewise, a regional court of justice's decision regarding monetary issues over TRY 78,630 (approximately USD 9,094) can be appealed to the Court of Cassation. If a court of first instance's decision is reviewed by both the regional court of justice and then the Court of Cassation, the process for a decision to become final may take three to four years, depending on the complexity of the case.

Regardless of how long the appellate process stretches, the winning party can enforce their decision against the losing party following the first instance court's decision. To avoid this, a losing party should file an appeal including a specific request to freeze enforcement, by depositing a sum or bank guarantee letter equal to the amount granted by the first instance court. Generally, parties prefer a bank guarantee letter if the amount granted by the first instance court is significant, as it enables them to use their money instead of keeping it idle as collateral in the enforcement office's bank account while the case is being reviewed by a regional court or the Court of Cassation.

Parties in Turkey tend to be quite litigious, regardless of the prospects of success. There are no real measures that force parties to think twice before resorting to litigation. For

instance, the losing party will not be forced to remunerate the winning party for professional fees incurred due to the proceedings, unless such proceedings are deemed to be initiated in bad faith. If the case can be categorised as a claim for an indefinite amount, the claimant can avoid depositing the *pro rata* application fee at the beginning of the claim, as well as paying the winning party's *pro rata* representation fee in case the claim is rejected. It is worth noting that an amendment introduced to the Attorney's Fee Tariff on 2 January 2020 seems to create a risk of increasing the number of groundless claims in monetary compensation cases. Pursuant to this amendment, in case of partial dismissal of a monetary compensation claim, the representation fee to be awarded in favour of the defendant's lawyer cannot exceed the representation fee awarded to the claimant's lawyer. Also, in case of full dismissal of a monetary compensation claim, the representation fee awarded to the defendant's lawyer is not proportional, but fixed. Although this amendment aims to enhance access to justice, alleviation of the representation fee burden would give rise to bad faith claims and aggravate the workload of the courts in the long term.

Thus, the workload of Turkish courts continuously increases every year. To accelerate the procedure for relatively small claims, a simple trial procedure with only one round of exchange of petitions has been introduced for commercial cases amounting to or with a value of TRY 500,000 or greater, in order to accelerate especially drawn-out commercial cases and to decrease the workload of the commercial courts.

There is also a distinction made in accordance with the amount and nature of disputes before the commercial courts in order to accelerate the proceedings. The commercial courts usually consist of a panel of three judges. However, only large commercial disputes are handled by a panel of three judges, while other disputes are heard by a single judge. Accordingly, the below disputes are tried by a panel of three judges:

- Monetary claims with a value exceeding TRY 500,000.
- Arbitration-related matters such as enforcement of foreign arbitral awards, setting aside of arbitral awards, appointment of, or challenge to, arbitrators.
- Declaration, postponement, cancellation and closing of bankruptcy and company reorganisations.
- Cancellation of shareholders' meeting resolutions, liability actions against management and supervision boards, dismissal of corporate organs or appointment of temporary corporate organs, dissolution and liquidation of companies.

As part of the effort to ensure efficiency of the judiciary, alternative dispute resolution ("**ADR**") mechanisms are greatly supported by the Ministry, and parties and attorneys are encouraged to have recourse to those. A notable reform that aims to reduce the workload of the courts is the implementation of a mandatory pre-litigation mediation stage in employment disputes as of 1 January 2018, in commercial disputes with monetary claims as of 1 January 2019, and in customer disputes involving monetary claims of and exceeding TRY 11,330 (as of 2021) introduced on 28 July 2020. Accordingly, parties to an employment dispute, a commercial dispute pertaining to monetary claims, or customer disputes pertaining to monetary claims of 11,330 and above, cannot bring their case before a court unless the mandatory mediation process is completed and a final report is issued by the mediator putting forth the parties' failure to settle the dispute. The parties must first apply for mediation; otherwise, the case will be dismissed on procedural grounds without further examination on the merits.

Further, apart from voluntary pre-litigation dispute resolution methods such as mediation, conciliation and dispute adjudication boards, arbitration has seen significant growth in

recent years. In particular, the foundation of the Istanbul Arbitration Centre ("**ISTAC**") has played an important role in establishing arbitration culture and practice in Turkey.

ISTAC has also followed the trend of virtualisation of process and publishing online hearings, including hearings held via teleconference or video conference, rules and procedures. The rules consist of 10 articles that cover general features of online hearings in order to provide guidance to parties and arbitrators. According to the rules, at the request of any party or in cases where the arbitrator or the arbitral tribunal deems it appropriate, hearings or meetings may be conducted through video conference or teleconference. Apart from the practical rules in relation to the conduct of online hearings, the rules emphasise the arbitrators' duty to ensure the parties' right to be heard and allow the arbitrators to end the hearing at any time and give their reasons for doing so in cases where they are convinced during the hearing that the right to be heard has been violated.

Integrity of process

Turkey adopted several legislative changes regarding the rules of natural justice as part of the EU accession process. Significant constitutional changes in 2001 improved Turkey's rules of natural justice, in line with EU legislation. Accordingly, the constitution protects the right to a fair hearing, the death sentence was abolished, and importance was given to the right to access legal remedies.

The constitution protects and guarantees judicial neutrality. The CCP also stipulates several detailed provisions to eliminate the partiality of judges. In this respect, the parties may request abdication of the judge in case any concern arises regarding their impartiality. Judges may abdicate themselves at their own discretion without the need of any party's request.

Turkey is continuously adopting reforms to ensure independence and impartiality of judges. Judges can be disqualified in case of existence of important causes giving rise to doubt in their impartiality. Even in case the reasons for disqualification are not proven but their existence is highly likely, the judge can be disqualified.

The latest judicial reforms aim to strengthen further the independent, objective, accountable and transparent features of the judiciary. Within this scope, a number of novelties were introduced to increase efficiency of proceedings through amendments made to the CCP in July 2020. According to those amendments, "*having acted as a mediator or conciliator in the dispute*" is added among the causes for the recusal of a judge.

