

Turkey

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DIRECT DISTRIBUTION

Ownership structures

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

Yes, a foreign supplier may establish its own entity with no greater restriction than a Turkish national in accordance with article 3 of the Foreign Direct Investment Law No. 4875 (the Foreign Direct Investment Law), and will be subject to the Turkish Commercial Code No. 6102 (TCC), as are Turkish nationals.

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

Yes. There is no specific restriction with regard to foreign suppliers in this respect.

- 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?

In practice, the best suited type of business entity for foreign suppliers would be a joint-stock company or a limited liability company. These companies are preferable as the liability of the shareholders of these companies is limited to the capital that is committed to the company.

A joint-stock company or a limited liability company may be established by one or more shareholders, who can be real or legal persons. These two types of companies are different with regard to the minimum required amount of capital. The capital of joint-stock companies shall not be less than 50,000 Turkish lira. For limited liability companies, the capital of the company shall not be less than 10,000 Turkish lira.

To establish a joint-stock company or a limited liability company, articles of association shall be filed with the Central Registry Record System and be signed by the founders, or via power of attorney, with the Trade Registry Office's authorised personnel. In addition to the articles of association, other company documents that are required for the establishment shall be submitted to the relevant Trade Registry Office. The capital shall be paid in accordance with the provisions of the TCC. For joint-stock companies, one-quarter of the subscribed share capital must be paid in cash prior to the registration of the company, and the remaining part must be paid within 24 months of the registration of the company. Alternatively, the capital may be fully paid prior to the registration.

The requirement to pay one-quarter of the capital before the registration of the company is not applicable to limited liability companies. Thus, subscribed capital for limited liability companies must be paid within 24 months of the registration of the company. When all of the required documents are duly submitted, the establishment of the

company shall be registered with the relevant Trade Registry, and, finally, the establishment shall be announced in the Trade Registry Gazette. Additionally, pursuant to article 64 of the TCC, during the registration of joint-stock companies and limited liability companies, opening approval of the company books shall be processed through the directorates of the Trade Registry.

Restrictions

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

Unless otherwise stated in international agreements or special laws, foreign investors are free to invest in Turkey and are subject to the national treatment principle. In other words, they have equal rights and obligations as those of national investors. The Foreign Direct Investment Law does not stipulate any restriction with regard to the branches of industry in which foreign businesses may operate.

Equity interests

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

Yes, foreign suppliers have equal rights and obligations with regard to national suppliers according to the Foreign Direct Investment Law.

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?

The Turkish direct taxation system comprises of two main taxes, namely personal income tax and corporate income tax. An individual is subject to personal income tax on his or her income and earnings in line with the provisions of the Income Tax Code No. 193. Corporations are subject to corporate income tax in accordance with the provisions of the Corporate Tax Code No. 5520.

Resident companies with unlimited tax liability would be taxed on their worldwide income in Turkey. Non-resident companies with limited tax liability are subject to tax only on Turkish-sourced income. The former standard corporate tax rate of 20 per cent has been increased to 22 per cent for 2018, 2019 and 2020. Additionally, withholding tax is applied on dividends, interest, royalties and technical services fees. The withholding tax rate varies depending on the type of payment and the provisions of the relevant double tax treaty.

Resident individuals are taxed on worldwide income, whereas non-residents are taxed only on Turkish-source income. Taxable income is

comprised of employment income, business income, income from agricultural activities, professional income, income derived from shares, income from immovable property and other income (capital gains and non-recurring income). Individual income tax rates apply on a progressive basis ranging from 15 per cent to 35 per cent.

Stamp tax is another tax burden in Turkey. In accordance with the Stamp Tax Code No.488 (STC), any legal documents (papers) signed in Turkey, or signed abroad where the beneficial interest of the parties lies in Turkey, will be subject to stamp duty unless there is an applicable exemption. In principle, stamp tax is levied as a percentage of the value stated on the agreements at rates varying between 0.189 per cent and 0.948 per cent (unless a specific rate is determined, the general rate for commercial agreements is 0.948 per cent). The STC also provides for a cap on the amount of stamp duty payable, which is adjusted on a yearly basis. For 2020, the stamp duty cap is 3,239,556.40 Turkish lira.

In addition to the above-mentioned tax liabilities, the Turkish taxation system comprises of several indirect taxes, the most important of which are value added tax (VAT) and special consumption tax (SCT). Liability for VAT arises when: (i) a person or entity performs commercial, industrial, agricultural or independent professional activities within Turkey, or (ii) goods or services are imported to Turkey. VAT is levied at each stage of the production and distribution processes. However, the real VAT burden is on the final consumer. In principle, the persons or entities that are liable for VAT are those supplying goods and services and those importing goods or services. In the event that the taxpayer is not resident, or does not have a place of business, a legal head office or a place of management in Turkey, or in another case as deemed necessary, the Ministry of Finance is authorised to hold any person who is involved in a taxable transaction responsible for the payment of tax. VAT rates vary from 1 per cent to 18 per cent, depending on the type of the goods and services subject to delivery.

