



MORAL & PARTNERS



**THE POST-PANDEMIC
FUTURE OF RETAIL SECTOR**

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INTRODUCTION

While Coronavirus (“**Covid-19**”) is still affecting the world essentially, retail industry, as one of the most deeply affected fields in the commercial world by the reflections of the pandemic, should also be careful to pass their plans through the legal filter, in order to protect the health of employees, to satisfy customers and to get over this Covid-19 period with the least possible losses. In this regard, it is necessary to take precautions and measures by evaluating the sector broadly in order to minimize the effects of Covid-19 in terms of different sections. More than one subject may arise within the scope of this assessment, which will be carried out with both a legal and commercial perspective.

In this scope; our evaluations with a legal and as commercial as possible sight regarding the measures and precautions to be taken on the issues of consumer management, human resources, remedying with the problems stemming from store operations and being able to transition to the post-pandemic period smoothly, are gathered under the titles which are; (i) Post-Pandemic Consumer Interactions, (ii) Precautions and Measures in Terms of OHS, (iii) Electronic Commerce and Compliance, (iv) Supply Chain Governance, (v) Lease Agreements’ Management, (vi) Data Protection Processes and (vii) Board Members’ Civil Liability. Solution suggestions and evaluations are included under the relevant titles and are as follows.



I. POST-PANDEMIC CONSUMER INTERACTIONS IN RETAIL INDUSTRY

i. General Considerations

- ❖ The consumer-focused provisions of the consumer legislation leading to make consumer-favored interpretation in the possible conflicts that may occur should be considered before and during any sort of action to be taken regarding the risk scenarios and crisis management plans to be composed.
- ❖ It is necessary for the retail enterprises to prepare a production plan concerning the second half of the year with a proactive approach and evaluate risk prevention systems in long term in order to manage the crisis.
- ❖ Cooperation with customers and suppliers should be maintained as well as preparing simultaneous projections and communication plans together with them.
- ❖ The current period and afterwards should be considered as a term in which deficiencies regarding technology and ability could be detected more easily and necessary examination could be carried out relating to the treatment methods needed to be applied.

ii. Actions to be Taken to Bring Back the Customers to Stores

- ❖ Necessary measures and precautions should be taken in shopping malls and stores for recalling customers to the *traditional* shopping standards and bringing them back to stores.
- ❖ Publications relating to the running and operation of stores within the scope of the legislation, particularly Circulars should be closely followed.
- ❖ Advertisements devoted to relieving and reassure customers should be published; introducing incentive type of special offers for the stores, promotions, option of payment by instalments and delivering discount vouchers should be evaluated.
- ❖ In the scope of the advertisement and sale policies to be conducted, practices that may be considered as “*unfair competition*” within the scope of Commercial Law, advertisement and sale methods violating the good faith, particularly those activities such as “*applying aggressive sale methods, deception of customers on the real value of product by additional performances, putting certain products on the market with a price below supply cost for several times and emphasizing deliberately these presentations in commercials*” should be diligently avoided by the retailers.
- ❖ It is important to comply elaborately with the relevant legislation regarding the notifications to be made to the customers. It should also be noted that introductory or informative messages aimed at customers are considered as commercial message and registration to the “Message Management System” (“**IYS**”) is obligatory in order for such messages to be sent.