Further, Turkey's three-layered judicial system allows decisions to be reconsidered by higher courts in terms of both substantive and procedural requirements. As a rule, the regional courts review both the facts and the legal expediency of the first instance court's decision, limited only within the scope of the appealing party's requests, while the Court of Cassation only reviews the legal expediency of regional courts' decisions without being limited by parties' requests.

Privilege and disclosure

Turkish legislation outlines several provisions regarding attorney privilege and disclosure obligations (Attorneys Law No. 1136). Accordingly, attorneys cannot disclose information obtained from clients during their duties. Violations of those obligations may cause disciplinary punishments as well as criminal and legal liability. Attorneys cannot testify about facts obtained from clients without prior client consent. Even if a client does consent, an attorney can still choose to abstain from testifying. However, attorneys must decline to pursue lawsuits or other tasks for a party if they have worked as an attorney or argued in

favour of the counterparty in the same matter. Attorneys must retain documents entrusted to them by clients for three years after their power of attorney expires. On an administrative front, however, especially in antitrust violation cases proceeded by the Competition Authority and administrative courts, attorney-client privilege has limited protection, applicable only to the extent there is an ongoing investigation in which case an investigatee can resort to right to defence.

An important provision regarding the non-disclosure obligation is enacted in the Law on Mediation in Civil Law Disputes. Accordingly, except for the final minutes, documents prepared during mediation proceedings cannot be disclosed or used as evidence in court proceedings. If this confidentiality obligation is breached by the parties, their attorneys and/or any other person who attended the meetings, the authors of the breach can be imprisoned for up to six months upon complaint.

Further, any acknowledgments made during the settlement negotiations do not bind the parties. Therefore, if any acknowledgment made by the parties or their counsel during the settlement negotiations is disclosed by the counterparty, the court cannot deem it as an acknowledgment that eliminates the burden of proof.

It is worth noting that a notable development tending to ensure confidentiality of proceedings in case of necessity was introduced through an amendment made to the CCP in July 2020. Accordingly, "situations which are indisputably necessitated by a superior interest worth preserving, of the persons related to the proceedings" are added among the exceptions of the principle of publicity, which enables the hearings to be held in private partially or wholly. This provides relief to the parties that are concerned about disclosure of their confidential and private information during the court proceedings.

Evidence

In general, Turkey has a multi-layered judicial system, addressing two pillars: civil and criminal law. Civil proceedings are based on the principle of party preparation, whereas criminal courts apply the inquisitorial system. The evidence collection phase takes the majority of time in both types of proceedings.

In civil law proceedings, the claimant bears the burden of proof. However, if it does not have required tools to collect all the evidence to support its case, the court can collect evidence upon the request of the claimant, particularly for evidence held by the counterparty. In this case, the claimant is expected to set out the importance and relevance of the evidence requested to be collected from the court. In addition, attorneys are granted with the power to collect information and evidence from public and private bodies that may be either a counterparty or a third party in the dispute. Accordingly, they may assist their client in the procedure of collection of evidence.

With the new CCP that entered into force in 2011, to ensure effective collection of evidence, civil procedure is divided into two phases. There is a preliminary investigation stage of the proceedings, where the court takes necessary actions for the collection of evidence. At this stage, the parties should submit all evidence to support their case and/or request the court to collect said evidence. Once this stage is completed, the examination stage, where the court may hear witnesses, order examinations on site and/or appoint expert(s), shall begin.

In order to enhance efficiency of the evidence collection process, a number of amendments were made to the CCP in July 2020. Through these amendments, it is clarified that the party who did not submit the documents shown in their brief or make the required explanation for summoning of the documents despite the notification made in the invitation for the preliminary hearing, shall be deemed to renounce from relying on this evidence.

Under Turkish law, developed and effective discovery and disclosure procedures as implemented in the common law systems do not exist. If required, the court may conduct an examination on site or appoint an expert panel to do so. If the respondent prevents examination, the court is entitled to execute the proceeding by force and impose an administrative fine and compensation to cover court expenses on the respondent. Courts tend to place the most evidential weight on expert testimony. As criticisms have been raised about inefficiencies in the system to review experts' competency, legislation has been improved to increase the reliability and efficiency of expert witnesses. Accordingly, the Law on Experts was published in Official Gazette No. 29898 on 24 November 2016, and introduced a regime for experts involved in judicial processes, including procedures and principles for experts' qualifications, training, selection and supervision. With this legislation, regional Committees located at regional courts of justice are established. Regional Committees establish and maintain lists of experts who can be appointed by the courts, and inspect experts either *ex officio* or upon application. Such inspections will consider experts' compliance with the relevant legislation regarding their attitudes and behaviours related to their duties or reports.

There are also tools for collection of evidence at the pre-trial stage or early stages of the proceedings. As a precautionary measure, recording of evidence may be claimed from the court in order to preserve evidence that may deteriorate over time or due to the counterparty's activities. The court may also avoid notifying the counterparty of the recording of evidence if there is a risk of deterioration of the evidence.

Costs

Claimants are expected to deposit various fees before, during and after trials, such as:

- Court fees.
- Attorney's fees.
- Other trial costs (such as on-site visits, notification costs, charges paid to witnesses and experts, etc.).

According to the Law of Fees No. 492, as updated for 2020, when making a claim, a claimant must deposit:

- a proportional fee, calculated as a quarter of 6.831% of the claimed amount; plus
- a fixed fee of TRY 59.30.

Pursuant to the tariff, in cases where the subject matter is decided based on a certain value by conducting examination on the merits of the case, proportional fees shall be collected over the value of the dispute in advance.

Claimants must deposit an advance to the court fund office, or their lawsuit will be deemed unfiled (CCP). During proceedings, judges can request an advance on costs from both parties, depending on the actions taken to resolve a dispute.

At the end of the trial, the court can decide that the losing party must pay all of the winning party's litigation costs (including court fees and advance payment deposited by the claimant) along with the attorney's fee.