SCT is levied only once at a stage of the consumption process of the goods within the scope of four lists annexed to the SCT Law No. 4760. The goods subject to taxation are indicated through tariff codes generated from the Turkish Customs Tariff Nomenclature (TCTN). The TCTN is in compliance with the Combined Nomenclature, which is the international classification system for goods.

Double tax treaty provisions should also be taken into consideration when making a final conclusion in terms of taxation principles.

LOCAL DISTRIBUTORS AND COMMERCIAL AGENTS

Distribution relationships

7 What alternative distribution relationships are available to a supplier?

There are several distribution relationships available to a supplier. The most common are those as described below.

Distributors buy goods from their principal and sell them directly to their own customers on their own behalf, and at their own risk, and are remunerated through a margin. There is no specific legislation regarding distribution agreements. If there are disputes between the parties as to a distribution agreement, then the provisions of the sales agreement, the agency agreement, proxy or service agreement shall apply by way of analogy, depending on the legal matter that is to be decided.

Agents are intermediaries who promote the conclusion of agreements, negotiate agreements between the principal and the customer, at no risk to themselves, and are entitled to a commission. Commercial agency agreements are regulated under articles 102 to 123 of the Turkish Commercial Code No. 6102 (TCC).

Sales representatives undertake the obligation to mediate in the process of transactions, conclude agreements or make transactions

set forth in the agreement, concluded between the merchant and themselves, in the name and on behalf of the merchant, consistently and outside the business, in return for payment. By concluding a sales representation agreement, a relationship of dependent merchant assistance shall be established between the parties.

Joint venture agreements, which qualify as ordinary partnership agreements, are subject to the provisions of the Turkish Code of Obligations No. 6098 (TCO). As joint venture agreements are not exclusively regulated under Turkish law, they are not subject to any formal requirements.

Although there is no specific legislation, or any regulation governing franchise agreements under Turkish Law, a franchising contract can also be concluded, and it is commonly used in Turkish commercial practice.

Moreover, licence agreements can be concluded in accordance with Industrial Property Law No. 6769 (the Industrial Property Law). Accordingly, industrial property rights, except for geographical indications and traditional speciality guarantees, may be subject to licensing.

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?

Agency agreements are regulated by the TCC in articles 102 to 123, sales representation agreements are defined and regulated under the TCO, trademark licensing agreements are regulated under the Industrial Property Law and joint venture agreements, which qualify as ordinary partnership agreements, are subject to the provisions of the TCO. Although franchise agreements are not explicitly defined under Turkish legislation, they can be concluded as sui generis agreements, and the provisions of the TCO and TCC regarding sales, agency, service and proxy agreements apply to franchise contracts by way of comparison. There is no specific legislation regarding distribution contracts. The TCO does not regulate exclusive distribution agreements or distribution agreements. If there are disputes between the parties to a distribution agreement, then the provisions of agency agreements, sales agreements, and proxy or service agreements shall apply by way of analogy depending on the legal matter that is to be decided. Also, the general provisions of the TCO, as the case may be and as they relate to agreements, may apply when appropriate, especially in the event of any breach of contractual obligations and default.

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?

In accordance with the TCC, either party to an agency agreement may declare the termination of an indefinite-term agency contract by giving three months' prior notice to the other party. In accordance with Turkish legal practice, this three-month notice period also applies to distribution contracts. Additionally, it is possible for a party to claim for damages arising out of the unjust termination of a contract or for not receiving three months' prior 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 stipulates the goodwill indemnity, also known as goodwill compensation, in terms of commercial agency agreements. Pursuant to the fifth paragraph of this article, this provision shall also be applied in exclusive distribution agreements, as well as in other continuous contractual relationships that grant similar exclusive rights. In this respect, after termination of the contractual relationship, the agency may claim reasonable compensation from the principal if:

- the principal, after the termination of the contractual relationship, continues to derive substantial benefits from the new customers that the agent has brought to the principal;
- as a result of the termination of the agency agreement, the agent loses its right to demand commission that would have been obtained from the agreements entered into or to be entered into within a short period of time with the new customers had the contractual relationship not been terminated; or
- payment of the compensation is equitable by taking into consideration all circumstances in question.

The goodwill compensation may not exceed a figure equivalent to the average of the annual commission or other payments made to the agent as a result of its activities in the last five years. If the agency agreement continued for less than five years, then compensation shall be calculated on the average for the period in question. However, the agency shall not be entitled to claim compensation if the agent terminates the agency agreement unless the termination is justified by circumstances attributable to the principal, or if the principal, owing to a default attributable to the agent, terminates the agency agreement. Additionally, pursuant to article 122(4) of the TCC, the parties may not derogate from the goodwill indemnity prior to the expiry of the agency agreement.

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?