iii. Providing Safe Shopping Environment Inside Stores

- ❖ Precautions should be taken in order to reduce the traffic at places of payment and provide the safest conditions for payment transactions. In this regard; adopting practices such as contactless payment and places of payment without cashiers should be considered.
- ❖ It should be noted that reopening the stores that have been closed for a while requires a well-conceived operational planning to be prepared.
- ❖ In the scope of the occupational health and safety rules; additional measures regarding protecting health of employees should be taken, consciousness raising based trainings should be given, protective safety equipment and outfit should be delivered, shift patterns should be regularly reviewed and adjusted to the Covid-19 period.
- ❖ By taking into consideration the relevant provision of legislation; necessary elements to relieve customers such as keeping social distance, hosting limited customers inside the stores at the same time and constantly having disinfectant in stores for the use of employees and customers should be considered. In this scope;
 - ❖ Elevators in stores should be offered for individuals having special needs, in order to keep the social distance inside elevators, an area - at least keeping one-meter distance- should be indicated with ground marks for each person in the area.
 - ❖ Touch-operated digital guidance systems guiding customers on finding their ways and reaching to another place inside stores/shopping malls (car park, infant care center, changing rooms, information, elevator, etc.) should be switched off.
 - ❖ It should be noted that only one person per eight square-meter shall be hosted, meaning that no more than one customer per eight square-meter could be welcomed.
 - ❖ In order to maintain personal hygiene rules; hand sanitizers should be provided at the entrances of stores and occupancy rates should be regularly checked. However; use of disinfectant spray systems (*disinfection tunnel, etc.*) not being advised by global health authorities due to toxic effects, should be avoided.
 - ❖ It is important that use of necessary disinfectant substances for disinfection process and hygiene of frequently touched surfaces should be provided by daily-cleaning grounds of stores with water and detergent.
 - ❖ In order for the customers waiting outside the store to keep social distance, marking the ground by keeping minimum one-meter spaces should be provided and customers should be reminded not to take off their masks in changing rooms.
 - ❖ It should be taken into consideration that applying ultraviolet light to the tried products is not recommended by European Centre for Disease Prevention and Control and Centers for Disease Control and Prevention of the US due to its

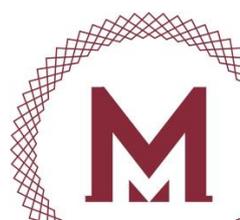


reverse effects on human health and therefore, this operation should not be applied at workplaces.

- ❖ Product introductions bearing trial purposes causing the same product to be touched by different persons (particularly cosmetics, etc.) should not be carried out, direct use of tester products should not be allowed and use and trial of this sort of products by merely in care of store staff should be provided.
- ❖ Moreover, in terms of the stores located inside shopping malls, having those materials such as red-colored cordon/strip and plastic bollard in workplaces should be maintained or alternative systems serving this purpose should be established.
- ❖ Additionally, stores should comply with the rules having been /to be published as well. Practices in terms of region, province/district should be taken into consideration, in this regard, local practices should closely be followed and supervised by store managements apart from sale and marketing departments.

iv. **Return and Replacement of Product Processes**

- ❖ Suspending or extending limitation periods in order to prevent imminent unjust treatment in terms of the consumers whose periods regarding the right of return and replacement of product had not expired until the beginning of Covid-19 should be considered, in contemplation of the relevant provisions stated within the scope of the legislation being subject to and stipulated under the agreements being part of.
- ❖ Clear and understandable announcements should be made at the sale points and in online platforms concerning these practices. In this regard, in case that activities of electronic commerce (“**e-commerce**”) are in question, necessary notices within the preliminary information forms and consumer agreements should be made and consents should be obtained.
- ❖ The point on the loss of the right of return and replacement of product in terms of the consumers whose periods regarding the right had expired before Covid-19 pandemic should be emphasized.
- ❖ Commercial enterprises running e-commerce business should not extend the periods of orders promised by them – even if such extensions still remain below the minimum 30 days period- against consumers.
- ❖ It is recommended that for returns and replacements of products *-if possible-* a locational convenient store could be determined and *-in a way holding consumers harmless-* it could be announced through convenient ways that returns and replacements of products to be merely carried out through such store.



- ❖ In regard of the periods of inspections and examinations to be conducted on the products bearing the possibility of being defective, an individual announcement concerning that the procedure and abnormal duration to be occupied due to Covid-19 pandemic should be made.
- ❖ Practice of switching to “**Cargo**” as a way for carrying out operations of return and replacement of product temporarily should be considered. Indeed, some retailers have already put this into practice, running quite successfully. However; for such purpose, operational infrastructure that will hold consumers harmless and not violate the provisions of legislation as well as planning of logistic services complying with the stated periods regarding returns and product changes.

Under such circumstances, it is useful that a separate and individual “**Circular on Return Process via Cargo**” indicating provisions relating to the conditions and practices of operations of return and replacement of product via Cargo should be issued and published in easily accessible online platforms by presenting the Circular to the attention of consumers. It is considered that such text in which the conditions regarding the policy of return and replacement of product *-including necessary conditions regarding particularly those such as Cargo preference, cost of Cargo, anticipated period of time and the fact that consumer errors do not arise the right of return and replacement of product-* brought about by the current pandemic are stated in compliance with the legislation could also be informative in terms of the consumers that will apply this practice

- ❖ In regard of the notices to be made to consumers, our explanations mentioned above are referred to.