In a partial decision, the court distributes litigation costs on a *pro rata* basis. If there are multiple losing parties, the court can distribute litigation costs amongst them, or hold the parties jointly and severally liable.

The attorney fee is calculated on a *pro rata* basis based on the Attorney's Fee Tariff, revised annually by the Union of Turkish Bar Associations. However, a significant amendment

to the Attorney's Fee Tariff was made on 2 January 2020. Accordingly, in case of partial dismissal of a monetary compensation claim, the representation fee to be awarded in favour of the defendant's lawyer cannot exceed the representation fee awarded to the claimant's lawyer. Also, in case of full dismissal of a monetary compensation claim, the representation fee awarded to the defendant's lawyer is not proportional, but fixed. This amendment aims to facilitate access to justice. However, the inherent risk of an increase in groundless claims due to lack of a dissuasive attorney fee in case of dismissal of the claims is undeniable.

In addition to the filing fees, in many cases, the courts require the foreign claimants to pay security for costs. As per Article 48 of the International Private and Procedural Law ("**IPPL**"), foreign individuals or legal persons who file a lawsuit, intervene in a lawsuit, or initiate execution proceedings before a Turkish court, shall be required to provide security whose amount shall be determined by the court to cover the expenses of the legal procedures and proceedings as well as losses or damages of the other party. However, the court may exempt the claimant, intervener, or applicant for execution from providing security on a reciprocity basis.

Proportional court fees and security for costs would give rise to a significant monetary burden on foreign claimants. Under Turkish law, there are two methods available to minimise those at the earlier stages of the proceedings: a partial claim or an unquantified claim. Under those methods, it is possible to claim a small amount and increase the claim during the proceedings in order to minimise the litigation costs.

Litigation funding

Third-party litigation funding is currently neither prohibited nor regulated under Turkish law. Turkish courts have not yet had occasion to rule on validity and enforceability of litigation funding agreements. However, Turkish civil law is built on the principle of freedom of contract, which allows the parties to freely tailor their contractual rights and obligations. Accordingly, parties and third-party funders, in principle, are able to enter into and shape their funding agreements, provided that they are in compliance with public policy and mandatory provisions of Turkish law.

Despite the lack of prohibition, litigation funding is not sufficiently known or used by Turkish parties. In fact, the number of high-value disputes where the claimants are *de facto* deprived of access to justice due to litigation costs is substantial. The legal aid provided by the State Treasury to parties without sufficient financial resources to pay for the litigation costs in civil matters does not provide an effective mechanism for commercial litigation. This mechanism is mostly available to individuals who evidence their lack of financial capacity with proper documentation rather than companies and businesspeople that do not have enough funds for litigation or avoid dedicating large sums to litigation. Therefore, there is an increasing need for an established litigation funding practice in commercial matters in Turkey.

It is fair to say that international arbitration is well ahead of court litigation in terms of third-party funding. The number of Turkish parties having had recourse to or at least being familiar with third-party funding has significantly increased in recent years, particularly in investment treaty arbitration. While the number of law firms having contact with foreign litigation funders is increasing, funding attempts from domestic actors are rare but existent. Specialisation of lawyers in the matter of arbitration funding is expected to trigger developments in litigation funding as well and pave the way for regulation of funding by Turkish legislative authorities.

Class actions

Turkish law does not provide for a special mechanism allowing class actions and collective redress that is comparable to those existing in common law jurisdictions. However, the CCP offers the possibility for collective actions that may be initiated by associations and other legal persons in accordance with their internal statutes and on their own behalf to protect the interests of their members or the group they represent. Accordingly, in the event that a group of individuals is affected or will be affected by an existing or future violation, a sole action can be filed by the relevant association or legal person to seek determination of rights of those individuals or to eliminate the illegal situation or violation of their future rights. Not only does the claimant association or legal person benefit from the decision to be given in the lawsuit as a result of a collective action, but also their members.

Apart from collective action provided under the CCP, there are other class action-like mechanisms in the Law on the Protection of Consumers, which allows consumer organisations, public institutions and the Ministry of Trade to file a lawsuit in consumer courts to detect, prevent or suspend unlawful situations.

On the administrative front in antitrust violations, individuals who have suffered damages can make individual claims before civil courts once the competition law violation is detected by the Competition Authority or a competent administrative court, and they can later request the court to consolidate the lawsuits in case they (i) have a connection, (ii) are held before the courts belonging to the same jurisdiction, or (iii) are held before courts of the same level and type. If the lawsuits have arisen from the same reason, or the result of one of these lawsuits will affect the results of others, the lawsuits are deemed connected.

Interim relief

Turkish legislation defines interim relief as temporary legal protection, with interim injunctions and precautionary attachments being the most significant and efficient methods in Turkey. Many types of relief exist, spread across the different laws. In general, however, temporary legal protection is primarily regulated under the Civil Procedure Law and the Enforcement and Bankruptcy Law.

Requests for these measures are reviewed and decided by the courts in a speedy manner. The applicant must submit documentary or at least *prima facie* evidence to convince the court of the necessity of rendering such orders to secure the rights of it. Both can be demanded from the courts where the substantial case is being tried.

In the case of a need for immediate protection of the rights of the claimant, the judge may decide on the *ex parte* injunction without hearing the counterparty's defence.

The party requesting interim relief must deposit a security for the counterparty, in order to prevent possible damages that may arise. The average collateral generally corresponds to 15% of the claimed amount in practice. However, it is at the judge's discretion as to how much guarantee should be deposited. It is also possible to request the court to exempt the client from depositing collateral. In practice, in most cases, the court requires deposit of the collateral. Furthermore, a filing fee amounting to TRY 157 should be paid while filing the request for interim relief.

Further, it is worth noting that interim relief such as worldwide freezing orders granted by foreign courts cannot be directly recognised and enforced in Turkey. However, they can constitute strong evidence for Turkish courts while deciding on a request for interim relief.