The parties may stipulate in their agreement that the supplier may transfer the products to the distributor without transferring the right of ownership of the products. This is referred to as the 'sale with retention of title' clause under Turkish law. The retention of title clause is regulated under article 764 of the Civil Code No. 4721. Accordingly, ownership of a good that has been transferred to a distributor may be retained if a notary in the transferee's place of residence registers the transfer agreement that is subject to official form with the special registry.

Transfer of the commercial business is regulated both under the TCO (articles 202 and 203) and the TCC (article 11(3)). These provisions do not stipulate any requirement of approval to be given by the supplier to be able to transfer the business to a third party. Nevertheless, the parties may stipulate such restrictions within the framework of contractual freedom. Likewise, the parties may also stipulate the scope and results of a change of control in their agreement, and those clauses will be enforced under Turkish law.

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?

Under the distributor's loyalty obligation to the supplier, the distributor has a confidentiality obligation regarding trade secrets and confidential information regarding works and workshops. Thus, the Turkish courts will enforce confidentiality provisions so long as the scope of these provisions comprises the protection of trade secrets of the business of the supplier.

Competing products

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

Restrictions on the distribution of competing products in distribution agreements may be enforceable provided they are in compliance with Turkish competition law.

Pursuant to the Block Exemption Communiqué on Vertical Agreements No. 2002/2 (Communiqué No. 2002/2), agreements concluded between two or more undertakings that operate at different levels of the production or distribution chain with the aim to purchase, sell or resell particular goods or services are referred to as vertical agreements, and they, as well as distribution agreements, are exempted in block from the prohibition in article 4 of the Law on the Protection of Competition No. 4054 (the Competition Law). The exemption shall apply if the market share of the provider does not exceed 40 per cent of the market in which it provides the goods or services that are the subject of the vertical agreement.

The exemption granted by Communiqué No. 2002/2 shall not be applicable if the non-competition obligations imposed on the purchaser are for an indefinite period or a period exceeding five years. Thus, distribution agreements with such non-competition obligations are deemed to restrict competition and are considered to be unlawful.

Prices

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

In accordance with Turkish competition law, the supplier's setting of fixed or minimum sales prices for the buyer is strictly prohibited. However, the supplier may set maximum sales prices for the buyer, or offer recommended sales prices to the buyer, provided that they do not transform into fixed or minimum sales prices. Where the supplier's market share does not exceed 40 per cent, recommended price and maximum price practices are evaluated within the scope of block exemptions. To ensure that maximum or recommended sales prices as notified to the buyer do not become minimum or fixed prices, price lists or the packaging of the product must clearly state that the prices concerned are the maximum or recommended prices.

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?

In addition to directly maintaining resale prices through the inclusion of explicit provisions in signed vertical agreements, suppliers may also commit the same violation indirectly through various practices, such as by:

- setting the profit margin of the buyer;
- setting the maximum rate of discount that may be implemented by the buyer over a recommended price level;
- providing discounts to the buyer to the extent that the buyer complies with the recommended prices;
- threatening the buyer by delaying and suspending deliveries;
- terminating the agreement if the buyer does not comply with those recommended prices; or
- implementing penalties, such as delaying and suspending activities and terminating the agreement.

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?

Most-favoured-nation (MFN) clauses are commonly found in a wide range of commercial agreements, from long-term industrial supply to distribution arrangements, and are allowed under Turkish competition law, provided that they do not hinder competition in the relevant market. Although there were no specific provisions regulating MFN clauses under Turkish competition law prior to 2018, as a result of an amendment introduced into the Guidelines on Vertical Agreements in 2018, MFN clauses are now formally recognised and regulated. In this regard, MFN clauses benefit from block exemptions under Communiqué No. 2002/2 if the beneficiary has a market share of less than 40 per cent. It is emphasised in the Guidelines that in competition law assessments involving MFN clauses, the market positions of the party benefiting from the clause, as well as its competitors, the purpose of including the clause in the agreement and the characteristics of the market and the clause must all be examined in detail. Furthermore, the Competition Board has been particularly interested in MFN clauses in online platform agreements and in recent years has rendered two decisions with respect to MFN clauses, concluding that broad MFN clauses violate competition and would not benefit from individual exemption whereas narrow MFN clauses may be justifiable in certain cases.

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?

The exemption granted by Communiqué No. 2002/2 may not apply to vertical agreements that involve limitations, such as introducing restrictions in relation to regions where, or customers to whom, the goods or services that are the subject of the agreement shall be sold by the purchaser and whose goal is to hinder competition, directly or indirectly. In this respect, regional or customer restrictions may not be imposed upon purchasers with the exception of:

- restrictions imposed by the provider on active sales to an exclusive region or to an exclusive group of customers assigned to it or to a purchaser, provided that it does not cover sales to be made by customers of the purchaser;
- restrictions of sales of the purchaser operating at the wholesale level in relation to end users; and
- restrictions of the performance of sales by the members of a selective distribution system to unauthorised distributors.