As a result, we underline that in order to minimize the flaws in retail industry occurred in terms of human resources, store operations and return and replacement of product processes during the pandemic period, taking into consideration the above-mentioned advices on the measures and precautions bear importance. We wish you to get over this period with minimum loss and in a best possible way.

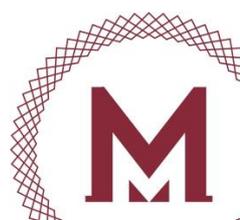


II. NECESSARY PRECAUTIONS AND MEASURES IN TERMS OF OCCUPATIONAL HEALTH & SAFETY

- ❖ All employees must be provided with at least two pairs of service uniforms.
- ❖ Hygiene of the service uniforms must be maintained by the employer until the end of the COVID-19 pandemic. (*Such as having dry cleaning, providing washing machine and dryer in the break room*)
- ❖ All employees must be provided with at least 3 (*three*) masks per day to be used within the workplace and during the use of public transport.
- ❖ All employees must be provided with visors to be used in the workplace.
- ❖ All employees must be provided with gloves to be used in the workplace and during the use of public transport.
- ❖ A contactless thermometer must be provided to measure the fever of employees during their entrance to the workplace and measuring fever must be carried out every morning.
- ❖ A questionnaire regarding the health conditions of the employees to be answered during the entrance to the workplace should be provided to reduce the risk level of infection and such inquiry must be carried into action.
- ❖ Sanitizers and paper tissues must be provided on the various spots inside the store and such kits must be placed at the entrance of the workplace, break rooms and nearby the cashier.
- ❖ Seating order of the break rooms must be rearranged in accordance with social distance rules.
- ❖ Seating order of the dining halls must be rearranged in accordance with social distance rules.
- ❖ Precautionary tapes must be put in front of the cashier inside the store to comply with social distance rules.
- ❖ Spaces that are suitable for causing employees to have close contact without paying attention to the social distance rules must be reduced.
- ❖ Certain training and instructions regarding the OSH rules must be provided for employees and the employers must have the employees sign the occupational health and safety directive.
- ❖ COVID-19-tests must be run on the employees 1 (*one*) week before the reopening of stores and the employees must start the work depending on the results.
- ❖ During the recruitment process, COVID-19 tests must be run for the candidates 1 (*one*) week before the start of work and the employees must be invited to the work depending on the results.



- ❖ The employee whose test results came negative despite indicating COVID-19 findings must take the COVID-19 test again and she/he must not start working until the results of the new test arrive.
- ❖ Duration of the employees' shifts must be reduced and employees must be set to work for maximum 4 (*four*) hours within crowded working environments. Afterwards, they must take a break for 1 hour.
- ❖ The employer must have an understanding approach in every situation where the employee feels weak and in case it requires, the employee must be kept out of the workplace by sending her/him on leave.
- ❖ All employees must be provided with separate pen and stationery and the employees must avoid using the items of each another.
- ❖ A separate set of pen and stationery must be placed nearby the cashier by the employer to be used by customers.
- ❖ Any kind of equipment must be provided to maintain the hygiene of the workplace.
- ❖ All kinds of relevant protective equipment must be distributed to employees.
- ❖ Employees' compliance with the OHS directives, either verbal or in writing, instructions of the workplace doctor and government agencies must be supervised and monitored by the employer.
- ❖ All employees must be allowed to see the workplace doctor in case it is required.
- ❖ Declarations regarding the compliance with social distance and other rules for the customers must be hung on various spots of the store for avoiding employees being stuck in a difficult situation.