Interim injunctions

Interim injunctions can be requested from the court either before or after filing a lawsuit. An interim injunction claim must raise a concern that:

- acquiring a right will become more difficult, or impossible, due to a change that will occur in the circumstances; and/or
- damages will be incurred due to any delay.

Interim injunction decisions protect the claimant's interest during trials, provided that no change occurs to the present circumstances. If a claimant files an interim injunction request before filing a lawsuit, the original lawsuit must be filed within two weeks after execution of the interim injunction order, or the injunction will be automatically lifted.

It is possible to object to an interim injunction decision by appealing to the authorised regional court.

Precautionary attachments

Precautionary attachment requests enable temporary seizure of a specific amount of the debtor's assets, without hearing the debtor's defences. Such interim relief is available for receivables (payable and due) in ongoing or planned execution proceedings, where the receivables are not guaranteed with a pledge and are at risk of collection difficulties.

The party requesting a precautionary attachment must:

- deposit collateral with the court (usually no less than 15% of the claimed amount); and
- seek enforcement of the attachment from the authorised enforcement office within 10 days of the court's precautionary attachment decision.

Failure to do so will mean the precautionary attachment is automatically lifted.

Upon executing a precautionary attachment order, the creditor must file the claim or start an execution proceeding regarding the merits of their case within seven days, or the relief will again be automatically lifted.

Enforcement of judgments/awards

Foreign civil judgments are enforceable in Turkey if they are recognised by a competent Turkish court.

If there is no bilateral reciprocity agreement between Turkey and the state where the decision was made, an enforcement and recognition action will be subject to the IPPL. Accordingly, decisions will be requested from the court at the place of habitual residence of the person against whom enforcement is requested. If such person does not live in Turkey, the Istanbul, Ankara and Izmir courts will be deemed competent.

The original decision, duly approved by the relevant country's authorised departments, together with an approved translation, must be submitted to the Turkish courts.

The competent court will enforce the decision subject to the following conditions:

- Dependent on any agreement that may exist, on a reciprocal basis between Turkey and the state where the court decision is given, or *de facto* practice, or a provision of law enabling the authorisation of the execution of a final decision given by a Turkish court in that state.
- The decision must not be on a matter within the exclusive jurisdiction of the Turkish courts or being contested by the defendant, and the decision must not be given by a state court that has accepted itself as competent in jurisdiction even if it is not.
- The decision must not be clearly contrary to public order.

- The person against whom enforcement is requested and whose right of defence has been violated by that foreign state shall not bring forward that violation before the Turkish court.

Turkish enforcement offices will enforce recognised foreign judgments as if they were rendered by a Turkish court. If the *exequatur* is appealed, the execution will stay until the upper court's decision is finalised.

Further, according to Article 48 of the IPPL, foreign individuals or legal persons who file a lawsuit, intervene in a lawsuit, or initiate execution proceedings before a Turkish court and/or execution offices, shall be required to provide collateral. The collateral amount shall be determined by the court and/or the execution office to cover the adverse costs that may be incurred by the counterparty as well as losses or damages of the counterparty. The court and/or the execution office shall exempt the claimant, intervening party, or applicant for execution from providing collateral on a reciprocity basis. Reciprocity can be established via bilateral or multilateral agreements on mutual judicial assistance in civil matters between the countries. As Turkey is a party to Hague Convention of 1 March 1954 on Civil Procedure, nationals of other contracting states are exempt from depositing collateral while filing lawsuits. In case the reciprocity cannot be established, a foreign party can be required to pay collateral to file enforcement proceedings.

Interim injunction or attachment can be issued against the counterparty by the enforcement court before or during enforcement proceedings upon the request of the claimant or *ex officio*, if the criteria are met.

Enforcement of arbitral awards in Turkey is governed by the IPPL and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"). Provisions of the IPPL are applicable if the New York Convention is not applicable.

Turkey made two reservations permitted under the New York Convention:

- the reciprocity reservation; and
- the commercial nature of disputes.

In line with the first reservation, Turkey will only recognise and enforce arbitral awards that are made in other contracting states of the New York Convention. Secondly, the award must be related to a commercial dispute.

As to the enforceability of partial awards, provided they resolve a separable and independent part of the dispute in a final and binding manner, they are enforceable. On the other hand, as interim relief awarded by foreign courts is considered temporary protection rather than a final decision, it cannot be directly recognised and enforced by the Turkish courts. However, it can constitute strong evidence for Turkish courts while deciding on the request for interim relief.

Among the conditions of enforceability, Turkish courts give specific importance to public policy. The term "public policy" is not explicitly defined by Turkish law and therefore, the standards for refusing recognition or enforcement on public policy grounds mostly depend on legal practice. The most common examples of violation of public policy are:

- Violations of the right to be heard.
- Awards being against good morals.
- Awards violating foreign trade, customs or tax regulations.
- Awards given on non-arbitrable disputes.

Despite the Turkish courts avoiding *revision au fond*, if a foreign arbitral award violates the main principles of the public policy and general ethics of the Turkish legal system, the court may review the merits of the dispute as well. The approach of Turkish courts is

becoming gradually more arbitration-friendly, and courts tend to avoid any assessment as to the merits of the case. As an example of this approach, in a landmark decision given by the 15th Civil Chamber of the Court of Cassation on 18 May 2020 with File No. 2019/2474 and Decision No. 2019/3640, it is clearly stated that procedural issues such as the appointment of experts and conduct of on-site visits, as well as language of the arbitration agreement, do not concern public policy. In this decision, the Court of Cassation emphasised that grounds for setting aside awards should be interpreted in a narrow manner.

It is worth noting that the court fees to be paid in enforcement proceedings is a matter of dispute in Turkey. In enforcement proceedings, no review is, in principle, made on the merits of the dispute and only a procedural examination is carried out to determine whether the *numerus clausus* enforcement conditions are met. Therefore, one can conclude that enforcement lawsuits are not subject to proportional court fees. Nevertheless, it is still a debated issue in Turkey due to conflicting decisions of the Court of Cassation. However, it is notable as a positive development that the regional courts tend to decide that enforcement must be subject to a fixed fee rather than a proportional fee (14th Civil Chamber of the Istanbul Regional Court, File No. 2019/2100 and Decision No. 2020/74).