In addition, regional or customer restrictions may not be imposed upon purchasers if parts are supplied to a purchaser with a view to combine them, and there is a restriction on the purchaser regarding their sale to competitors of the provider, who is also the producer.

To be in compliance with competition law, the seller may charge different prices to different customers by way of introducing restrictions in relation to regions or customers.

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?

The exemption granted by Communiqué No. 2002/2 may not apply to vertical agreements that involve limitations, such as introducing restrictions in relation to regions where, or customers to whom, the goods or services that are the subject of the agreement shall be sold by the purchaser and whose goal is to hinder competition, directly or indirectly. In this respect, regional or customer restrictions may not be imposed upon purchasers with the exception of:

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To be in compliance with competition law, the seller may charge different prices to different customers by way of introducing restrictions in relation to regions or customers.

The protection provided to distribution partners via the granting of an exclusive region or customer group is not absolute. When selling to the region or customer group assigned to them, buyers can only be protected from active competition by the other buyers within the system. In other words, the supplier may restrict active sales to exclusive regions or customer groups assigned to it or to a buyer. However, the restriction of passive sales to that region or customer group shall be considered an infringement that excludes the agreement from the block exemption.

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

Restrictions on passive sales (ie, restrictions limiting a distributor's ability to passively sell to customers or territory designated to other distributors or the supplier itself) are prohibited. This prohibition is enforced by the Competition Authority via investigations and the Competition Board via the prohibition decisions it issues as a result of these investigations. If the Board determines that the Competition Law has been violated by way of a restriction on passive sales, it will impose administrative fines on the undertaking that implemented the relevant restriction and will render the restriction null and void. The decision of the Board is of an administrative (public and civil) nature and is not considered as criminal enforcement. The Board's decisions may also be appealed before the administrative courts.

Online sales

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

Pursuant to the amendments to the Guidelines on Vertical Agreements in 2018, the Competition Authority has implemented a broad regulation based on the European Commission's guidelines regarding prohibitions on online sales. In accordance with the Guidelines on Vertical Agreements, limitations imposed on online sales exclude vertical agreements from the scope of block exemptions. These limitations, in particular, are: restrictions imposed on buyers with regard to the territory and the customers to which the contractual goods and services will be sold; restrictions on the proportion of sales made via the internet; and limitations on determining higher prices to be paid by the buyer for products to be sold on the internet other than the products that are to be offered at physical points of sale.

Furthermore, the Guidelines regulate that the provider may set forth certain conditions with respect to the use of the internet as a sales channel, such as: conditions regarding the quality of the website on which the products are offered for sale; requirements to provide certain services to online consumers; and an obligation to maintain a physical point of sale. Also, in accordance with the Guidelines, provided that online sales are not prevented, directly or indirectly, the provider may request that the buyer sells through the sales platforms that meet certain standards and conditions.

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 on internet sales that are imposed on the distributor by the supplier are prohibited pursuant to Communiqué No. 2002/2 and the Guidelines on Vertical Agreements. However, there are no specific provisions or guidelines in Turkish competition law that prohibit online sales restrictions imposed by the distributor or agent on the supplier. However, no decision of the Competition Board addressing this subject has been rendered to date. Accordingly, this is currently a grey area in Turkish competition law and may be examined by the Competition Board in its future decisions.

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?

Under Turkish competition law, undertakings, whether in a dominant position or not, are, in principle, not obliged to conclude contracts with other undertakings, in line with the principle of freedom of contract. In other words, any undertaking, whether dominant or not, should have the right to choose its trading partners and to dispose freely of its property. However, in some cases, undertakings in a dominant position are under the obligation to conclude contracts in opposition to the principle of freedom of contract. This obligation is referred to as the essential facilities doctrine. Based on this obligation, the owners of an essential facility must enable their competitors or customers to access that facility.

Refusal to supply may be related to competitors or non-competitive clients in a downstream market. A supplier may restrict its distributor's ability to deal with particular customers on the condition that an exemption is granted under competition law.

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?

The Competition Authority is entitled to control significant concentrations. Pursuant to article 5 of the Communiqué on Mergers and Acquisitions Subject to Approval of the Competition Board, (i) the merger of two or more undertakings or (ii) the acquisition of direct or indirect control over the whole, or a part of, one or more undertakings by one or more undertakings, or one or more persons who currently control at least one undertaking, by way of purchasing shares or assets through a contract or any other means shall be considered a merger or acquisition transaction, provided that there is a permanent change in control.

Pursuant to article 7 of the Communiqué, approval of the Competition Board is required to gain legal validity, where: (i) the total turnover of the transaction parties in Turkey exceeds 100 million Turkish lira, and the turnover of at least two of the transaction parties in Turkey each exceeds 30 million Turkish lira; or (ii) the asset or activity subject to the acquisition, and at least one of the parties in merger transactions, has a turnover in Turkey that exceeds 30 million Turkish lira, and the other party of the transaction has a global turnover that exceeds 500 million Turkish lira.

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?