III. ELECTRONIC COMMERCE DURING AND AFTER THE PANDEMIC

- ❖ Service providers willing to send commercial messages are primarily required to register to the Commercial Electronic Messages Management System (“IYS”) in order to send commercial electronic messages. Accordingly, information of the recipients giving consent to receive commercial electronic messages must be registered in (*uploaded to*) the IYS. Commercial electronic messages shall not be sent to the ones whose approvals are not involved in the IYS.
- ❖ In accordance with the relevant legislation, in order to reach the information of the service provider, a “**Communication/Contact**” header that can be accessed directly on the main page must be included over the electronic network.
- ❖ Service providers running business on their own e-commerce environment, intermediary service providers and the resident service providers that do not engage in e-commerce activities domestically, but contract or order through an intermediary service provider located abroad are **obliged to register and notify to the E-Commerce Information System (ETBIS)**.
- ❖ In accordance with the relevant legislation, an “**Operations Guide**” header that explains the technical steps to be followed to establish the contract must be included on the main page, which can be accessed directly from the network on which e-commerce transactions are carried out.
- ❖ Buyers should be enabled to see clearly the total amount to be paid, including the tax and delivery costs apart from the other terms of the contract at the approval stage but before the payment information stage of the order. Likewise; before entering payment information, summary of order and **appropriate, effective and accessible technical tools such as undo and replace** should be provided for buyers in order to identify and correct such data errors.
- ❖ Buyers should be notified without any delay regarding the order that have been received through the network on which the transaction is carried out and at least with one of the communication tools provided for in the legislation.
- ❖ Just before approving the order, consumers must be informed that the order given bears the meaning of payment obligation, through the way referred to in the legislation. (***Preliminary Informing on Distance Contracts***)
- ❖ Consumers must be informed about the form, the method it will be used and the limitation period of exercise of the right of withdrawal, in terms of the issues regulated by the legislation. (***Consumer’s Right of Withdrawal on Distance Contracts***)
- ❖ Sellers or providers must fulfill their performances within the promised period starting from the date of receipt of the consumer’s order, and in any case this period shall not exceed 30 days. If this obligation is violated, the consumer will have the right to terminate the contract. (***Obligations Regarding the Performance of Distant Sale Contract and Delivery***)



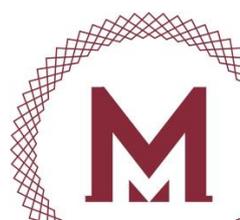
- ❖ In case the performance of the goods or services involved in the order becomes impossible, the seller or the provider has the obligation of notification and return.
- ❖ The explicit consent of consumers must be separately obtained in order to request any additional cost other than the main cost stipulated in the contract.
- ❖ Each single operational data and document relating to the right of withdrawal, information, delivery and the obligations regarding other issues should be stored for three years.
- ❖ In order to process and transfer the personal data received from users, **explicit consent of the concerned person is required.**
- ❖ All operations regarding the deletion, destruction and anonymization of personal data should be recorded. The data obtained should be maintained **at least for three years** from the date of operation and **measures ought to be taken to prevent them from being illegally accessed and processed.**
- ❖ “Obtaining “**Trust Mark**” which is not an obligation but a symbol, indicating to users that the e-commerce platform takes certain security measures and is reliable in terms of complying with the minimum security and service quality standards should be considered.

As a result; by taking into consideration the administrative fines that will be applied within the scope of non-compliance with the principles and procedures regarding the delivery of commercial electronic message regulated under the legislation vary between 1,000 and 50,000 Turkish Liras, during and after the pandemic, the above-mentioned issues bear crucial importance.



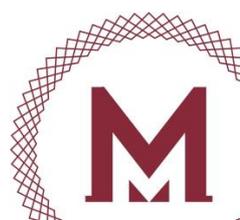
IV. SOLUTION SUGGESTIONS TO DECREASE NEGATIVE IMPACTS OF COVID-19 ON SUPPLY CHAIN