Cross-border litigation

As part of the rogatory process, Turkish courts assist foreign courts for cross-border litigation in accordance with the terms and conditions set out under numerous international and bilateral judicial assistance treaties. Turkish courts can collect information, take party statements, carry out site examinations and appoint experts to do reviews if needed, depending on the nature of the request.

International arbitration

In line with the general international trend, arbitration is becoming the principal method of dispute resolution for cross-border disputes in Turkey. In particular, in the energy, construction, infrastructure and telecommunications sectors, multi-tiered dispute resolution mechanisms resulting in arbitration are frequently adopted.

In Turkey, the International Arbitration Law ("**IAL**") outlines principles and procedures regarding international arbitration processes where a foreign element exists, and Turkey is determined as the seat of arbitration. Accordingly, the parties can either agree on the arbitration rules to be applied or determine these by referring to international or institutional arbitration rules. In case a claim is filed before a court and such claim is subject to an arbitration agreement, any party may lodge an arbitration plea before the competent court as a preliminary objection. If such an objection is accepted by the relevant court, then the lawsuit will be dismissed on procedural grounds. However, the IAL adopted a limited scope for judicial interference in international arbitrations, only allowing courts to intervene for supportive purposes, such as arbitrator selection, if a dispute arises. Like other contemporary arbitration legislation, the IAL minimised the scope of judicial intervention into arbitration during the proceedings themselves. Courts can only review mistakes and faults made within arbitration proceedings during actions to set aside the arbitrated decision, filed by the counterparty before regional appeal courts. There are no other legal remedies against arbitration awards.

There are two notable arbitral institutions in Turkey:

1. ISTAC: Established in 2014, ISTAC aims to become a regional international arbitration body and increase the demand for arbitration in Turkey. ISTAC offers services such as fast-track arbitration, emergency arbitrators and appointment of arbitrators in *ad hoc*

procedures. ISTAC arbitral awards are binding and subject to enforcement anywhere in the world.

Under ISTAC Arbitration and Mediation Rules, which entered into force on 26 October 2015, parties can determine the arbitration's seat and language, as well as select the arbitrators. Unless the parties agree otherwise, the arbitration seat will be Istanbul and the arbitrator (or tribunal) will determine the arbitration's language, considering all circumstances and conditions.

ISTAC has also published rules governing "mediation-arbitration" (med-arb) that provide a two-tier dispute settlement.

Recourse to arbitration governed by ISTAC Rules is also encouraged by the government, which has invited public authorities to consider inserting ISTAC arbitration clauses into their contracts. Accordingly, the Turkish Public Procurement Authority amended the standard contracts annexed to the Regulations on the Implementation of Public Procurements, effective as of 19 January 2018. Pursuant to this amendment, Turkish public authorities may refer to ISTAC arbitration for both domestic and international contracts.

2. Istanbul Chamber of Commerce Arbitration and Mediation Centre: Established in 1979, this Centre operates for both domestic and international disputes. Its rules apply the same approach as above regarding an arbitration's seat, language, and selection of arbitrators.

In relation to investment treaty arbitration, Turkey is a contracting party to the ICSID (International Centre for Settlement of Investment Disputes) Convention and to numerous bilateral treaties with other countries providing for arbitration under ICSID, ICC and/or UNCITRAL Rules. There are considerable efforts to increase the number of these treaties in order to encourage foreign investors to invest in Turkey.

Mediation and ADR

Mediation has an increasing profile in Turkey and is considered a final chance for parties to settle disputes amicably under Turkish law. Pre-litigation mediation is gradually becoming a mandatory stage in different branches of the Turkish judicial system.

Mediation became mandatory first for employment law-related disputes at the beginning of 2018, then as a mandatory pre-litigation step for commercial monetary claims as of 1 January 2019. Finally, mediation is stipulated as a mandatory pre-step in customer disputes through an amendment made to the Consumer Protection Law published in the Official Gazette on 28 July 2020. Accordingly, the parties must firstly apply for mediation; otherwise, the case will be dismissed on procedural grounds without further examination of its merits. If mandatory arbitration or ADR methods are prescribed for certain disputes under special laws or in the event of the existence of an arbitration agreement between the parties, mandatory mediation provisions will not be applied.

Mediation applications will be made to the mediation bureau within the jurisdiction of the competent court with regard to the subject of the dispute at hand and a mediator will be selected by the mediation bureau from a list presented to the relevant presidency of justice commissions unless the parties agree on a mediator ranked within the list.

During the period between the application to the mediation bureau and the preparation of the final report by the mediator, limitation periods and final terms will be suspended.

If mediation fails due to one party's non-participation in the first mandatory session held by the mediator without a valid reason, this situation will be recorded in the final report by the mediator and such party will bear the total cost of the proceedings even if the court rules in its favour. However, an exception is made for customer disputes. If the mandatory

mediation process concludes due to the consumer's non-attendance to the first mediation meeting without a valid reason, the customer will not be held liable for the litigation costs.

Mandatory mediation seems to reach the targeted success. According to the latest data published by the Ministry, 51% of commercial disputes, 53% of employment disputes, and 59% of customer disputes have been settled at the mandatory mediation stage so far.

Turkish parties are also becoming more familiar with voluntary mediation as an ADR mechanism and there is a smooth transition from the established litigious culture towards multi-tiered dispute resolution mechanisms. In this transition, the role of legislative developments is crucial. In order to promote mediation, the Law on Mediation in Civil Law Disputes was enacted in June 2012, which also established the Mediation General Office of the Ministry. Accordingly, parties may voluntarily choose to refer the dispute to a mediator. If the parties reach a settlement as a result of the negotiations, the minutes to be signed by the parties and the mediator shall carry the legal nature of a court order upon obtaining an annotation from the court. Therefore, the parties shall make a request, from the competent court in the place of business of the mediator, for the annotation of the minutes. In order to grant the minutes with the annotation on enforceability, the court shall review whether the subject matter of the dispute can be mediated and whether the agreement is enforceable.