In general, antitrust law prohibits any agreements that intend to, or result in, the restraint of competition. In selective distribution systems, the following restrictions, the goals of which are to hinder competition directly or indirectly, may not benefit from the exemption granted by Communiqué No. 2002/2: (i) restrictions on active or passive sales to end users, to be performed by system members operating at the retail level, provided that the right is reserved with respect to the prohibition for a system member against operating in a place where he or she is not authorised; and (ii) the prevention of purchases and sales between system members themselves.

Competition law is mainly enforced by the Competition Authority, in particular through fines. Private competition law enforcement in Turkey is regulated under article 57 et seq of the Competition Law. In accordance with article 57, anyone who prevents, distorts or restricts competition via practices, decisions, contracts or agreements that are contrary to the Law, or abuses their dominant position in a particular market for goods or services, is required to provide compensation for any damage suffered.

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?

The supplier cannot prevent parallel or grey market imports after the products have been supplied to the market. Article 152(1) of the Industrial Property Law stipulates that acts related to products that are subject to protection of industrial property rights shall fall outside the scope of the rights where the acts occurred after those products have been supplied to the market by the right owner or third parties who are authorised by it.

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?

Advertisements that are in violation of the principle of good faith are restricted under article 55/1(a) of the Turkish Commercial Code No. 6102 (TCC). Accordingly, advertisements that slander competitors by making incorrect, misleading or unnecessarily harmful statements about their products, prices, commercial operations, and so forth, are prohibited. Moreover, providing incorrect or misleading information about oneself, or one's products and services, is considered to be unfair and illegal.

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?

The Industrial Property Law regulates industrial property rights that are trademarks, geographical indications and traditional product names, designs, patents and utility models. To safeguard its intellectual property from infringement by its distributor partners and by third parties, a supplier should register its intellectual property with the Patent and Trademark Office. Registered intellectual property rights are protected by the *lex specialis*, the Industrial Property Law. The supplier may exercise the relevant rights in the event of infringement, such as by requesting indemnification of pecuniary and non-pecuniary damages and claiming for damages, including actual loss and loss of profit. Nonetheless, the general provisions under the TCC's unfair competition rules protect unregistered intellectual property rights.

Technology transfer agreements are also commonly used in Turkey, whereby the intellectual property rights that are licensed are basically regulated within the framework of the legislation relating to those rights. The legislation allows for provisions, such as the granting of exclusive licences, which may be restrictive towards competition under certain circumstances, to be included in technology transfer agreements. In this context, the Block Exemption Communiqué Relating to Technology Transfer Agreements exists, which provides for conditions whereby the provisions contained in technology transfer agreements that restrict competition under article 4 of the Competition Law are granted an exemption where they are judged to satisfy the requirements under article 5 of the Law.

Consumer protection

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

The Law on Protection of Consumers No. 6502 defines the provider as a real or legal person that provides services to consumers with commercial or professional purposes or acts in the name of, or on behalf of, the service provider, and regulates the obligations of the service supplier with regard to providing defective products to consumers. The Law applies when the other party to the contract is a consumer; thus, whenever the end customer of a service provider is a consumer, the service provider may be held liable.

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?

The Law on the Preparation and Implementation of Technical Legislation regarding Products No. 4703 constitutes the legal basis for market surveillance activities by regulating the supply of products to the market, the obligations of producers and distributors as well as prohibitions on the supply of products to the market and the recall of products. In accordance with the Law, the producer is obliged to supply safe products to the market and provide necessary information about its content, packaging and possible risks of hazard. Suppliers may only be released from liability if they prove that the product was not supplied to the market by them or that the hazard deviated from conformity with technical regulations. The producer shall provide the consumers with the necessary information about the risks of the products and, when necessary, take samples from the products supplied to the market, investigate complaints, inform the distributors of the results of the inspections made and take the necessary precautions, including the prevention of risks, and the recall and disposal of the products. Additionally, the distributors shall not supply unsafe products to the market, and they shall fulfil the obligations imposed on them by technical regulations.

However, Law No. 4703 should be revised taking into consideration the updates of the EU acquis. To do this, the Draft Law on Product Safety and Technical Regulations was prepared and submitted to the Grand National Assembly of Turkey on 29 March 2018; however, it has not yet been enacted as of 2019.

The responsibility for carrying out and absorbing the costs of a recall may be delineated by the distribution agreement.

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?

The parties may limit their liability in their agreements, and these types of clauses are enforceable under Turkish law. As clauses that exclude or limit liability are vital with regard to the parties' relationships, it is recommended that they be written in explicit and clear language. The validity of clauses that limit liability shall be subject to the general provisions of freedom to contract and nullity of the contract as regulated under the Turkish Code of Obligations No. 6098 (TCO). In this respect, clauses that limit or exclude liability shall be rendered invalid if they are in contradiction with the principles of good faith.

Moreover, pursuant to the TCO, agreements, in advance, on the exclusion of liability for gross negligence are deemed null and void.

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?