- ❖ Primarily, by creating a versatile and multiple supply network, production and/or raw material supply processes should not be carried on by a limited number of suppliers and the supplier network that can be contacted in case of any problem occurrence shall be diversified. In this sense, supply chain stabilization should be ensured by diversifying suppliers and it would be beneficial to prefer substitute suppliers that can overcome difficulties rather than suppliers who have faced important problems during pandemic.
- ❖ In supplier diversity, existing suppliers shall be analyzed based on their location at first, and then location-based diversity should be provided. In addition, the suppliers that are affected negatively by the crisis during the Covid-19 outbreak should be determined, the process of eliminating the deficiencies of the suppliers should be carefully monitored, risk strategies should be implemented, and if necessary, a substitute supplier should be appointed by the companies.
- ❖ Alternative port/warehouse, transportation methods and trade routes which constitute supplemental elements of supply chain should be reviewed. The action plan and the risk management plan to be created in case of a possible risk should be developed accordingly.
- ❖ The online operation abilities shall be improved, end-to-end supply chain planning shall be focused and investments shall be made in digital trading solutions to avoid supply chain interruptions and resolve logistical problems faster. The insights produced by artificial intelligence can be used with digital trading solutions, digitalization on some issues such as omni-channel order, keeping inventory and tracking deliveries can eliminate many physical disruptions.
- ❖ The production constraints and production capacities of companies and suppliers should be determined. In this sense, using additional production capacity will be useful in managing the fluctuations in the supply chain.
- ❖ After the examination and evaluations to be carried out on stocks and sales, studies can be performed on ensuring the balance by keeping safe level of stock and reducing the risk. In this regards, safe stock and logistics capacity should be created.
- ❖ It will be useful to review the provisions of the agreements signed with the suppliers and make contractual arrangements (amendment) / additional protocols to protect the parties in case of a possible disruption in the supply chains. This examination should be extended within the framework of the claims based on force majeure and/or hardship clauses. In this sense;
 - In case of a supplier change, the existing supply relationship can be terminated with minimum loss by adding the clauses related to the termination right without any compensation,
 - In the event of receiving a service from another supplier due to the non-fulfilment of obligations by the current supplier, it will be beneficial to add a provision related to the right to claim compensation for the losses arising from other service provided.



- The articles regarding force majeure and hardship should be updated considering national and international suppliers, by referring correct regulations and experiences during the pandemic period.
 - Amendments on parties' obligations in terms of operational changes such as new systems, inventory, logistics, order processes should be reflected in the agreement correctly, new agreements shall be drafted accordingly and existing ones shall be amended in this sense.
 - New action, crisis and risk management plans shall be reflected in the agreements and supplier obligations must be determined clearly according to the said plans.
- ❖ Supply chain priorities such as demand, supply, stock, production and logistics should be reviewed and looking forward, short-term plans should be revised quickly according to the updates.
 - ❖ New products planned to be produced in the production facilities of the countries affected by the epidemic, particularly Asian countries, shall be directed to production facilities in other countries less affected by the pandemic or that have taken control over the pandemic. Inventories for these countries should be rescheduled.
 - ❖ Existing stocks should be taken away from quarantine areas to other places where transportation can be easily performed.
 - ❖ When determining alternative supply sources, transport routes and combinations should be defined simultaneously.
 - ❖ Demand changes in the eyes of consumers, supply shortages and supply, sales and production plans depending on market changes due to pandemic should be re-evaluated and in this sense, the supply chain on the basis of products that will be determined according to the current demand and that will be concentrated on their trade should be strengthened.
 - ❖ In terms of evaluating emergency inventory management strategies, stock levels should be reviewed.
 - ❖ A communication plan with customers and suppliers should be prepared, collaboration with customers and suppliers should be made, and plans should be made simultaneously.
 - ❖ Delivery times of suppliers should be monitored closely and lack of labor force in transportation and production arising from travel restrictions should be evaluated.
 - ❖ Production plan focus should be arranged and optimized. Companies should set up a dynamic sales and operations planning processes (S&OP).
 - ❖ The profitability, demand trends and operations of the products should be analyzed.

As a result, the pandemic period has revealed disruptions that may occur in the supply chain and led market players to find creative and effective solutions in this regard. For this reason, minimizing supply chain disruptions is very important for the continuity of commercial operations. In this sense, with the thought that the above-mentioned measures and suggestions may be useful, we wish the world to overcome the effects of the pandemic with minimum damage in the best way possible.



V. RETAIL SECTOR AND LEASE AGREEMENTS IN ACCORDANCE WITH COVID-19

i The Effect of Covid-19 Epidemic on Rental Agreements

With the effect of the Covid-19 epidemic, businesses operating in the retail sector have faced problems with their lease agreements. Within the scope of public health measures; the number of visitors / customers turning to shopping malls and stores (footfall) has decreased, The issue of closing the stores for a certain period of time or operating with a lower capacity has been brought to the agenda, which has caused damage to the sector in question.

Due to the decrease in turnover and in store sales, the minimum / fixed lease payments have become heavier in the retail sector and even turnover lease remain under the fixed amount. On the other hand, it is necessary to keep the leased complex standing in terms of investor position and to fulfill its obligations to the credit banks or financial institutions within the scope of project finance.