Another method of ADR offered by Turkish law is the right of attorneys to settle a dispute and reach a binding settlement for the parties by virtue of signing a settlement protocol under Article 35/A of the Attorneys Law. This protocol has the legal nature of a court order as per Article 38 of the Enforcement and Bankruptcy Law dated 9 June 1932 and numbered 2004.

Article 35/A aims to resolve disputes by means of settlement of the parties of the dispute in an efficient and just manner and allows parties to settle a dispute at their own discretion through negotiations to be carried out alongside their attorneys. It allows the dispute to be resolved in an environment in which both parties are well informed and well represented through their attorneys and are endowed with equal rights throughout.

As part of the efforts to promote voluntary mediation, which appears to be successful, on 25 February 2021, Turkey ratified the United Nations Convention on International Settlement Agreements Resulting from Mediation, which provides enforceability to international settlement agreements. The Convention entered into force on 11 March 2021 in Turkey.

Further, under the CCP, judges are obliged to encourage parties to settle their disputes or refer to mediation at the beginning of each lawsuit. If the judge deems that there is a chance of settlement or mediation, the judge may postpone the hearing only once.

The other methods of ADR such as dispute resolution boards and expert determination are frequently used in large, cross-border construction projects as a pre-arbitration/litigation stage.

Regulatory investigations

There is no central authority regulating and conducting regulatory investigations in Turkey. Investigations are conducted by several authorities, such as the Ministry of Customs and Trade and the Ministry of Health. Market regulatory authorities such as the Banking Regulation and Supervision Agency, the Energy Market Regulatory Authority, the Information and Communications Technology Authority, the Capital Markets Authority, the Public Procurement Authority, the Competition Authority as well as the Data Protection Authority carry out regulatory investigations, either *ex officio* or upon receiving complaints. All regulatory authorities are affiliated with a Ministry and their management has administrative and financial autonomy. Activities of those authorities are subject to judicial review.

Although the procedure of regulatory investigations for each regulatory body differs, usually the investigations are conducted by a team of specialists/experts appointed by the decision-making body of the regulatory authority. The time frames for investigations for different regulatory authorities differ. Usually, investigations involve written and oral argumentation phases, depending on the subject matter of the investigation. There might be more than one round of each phase. The decisions of the regulatory authorities must be reasoned.

Apart from other regulatory authorities in Turkey such as the Competition Board and Capital Markets Board, the Board is not under any obligation to publish its decisions, and it is within its discretion whether a particular decision will be published and in what form, and whether and to what extent redactions are necessary prior to publishing. The parties can make confidentiality requests to regulatory authorities for trade secrets and other commercially and competitively sensitive information that should not be shared with the public in reasoned decisions.

Among all regulatory bodies having authority to conduct investigations, the Competition Authority has the most extensive powers with a long-established decisional practice. Under IPPL No. 5718, claims regarding infringement of competition law are subject to the law of the state in which the market directly affected by the infringement is located. Similarly, Law No. 4054 on the Protection of Competition states that anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements contrary to the competition law, or abuses its dominant position in a particular market for goods or services, must compensate for any damages suffered by other persons. Therefore, all infringements directly affecting the Turkish market are subject to Turkish law, and even if infringements originate from a third country, claims can be brought against undertakings from other jurisdictions under Turkish law and in Turkish courts, provided the infringement directly affects Turkey. Claimants can be anyone who suffers losses from the actions of undertakings infringing the competition law. Therefore, consumers and competing undertakings can claim damages for the losses they have suffered. In essence, private claims regarding competition law infringements are subject to the provisions set out in the Code of Obligations No. 6098, and to the provisions regulating claims regarding tortious acts. Procedural rules set out in Civil Procedure Law No. 6100 will apply to the private enforcement of competition law.

As regards the private enforcement of competition law, precedents of the Court of Appeals require claimants to file a complaint to the Competition Board before filing a civil lawsuit for damages, and civil courts are also required to await the Competition Board's decision regarding the competition law infringement before they can render their decision in the civil lawsuit. The limitation periods for civil lawsuits filed for damages regarding competition law infringements are subject to the statute of limitations applicable to tort claims regulated under the Code of Obligations No. 6098. Actions should be brought within two years of the claimant knowing of the tortious act, but must be brought within 10 years of the tortious act.

First instance civil court decisions can be appealed to the Court of Appeals under the same provisions applicable to any other civil lawsuit filed for a tortious act. First instance court decisions can be appealed on procedural law and substantive law grounds. Lack of jurisdiction of the first instance court and the existence of a judgment of a different court on the same dispute can be given as examples of appeals that can be made on procedural law grounds. The reasons for appeal because of substantive law issues include, most importantly, incorrect application of the law and mistakes made in the legal determination of the facts of the case (e.g. erroneously determining a lawful action as unlawful and, as a result, accepting a tort claim). The Court of Appeals is also empowered to evaluate evidence and overturn

the first instance court decision if it finds that the facts are incorrectly evaluated in light of the evidence, or that the evidence itself is incorrectly evaluated. The appeal procedure can be relatively long in Turkey, and it can take up to one to two years depending on the specific characteristics of the case.

Through the establishment of regional courts of justice in 2016, they have started serving as the first-tier appeal courts for first instance court judgments and the Court of Appeals have become the second-tier appeal court.

In terms of liability from competition law infringements, undertakings that have jointly caused a particular damage will be jointly liable to claimants for that damage. Therefore, for example, one cartelist can be sued for all damages caused by all the cartel participants. The cartelist can then seek a contribution towards the damages by way of recourse or settlement with the co-conspirators.