In compliance with the Law on the Protection of Personal Data No. 6698 (the Data Protection Law), any operation performed on personal data (all the information relating to an identified or identifiable natural person) of customers and end users including, but not limited to, collection, recording, storage, retention, alteration, reorganisation, disclosure, transferring, taking over and so on, are only allowed if permitted by law or by the explicit consent of the data subject (customers and end users).

Personal data shall not be transferred without obtaining the explicit consent of the consumers and end users. Nonetheless, pursuant to article 8 of the Law, personal data may be transferred without seeking the explicit consent of the individual, subject to the existence of one of the conditions provided for in: (i) the second paragraph of article 5 (Conditions for processing of personal data); or (ii) the third paragraph of article 6 (Conditions for processing of personal data of a special nature), provided that sufficient measures are taken. However, for the transfer of personal data abroad (ie, outside Turkey), explicit consent of the data subject is required. Exceptionally, personal data may be transferred abroad without obtaining the explicit consent of the data subject if certain conditions set forth under the Data Protection Law exist and if the foreign country to which the personal data will be transferred has an adequate level of protection. If there is no sufficient protection in the destination country, then to allow for the data transfer, the data controllers in Turkey and in the foreign country must provide a written commitment, stating that sufficient data protection will be provided and that the transfer must be authorised by the Personal Data Protection Board (the Board). Countries providing sufficient protection will be determined by the Board; however, no such determination had been made at the end of 2019.

In general, being independent from the supplier, each distributor owns the data they have gathered concerning the customers and end users to whom the products were resold. Based on the above, regardless of the exceptions provided under article 8 of the Data Protection Law, distributors may not transfer any information related to customers and end users without obtaining their explicit consent.

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

Pursuant to article 12 of the Data Protection Law, data controllers (ie, suppliers and distributors) have certain obligations regarding data security. To that end, data controllers are obliged to adopt all technical and administrative measures necessary to prevent the illegal processing of personal data, to prevent unauthorised access to personal data and to provide safekeeping of personal data.

Details of suggested technical and administrative measures are determined in guidelines produced by the Personal Data Protection Board. In brief, administrative measures include numerous actions, such as determining current risks and dangers, training employees and improving awareness, implementing data security policies and procedures and minimising the unnecessary storage of personal data, among other things. The technical measures mainly focus on IT procedures regarding cybersecurity.

A data controller that authorises a third party to process personal data will be jointly liable with the data processor in relation to the adoption of these administrative and safety measures. If the measures are not adopted, the data controllers will be liable for an administrative fine of between 15,000 Turkish lira and 1 million Turkish lira.

In the event of a data breach, the data controller must notify both the data subject concerned and the Personal Data Protection Authority of the unauthorised access as soon as possible (within 72 hours of being made aware of the unauthorised access, as the Board has set forth in one of its decisions).

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?

Provided that the parties explicitly stipulate the approval or rejection right, a supplier may approve or reject those individuals who manage the distribution partner's business. There is no specific regulation regarding distribution agreements under Turkish law. Therefore, in those cases, the relevant proxy provisions may find application, and the supplier may have a right to approve or reject the service in question if it must be rendered by the distributor in person.

Dissatisfaction with management must constitute a justified and important reason to terminate the distribution relationship. A reason is considered to be important in the event that the continuation of the distribution agreement becomes unreasonable for the party that seeks to terminate it. As it is also accepted in Turkish law, it is impossible to determine all the reasons that constitute an important reason; therefore, the judge shall consider the circumstances of each case. What is decisive in this respect shall be the continuation of mutual confidence.

Another option for the supplier is to terminate the relationship with notice. There are no periods of notice stipulated, in particular for distribution contracts. There are those who argue that a three-month period stipulated for agency agreements should be applicable for distribution agreements as well. However, there is no consensus on this issue. This termination right should be used in accordance with the trust that is created with the distributor.

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?

As distributors and agents act independently, in principle, they are not treated as an employee of the supplier. Pursuant to article 102(1) of the TCC, commercial agents should not be strictly dependent upon the principal in the way that the principal's employees are. Therefore, under Turkish law, it is explicitly regulated that commercial agents cannot be considered as employees. The relationship between an agent and a principal is deemed as a form of special representation. An agent is legally required to conduct the agency activities in compliance with the principal's instructions to the extent that the instructions do not infringe upon the independence of the agent.

To distinguish self-employed agents from employees, the activities of the agent and his or her working hours should be examined. If the principal gives strict instructions on these topics, then the counterparty is deemed to be an employee but not an agent. An agent must freely coordinate his or her own business activities.

Although a person concludes a contract under the title of 'agency contract', if he or she has obligations, such as to remain at the workplace for a certain number of hours or to submit reports regularly within short periods, or if he or she does not have a separate office, among other things, that indicate subordination to the principal, he or she would be considered to be an employee. Thus, he or she would not be subject to the TCC but to labour law. Pursuant to the Labour Law No. 4857 (the Labour Law), an employment agreement is an agreement whereby the employee independently undertakes to perform work for the employer who undertakes to pay him or her remuneration. In this respect, the dependency element is an important factor in determining the employment relationship. It is not always easy to distinguish an agent from an employee where the agent works closely with the principal. In

such cases, the distinction should be made by taking into consideration the facts of the case.