For this reason, it is obvious that the importance of adaptation suits will increase in the normalization process.

First of all, whether the Covid-19 epidemic and related administrative measures can be evaluated as force majeure in lease agreements have become a subject of discussion. First, we can define force majeure as a situation that does not exist during the signing of the contract and makes it difficult / impossible to perform. Accordingly, if the Covid-19 epidemic is considered as a force majeure, the violation that occurs due to the epidemic and in cases where the acts in the lease agreement such as closing stores and / or closing shopping malls cannot be executed due to the difficulty of performance, it may come to the agenda that the violation is occurring outside (exempt) of the scope of responsibility.

The first point from current developments that will bring up the impossibility of performance in the lease agreements is the statement dated 18.03.2020 made by the Presidency of the Republic of Turkey in line with the precautionary decisions enacted by the Ministry of Interior in 81 provinces on 16.03.2020. Within the scope of the said statement, it was stated that citizens should stay away from social life by staying at home for 3 (three) weeks, and this statement directly affected the current business life and therefore the store employees and customers in the shopping malls. In line with these measures, the Shopping Center Investors Association (“AYD”) made a recommendation to close the shopping malls by applying to the Presidency, taking into account the demands of the community and retail sector representatives for public health.

Moreover, the statement made by Turkey Shopping Centers and Retailers Association (“TAMPF”) which states that the citizens should stay in their homes, except for compulsory cases is fully agreed by the government and the government supports the decision to close all shopping areas, shopping malls, food and beverage businesses, except for the health, logistics



services and food and basic necessity sales points, which are obligatory to remain open throughout the country. Most importantly, they will support the businesses that are closed during the period when the shopping malls and stores that are within the scope of TAMPF.

When all these issues are evaluated together, it is inevitable that the impossibility of performance in terms of lease agreements emerges. Article 136 of the Turkish Code of Obligations (“TBK”) regulates “*If the fulfillment of all obligations under the contract becomes impossible due to the reasons that the debtor cannot be held responsible, the debtor gets rid of fulfilling those obligations*”. It should be expressly evaluated that the impossibility of performance has occurred due to the fact of taking extraordinary measures inevitably in the light of current developments. In this respect, although it is necessary to analyze and evaluate each lease agreement, it can be stated that the implementation of the force majeure provisions will be fair in the lease agreements between the shopping malls that have decided to close within the scope of the epidemic and the retail sector representatives who close their stores in these malls, by carrying out this process in maximum good faith.

If there are force majeure clauses in these agreements, it is probable that the implementation procedure is defined in detail in the said provision. Accordingly, it is essential for the parties to carry out effective communication within the framework of the correspondence and notification procedure in accordance with the agreement, to suspend their obligations during the force majeure, and to continue the agreement in good faith by abiding all the provisions of the Convention as well. It should not be forgotten that the concept of mutual maximum goodwill, which we underline here, is the most important balance mechanism for the abuse of the rights.

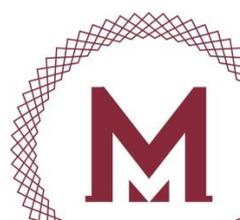
In retail sector, brands, shopping mall investors, street store investors, banks and financial institutions are the rings that cannot be torn apart from the sustainable life cycle, and the adaptation of the lease amount by means of dialogue in the light of empathy and mutual good faith agreements, which cannot be foreseen and controlled by the Covid-19 epidemic, alternative flexible solutions such as temporary incentives, grace periods, net turnover lease, and a safe way of ensuring sustainable relations should be preferred.

In this context, despite the decreasing operating profitability, the sector players continued to fulfill their debts arising from the lease agreements of both Malls and Street Stores by considering *pacta sunt servanda* principle within the framework of good faith principle.