As regards burden of proof for violations of competition, the same rules governing civil tort litigations would apply. There are, however, certain provisions in Law No. 4054 on the Protection of Competition that provide exceptions to the general rules for civil litigation. In civil litigation, claimants bear the burden of proof for all relevant facts of the case and, in particular, claimants must prove that all mandatory elements of a tortious act existed in any given case. In proving the existence of these mandatory elements, claimants must establish that there exists an unlawful action by the defendant, damage, causation between the unlawful action and the damage, and a default by the defendant while acting unlawfully. When establishing whether there is an unlawful action by the defendant and a default by the defendant while acting unlawfully, claimants rely on the decisions of the Competition Board. A Competition Board decision is a prerequisite for filing an action in civil courts under the precedents of the Court of Appeals. Civil courts are not bound by the decisions of the Competition Board. These decisions, however, have influence on civil courts and it is likely that civil courts will rely on Competition Board findings while evaluating their case.

Another mandatory element that claimants must prove in civil litigation is the causation between the tortious act and the damage suffered. Although this is also the case for the private enforcement of competition law, the competition law provides a legal presumption, which reverses the burden of proof in favour of claimants in certain events. Defendants will bear the burden of proof if the claimants submit evidence giving the impression that there is an agreement restricting competition or a distortion of competition in the market, such as evidence demonstrating that markets are partitioned, if a stability has been observed in market prices for a long period, or if prices increase within close intervals by undertakings operating in the market. In addition, claimants, as a general rule, must also prove that they suffered damages because of the tortious act and the exact damage they suffered. If the claimant cannot establish the exact amount, courts can estimate the damage provided the claimant submits sufficient evidence for a reasonable estimation.

In private enforcement regarding competition law infringements, claimants can claim as damage the difference between the actual loss they incurred because of the infringement and the loss they would have incurred if competition law had not been infringed. In quantifying the damage, all profits the claimants expected to gain should also be calculated by considering the balance sheets of the preceding years. Accordingly, it is generally considered that the type of damage, which is suffered as a result of competition law infringements, should be defined as loss of profit. That said, the competition law provides no method for quantification of damages. These methods develop through case law. Since there have been no published court decisions whereby damages suffered as a result of competition law infringement are quantified, it is not quite possible to envisage how the

courts' approach will develop in this matter. The methods will be subject to the same rules applicable for civil tort litigations. Most importantly, the competition act provides a treble damages remedy for claimants in private enforcement. If a person has incurred damages because of an agreement, a decision of undertakings or gross negligence of an undertaking, the court can, upon the request of the claimant, award three times the loss incurred by the claimant as compensation.

For interim or final injunctions regarding an alleged competition law infringement, civil procedure rules that are governed by Civil Procedure Law No. 6100, providing for several interim remedies, including injunctions, perpetuation of evidence and charging orders, may be granted by the courts depending on the facts of the case. The courts can grant interim injunctions if acquisition of a right, which is the subject matter of the dispute, becomes difficult or impossible and/or there is a risk that would result in substantial damages unless an interim injunction is granted. The courts can grant any type of injunction to remove the risks or prevent the damages. The claimant asking the court for an interim injunction must provide security for any possible damage that may be caused to the defendant because of the injunction. However, if the claim is made on the basis of an official document, courts cannot require the claimants to provide security. It is likely that the courts would consider any Competition Board decision an official document. Also considering that a Competition Board decision is a prerequisite for any civil law claim under Turkish case law, in cases of competition litigation, courts cannot require claimants to provide security.

Apart from the competition regime, it is worth noting that the Data Protection Authority, which was established in 2016 and delegated with authorities and duties in parallel to EU legislation within the scope of the EU accession process, is, among other things, quite active, and conducts significant investigations as well as imposing administrative fines for illegal data processing. Data controllers that have been subject to administrative fines and measures include famous social media platforms, universities, banks, e-commerce companies, and hotel chains.

September 2020 marked the end of the registration period for data controllers to register as private entities whose main business activity does not involve processing special categories of personal data. During the registration process, many data controllers were investigated by the Personal Data Protection Board ("**Board**"), and some were fined or otherwise sanctioned for non-compliance.

Notably, for many data controllers, cross-border transfer of personal data in compliance with current regulations remains a challenge. The legal and business communities await both publication by the Board of a comprehensive list of countries with adequate level of data protection, and amendments to enacted legislation that are expected to address Turkey's goal of closer alignment with EU law, i.e. the General Data Protection Regulation ("**GDPR**").

Article 15 of the DP Law allows the Board to carry out investigations on its own initiative or when it receives complaints. Unlike the GDPR, the DP Law specifies the regulator's powers.

The Board can initiate surveillance and legality monitoring investigations either *ex officio* or as a result of a data subject's complaint.

Ex officio investigations may be conducted based on information provided by the supervisory body, public authority, data subject, employee of a data controller (whistleblowers), or third parties. In GDPR practice, data controllers are audited by independent auditors in certain periods and the audit reports are sent to the data protection authority of the relevant country. Data protection authorities may initiate an investigation relying on these audit reports. Contrary to the GDPR, the Board has no possibility to start an investigation by relying on

such audit reports, since no data protection audit report mechanism is regulated under the DP Law. The Board may become aware of an infringement by the information on press releases, news, social media posts, market research, or even information obtained during a continuing investigation and decide to conduct an *ex officio* investigation.

Apart from *ex officio* investigations, investigations following a complaint may be initiated by the Board as a result of the receipt of a complaint from a data subject about a potential violation of the DP Law. Data subjects whose rights are violated are allowed under the DP Law to file a complaint with the Board if certain conditions are fulfilled.

When a complaint is duly filed, it will be examined by the Board, and the Board can decide to initiate an investigation against data controllers or to decline the complaint. If complainants do not receive an affirmative or negative respond within 60 days from the Board informing them that their complaints have been dismissed, complaints are deemed to be declined without any further notice. Complainants can approach administrative courts to review decisions to dismiss complaints.