In a general sense, a supplier does not need to protect against responsibility for potential violations of labour and employment laws by its distribution partners; however, when distribution partners are dependent on the supplier, and therefore an employment relationship is established, the supplier may be held liable in accordance with the Labour Law.

Commission payments

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

In accordance with article 113 of the TCC, the agent may claim commission if the transaction has been:

- intermediated or concluded by the agent, personally, and on behalf of the principal; or
- concluded directly between the principal and a third party within the territory assigned to the agent and within its exclusive field of activity.

To protect the agent, it is stipulated that the principal is obliged to inform the agent immediately concerning any transaction it has concluded. Pursuant to the TCC, should the above circumstances exist, the agent may even request a commission regarding the agreements concluded after the termination of agency relations. This is sometimes referred to as a post-termination commission.

There are no provisions in the TCC concerning an agent's right of commission on successive business that is concluded directly by the principal with a third party who was previously acquired as a customer by the agent. A clause stipulating this right to the agent may be inserted in the agency contract.

The parties are free to agree on the amount of commission. If there are no provisions in the contract, the amount of the commission will be determined according to the trade customs and practices within the territory of the agent. If such trade customs and practices do not exist, then it will be determined according to other considerations by the court. Additionally, the collection of commission by the supplier shall not necessarily be expected for payment of the commission unless otherwise specified in the agreement.

Pursuant to the TCC, the agent has the right to commission at the time, and to the extent, that the business is concluded. The parties may agree to different terms in the agency agreement; however, when the principal concludes the business, the agent has the right to a reasonable commission that may be requested on the last day of the subsequent month. In any event, the agent has the right to commission at the time, and to the extent, that the third party concludes the business.

Good faith and fair dealing

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

Pursuant to article 2 of the Civil Code No. 4721, every person must act in good faith in the exercise of its rights and the performance of its obligations. According to this provision, the abuse of rights is not protected by the rule of law. This principle shall also apply to distribution relationships. Within this legal framework, specific provisions that are based on good faith may also apply to those relationships. For instance, as there is no specific legislation regarding distribution agreements under Turkish law, and agency provisions may apply to those relationships, the provisions regarding goodwill compensation under the TCC may apply to distribution agreements.

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?

Pursuant to the Industrial Property Law, industrial property rights, except for geographical indications and traditional speciality guarantees, may be assigned and subjected to pledges and licensing, and these legal transactions may be registered with the Patent and Trademark Office. They may be registered at the request of a party and if payment of the fee and other conditions specified by the regulation are fulfilled. Legal transactions that are not registered with the registry cannot be alleged against bona fide third parties. On the other hand, registration does not have constitutive effect and is explanatory. In other words, although registration does not have to be effected for the validity of the agreement, the agreement cannot be alleged against third parties unless it is registered.

In terms of distribution agreements, in principle, they do not have to be registered or approved by any government agency.

Anti-corruption rules

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

Pursuant to the Penal Code No. 5237 (the Penal Code), penal sanctions cannot be applied to legal persons. However, sanctions that are qualified as precautions, and that are stipulated by law, may be imposed upon legal persons. The main offences regarding corruption and bribery stipulated under the Penal Code are bribery, fraud, embezzlement, laundering of criminal proceeds and bid-rigging. In this respect, pursuant to the Code, security precautions that are specific to legal entities are applicable for those who secure unjust benefit by committing the offence of bribery. In those cases, the licence granted to the company may be cancelled, and the provisions regarding confiscation shall be applied to the legal entities involved in the commission of the offence. Moreover, pursuant to the Misdemeanours Law No. 5326, in the event that a body or a representative of a legal person, or a person who undertakes a duty within the framework of the operational field of the legal person, commits this offence, an administrative fine of 10,000 to 2 million Turkish lira shall be applied.

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?

The TCC regulates the contractual non-compete obligation for the period that is subsequent to termination of the agency agreement. Non-competition agreements should be concluded for a maximum of two years. The principal shall compensate the agent for valid non-competition agreements. As provisions of the law regarding agency contracts apply to distribution contracts by comparison, this provision shall also apply to distribution contracts. Statutory law will apply even if the related provisions are absent from 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. The parties may choose any country's law to govern a distribution contract.

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?