In this context, adaptation lawsuits and other solutions are important in order to keep the economic effects arising from the current situation to a minimum and manageable level for both parties of the lease agreements.

ii. The Negotiation Phase Before the Adaption Case in Lease Agreements

First of all, filing a lawsuit for adaption of a lease agreement may fail to provide maximum benefits expected in this period due to the long-lasting litigation process. **Therefore, it could be more efficient to negotiate the issues subject to revision among the contractual parties and to adapt the provisions to the current terms of the agreement if there**



are adaption conditions in the lease agreements. Furthermore, if the parties reach a mutual agreement, it will be advisable for the parties to sign an amendment protocol regulating the lease payment obligations. However, if the parties cannot mutually agree on the adaption or revision of the conditions and if there is no provision for adaption in the lease agreements, or if the implementation of the adaption provisions has unfair consequences, it will be inevitable to file an adaption lawsuit.

iii. Adaptation Case Stage in Lease Agreements

According to Article 5 of the Turkish Commercial Code Law No. 6102 (the “TCC”) and Article 20 of the Law No. 7155 The Law on Starting Execution Proceedings for Monetary Receivables Arise from Subscription Agreements (“Law No.7155”), it is a requirement to apply to the mediator in commercial cases before filing a lawsuit about the receivable and compensation claims that are subject to a certain amount of money. In this context, it will be necessary to apply for compulsory mediation before filing the lawsuit in a case where the demand for the adaption of the financial obligations of the “commercial type” lease agreement will be determined, considering the determination of the financial liabilities that have arisen or have not yet arisen and the purpose of the mediation arrangement which is to cover the wider types of cases.

If the lawsuit is filed after the compulsory mediation application in question, all of the following conditions stated in Article 138 of the Turkish Code of Obligations (“TBK”) numbered 6098 must be provided.

- i. An extraordinary situation that has not been foreseen or expected by the parties,
- ii. The extraordinary situation did not originate from the debtor,
- iii. Due to the extraordinary situation that has occurred, the demand of the performance has changed against the debtor to a degree that is against the rule of integrity and
- iv. The debtor must also have not yet performed his debt or performed his rights, arising from the excessive difficulty of performance.

First of all, we would like to point out that in a possible adaptation case, the burden of proof that the above-mentioned conditions have been fulfilled will be on the claimant.

In this context, although it is evident that the COVID-19 epidemic is an extraordinary situation that is not anticipated and does not arise from the debtor, each agreement will be evaluated separately for the individual and the party, whether the request of performance has changed against the debtor to a degree contrary to the rule of good faith.

In addition, it will be important to pay the lease debt from the date of the emergency situation, by reserving the rights arising from the excessive difficulty of performance, by recording the appeal in a shorter expression. Indeed, in the event of a possible case, the fact that payments were made without registering the appeal can also undermine the claim that the request of the person in front of the court has changed against the borrower to the extent that it contradicts the rule of good faith.



iv. Authorized and Competent Court and Litigation Costs in Adaptation Lawsuits

The court in charge of the rent adaptation case is the Civil Court of Peace, and the competent court is the court where the claimant party is located. In adaptation cases, in accordance with the Law No. 492, the relative fee (one of the court costs) is paid over the annual sum of the rental difference between the value of the case and the rental price paid.

In this scope, the proportional fee rate is 68,31 per thousand (*The proportional fee rate determined according to the Legal Fees Tariff for 2020*) of the difference between the current annual lease amount and the annual lease amount claimed with the lawsuit, and one-quarter of such proportional fee must be paid in advance when filing the lawsuit. However, if the court orders for the dismissal of the lawsuit, such proportional fee shall be returned to the plaintiff by the treasury upon deducting the fixed fee on the amount of TRY 25.00 –as of 2020.

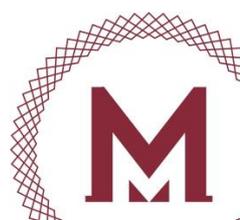
v. Payment of Lease During the Adaptation Case

In principle, during an adaption lawsuit, the tenant is obliged to pay the lease amount until the lawsuit is finalized. However, the balance between the current lease amount and the lease amount determined by the court calculated as of the filing date of the lawsuit shall be set off from the next lease terms' annual amount. In the letter of law, there are no obstacles for the tenant to file the adaption lawsuit by paying the lease partially. Since the relevant Article 138 of TCO consists of a provision such as "...the obligor who has not fulfilled its obligations...", it may be deemed possible for the tenant to pay the lease partially by reserving its rights in case of partial or full performance.