The Board's investigative authority is vested under Article 15 of the DP Law, although without any attributions to a clear or specific extent or limit. Article 15/3 of the DP Law sets forth that the data controller shall, within 15 days upon notice, deliver to the Board all information and documents, except for those qualifying as state secrets. Obviously, the limit of the Board's investigative authority under this clause finds its limit under Article 22 of the DP Law, which sets forth the authorities of the Board. Furthermore, the authority of the Board should be, save for the restrictions arising from the constitution and basic principles of administrative law, interpreted only as broad as the circumstances of the incident requires. If the same results can be achieved as effectively by using less public force, the use of exceeding public force cannot be regarded as proportional and therefore lawful. The Board would indeed be expected to use its authorities in the same manner as would be expected from any administrative authority under the general principles of Turkish administrative law and should always adhere to the principle of lawfulness, fairness, proportionality and transparency.

Unlike the GDPR, the territorial scope of the DP Law is not explicitly stipulated. In the absence of such territorial scope, the applicability of the DP Law and whether the Board would have jurisdiction on any specific incident shall be evaluated based on the sanctions that are attributed to each such incident. Article 18 provides the misdemeanours related to the violation of the law. Therefore, in each case where the Board uses its investigative authority, the assessment should be made on the basis of the application rules based on territory under the Misdemeanours Law No. 5326, which addresses the topic to the Turkish Criminal Code's related provisions. In case the incident is determined to fall within the scope of the territorial scope of the DP Law, the Board would have the authority to investigate the incident, reach a decision and enforce the given decision regardless of the data controller having its registered address in Turkey or abroad.

As and when an investigation is initiated as explained above, all necessary information in respect of the incident starts to be gathered by the Board. In this manner, the investigation methodology will be determined by considering how the necessary information can be acquired. Unlike other independent supervisory authorities, the Board's investigative authorities are not regulated in a detailed manner in the DP Law.

On-file investigations are conducted on the basis of a notification letter sent to the data controller whereby the authority requests the information and documents needed to resolve the case. Article 15/3 of the DP Law sets forth that the data controller shall, within 15 days upon notice, deliver to the Board all information and documents, except for those qualifying as state secrets.

In case the need for an on-site inspection emerges before or during an investigation in order to gather the required information to conclude, said inspection can be conducted by the Board. The Board is not under the obligation to notify data controllers before an on-site inspection takes place. In other words, the Board is entitled to initiate a spontaneous on-site inspection without notifying the data controller. Authorised officers can conduct a full-scale inspection at the data controller's premises, on all information systems and documents, by capturing disks and/or servers or walking through the information systems.

The data controller is obliged to enable the on-site inspection and provide all the information requested within the authority of the Board. In case the Board's information and document requests, which find their base in an initial decision of the Board for launching the investigation, are not satisfied, an administrative fine can be imposed on the data controller as prescribed by Article 18/3 of the DP Law.

By taking into consideration all the information, documents, evidence and the defence letter provided by the data controller under the investigation made upon complaint or *ex officio*, the Board can either decide (i) on the existence of infringement, or (ii) to decline the complaint if no infringement can be detected.

In case an infringement is determined by the Board, it shall:

- notify the data controller and deliver the reasoned decision;
- publish the decision if it has the quality of a principle decision;
- if the measures decided upon by the Board are not completed by the data controller, impose an additional administrative fine for non-compliance with the Board's decision; or
- decide that processing of data or its transfer abroad should be stopped if such operation may lead to damages that are difficult or impossible to recover and if it is unlawful.

As explained above, different types of sanctions may be imposed on the data controller and thus the appellate mechanism differs for different types of sanctions.

Assuming that only an administrative fine is imposed on the data controller, as the administrative fines are regulated by the Misdemeanours Law no matter which regulation they are stipulated under, the appellate mechanism under Article 27 of the Misdemeanours Law applies. According to this, the Board's decision may be challenged by the data controller before the criminal court of peace within 15 days as of the notification or pronunciation date of the decision. If no request of appeal is made within this period, the decision becomes final.

On the other hand, in case any other decisions are rendered by the Board on the data controller, for example, any instructions given for remedying the infringement such as changing data processing operations, destructing data, rewriting information notices, etc., such action is deemed an act of administration and will be subject to the appellate mechanism of administrative law. Data controllers may request an appeal within 60 days after the notification date before administrative courts as per Article 7 of Administrative Jurisdiction Procedures Law. Also, the court's decision may be subject to appellate according to the general provisions of administrative law.

These Board decisions are enforced in Turkey as per the administrative and enforcement laws of Turkey. However, as these are not court rulings, they do not benefit from general recognition and enforcement principles provided by international treaties. Therefore, for data controllers abroad, direct enforcement through recognition of the decision by the local court of the country of residence is not applicable. In this respect, only if there are any bilateral agreements between Turkey and the country of residence that enables administrative sanctions to be recognised by the country of residence, may these decisions be enforced.

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Benan Arseven advises major foreign, local and multinational Fortune 500 companies on all aspects of launching and managing their daily operations in Turkey, as well as end-to-end advice during disputes. He specialises in supporting in-house legal teams around the world, taking the role of external general counsel.

Benan has broad experience in corporate and commercial dispute resolution, with speciality in agency and distributor conflicts. His advice often looks beyond strict black-and-white legal rights and obligations, involving recommendations that consider the commercial and operational realities of operating a business in Turkey. Benan's broad, business-focused perspective is particularly useful during disputes. It enables Benan to quickly identify the critical commercial risks and negotiation strategies, as well as potential resolution opportunities. He spends a significant portion of time focused on dispute mitigation, settlement, litigation, and enforcement work.

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Burak's experience spans all stages and types of disputes, having represented clients before all levels of national courts and arbitral tribunals, as well as during related judicial procedures. He supports clients to use a range of tools to settle their disputes and retrieve or protect their assets, such as proactive settlement negotiations, or obtaining interim injunctions and precautionary attachment orders.

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