Pursuant to the Turkish Code of Civil Procedure No. 6100 (TCCP), the competent court with regard to place of jurisdiction is the court located at the domicile of the defendant on the date of filing the lawsuit. This is also binding upon the parties of the distribution agreement. The courts located at the place where the contract is performed are also accepted as competent under article 10 of the TCCP. On the other hand, if both parties are either merchants or public legal persons, then they can agree upon the competent court with regard to the place of jurisdiction under the TCCP; however, real persons, who are not merchants, may not agree on the competent courts. There is no explicit reference to distribution contracts in the Turkish Commercial Code No. 6102 (TCC). However, article 4(1) of the TCC stipulates that disputes arising out of the matters related to the commercial enterprises of each party shall be deemed as 'commercial disputes' regardless of whether they are merchants. Considering the fact that distribution agreements are related to the commercial enterprises of the parties, such disputes shall be submitted to the commercial courts pursuant to the article 4(1). Distribution contracts are arbitrable under Turkish law. Therefore, the parties may freely refer their disputes to arbitration.

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?

Commercial courts are the competent courts with regard to disputes related to distribution contracts. Appealing the decisions of commercial courts by referring the case to the Court of Cassation is possible.

Foreign businesses may refer to the Turkish courts when the rules of the International Private Law and Procedural Law No. 5718 stipulate that the case shall be heard before Turkish courts.

A litigant may require disclosure of the commercial registers to the court from an adverse party. According to the TCCP and the TCC, the court can decide on submission of the commercial registers of the parties of the commercial dispute ex officio, or upon request of the parties, even when the parties are foreign real or legal persons.

The disadvantage to a foreign business in resolving disputes in Turkish courts is the potential long-lasting lawsuit process. Foreign real or legal persons who file a lawsuit in Turkey, participate in a lawsuit that is being examined or request the enforcement of a foreign court judgment in Turkey shall pay the security deposit determined by the court to cover the court costs or enforcement proceedings and the losses of the counterparty. The court may hold the foreign persons exempt from paying this security deposit provided that the reciprocity conditions are

fulfilled. On the other hand, there are also some advantages to a foreign business resolving disputes in Turkish courts, such as the availability of legal remedies and the possibility of the court's attendance on-site. Moreover, referring the case to a Turkish court can be less costly than referring it to arbitration; however, that depends on the value of the asset that is the subject of the case.

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?

Yes, an agreement to mediate or arbitrate disputes will be enforced in Turkey. An arbitration agreement shall include the explicit common consent of the parties to submit their dispute to arbitration. Moreover, it must be in writing, and it must be based on an existing legal relationship. In this respect, the parties may agree to submit disputes that have arisen, or which may arise, from this relationship.

Depending on the scope of the dispute and the arbitration institution to be chosen, arbitration may cost more for the parties with regard to litigation before state courts. Nevertheless, by referring their disputes to arbitration, the parties may finalise their dispute within a shorter period of time. Arbitration proceedings will also address the confidentiality concerns of the parties as the proceedings will not be open to the public.

The Turkish legislature considered the UNCITRAL Model Law and Swiss Federal Private Law provisions during the codification of the International Arbitration Law No. 4686 (IAL). Therefore, the legislation on international arbitration is compatible with current codifications. The IAL is applicable when there is a foreign element in the dispute at stake, and when the seat of arbitration is in Turkey, or the provisions of the IAL are chosen by the parties or arbitrators.

The parties may also enforce foreign arbitral awards in Turkey, as Turkey is a member of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). The enforcement process under the regime of the New York Convention is easier for the parties as it is prohibited for the courts to examine the merits of the case; that is, the prohibition of the revision au fond. Moreover, the bases for refusal of the recognition and enforcement of an arbitral award are limited under the New York Convention. Turkey opted for two reservations in the New York Convention; namely, reciprocity and the requirement for the disputes to be of a commercial nature. However, Turkey is an arbitration-friendly country, and it takes a positive approach to the enforcement claims under the New York Convention.

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 is a current development regarding the taxation of digital services in Turkey. Through the promulgation of Law No. 7194 on the Digital Service Tax and the Amendment on Certain Laws and Law Decree No. 375, published in the Official Gazette dated 7 December 2019, No. 30971, digital service tax has been introduced into the tax system. Accordingly, revenues derived from the provision of the following are subject to digital service tax:

- digital advertising services, including advertisement control and performance measurement services, services for data transmission and user management, and technical services for the presentation of advertisements;
- sales of any audio, visual or digital content in digital media;
- services provided in digital media for listening, viewing, playing or recording or their use in digital media, including computer programs, applications, music, videos, games and in-game applications; and
- services for the provision and operation of digital media in which users may interact with each other, including platforms enabling the sale of goods or services among users.

Intermediary services provided in the digital environment for the services above are also subject to digital service tax.

The taxpayers of digital service tax are the providers of these digital services. Their full, limited or non-liability status does not affect the tax liability for digital services. The question of whether they are dealing with the activities concerned through a place of business or permanent representatives in Turkey does not play a role either.

Taxpayers not exceeding a threshold of €750 million in global revenue and 20 million Turkish lira in local revenue will be exempt from digital service tax.

The taxation period for the digital service tax is calculated in one-month periods in the calendar year. The tax rate is 7.5 per cent.

This regulation will come into effect on 1 March 2020.



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