Although an adaption lawsuit may be filed with a partial performance; according to Provisional Article 2 of the Law Amending Certain Laws numbered 7226 and dated 26 March 2020, it is provided that the lease agreements cannot be terminated between 1 March 2020 and 30 June 2020, and the tenant cannot be evicted due to non-payment of the lease amounts of the workplaces during the aforementioned term. In case such term is not extended in the upcoming days, it will be possible for the landlords to commence an execution proceeding and claim eviction against the tenant who has partially paid the lease amount as of 30 June 2020.

The relevant regulation should definitely not be interpreted as a "right not to pay rental fees during the relevant period". Whereas; in the related regulation, there is no provision to postpone the rent payment obligation. In this context, as a rule, the obligation of companies to pay the rental prices of their workplaces continues.

This regulation is related to the fact that the failure to pay the rental price in the lease agreements in the event of difficulty or performance impossibility during the relevant period cannot be qualified as a reason for terminating a valid agreement by the lessor and evacuating the lessor.



vi. With / Without Adaptation Clause in the Agreement

If there is a positive adaption provision in the lease agreement, requesting the *ad-verbatim* adaption of the agreement pursuant to such provision can be considered as an act contrary to good faith principles. Therefore, if there is an excessive imbalance between the obligations of the parties despite the adaption provision, an adaption lawsuit can still be filed against the adaption method set in the agreement.

In addition, while maintaining the principles of fairness and good faith with the adaption, claiming that the agreement's *ad verbum* implementation of a negative adaption provision (*waiver of the adaption*) may also mean misuse of a right. As a matter of fact, in the recent High Court of Appeals' decisions, it is stated that the Articles 1, 2 and 4 of the Law No. 4721 should be used as a source for the settlement of disputes related to the collapse of the transaction grounds. In this regard, "*It is a requirement for the act of good faith to consider that the grounds of the transaction have collapsed.*" It is stated that claiming the *ad verbum* implementation of the provisions of the agreements based on the negative adaption provision would be deemed as a misuse of a right.

vii. Provisions of the Agreements that may be Claimed to be Adapted

Since the judge is free to determine the amount and method of adaption, he/she is free to choose the adaption method which is the most appropriate to the balance of interest between the parties, unlike the adaption method requested by the claimant. If the judge decides to adapt the agreement to current conditions, he/she shall make the adaptations that fit best to the purpose and meaning of the agreement with taking the interests of both parties into account.

In a decision by the High Court of Appeals dated 2014 as "Adaptions can be made in the form of decreasing the performance obligation or increasing the counterpart, or in any way that the judge deems appropriate, such as changing the due date or the performance method"; it is stated that the provisions regarding performance, maturity and performance in the agreement may be adapted as a result of an adaption lawsuit.

Furthermore, even if the party who claims the adaption informs the judge on the conditions of the agreement preferred to be adapted, the judge has the right to make adaptations in other provisions of the agreement other than those which were claimed to be adapted. For instance, although the tenant claimed an adaption in the lease amount, the judge may only adapt the increase rate of the lease amount or shorten the duration of the agreement. In this context, with the adaption lawsuit; not only the lease amount but other provisions such as duration, increase rate, etc. may also be also subject to an adaption and the adaption may be made on the provisions which are deemed appropriate by the judge other than those that are claimed to be adapted.

According to Covid-19, the developments in the retail sector and the effects of these developments on the lease agreements have been stated are like said. Technological transformation is more important than ever for the retail sector and the age of digital retailing is



starting. In order to get out of the Covid-19 epidemic with the minimum loss and damage, every actor in various sectors in the retail chain must approach each other in good faith.

viii. Entry into Force of the Postponed Provisions Regarding Workplace Leasing as of 1 July 2020

Certain provisions stipulated under the Lease Agreements' phase of the TCO **where the leased area is a workplace and the lessee is a person deemed as a tradesman or private and public legal entity which are postponed for 8 (eight) years** in accordance with the provisional Article 2 of the Law Amending Certain Laws to Accelerate Jurisdiction Services numbered 6217 (the "**Law no. 6217**") have entered into force as of 1 July 2020. Our evaluations regarding the mentioned Articles are as below:

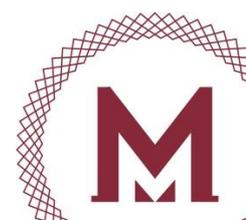
- ❖ ***Transfer of Tenancy Relationship (TCO art.323)***: In accordance with the Article 323 of the TCO, unless the lessee obtains the written consent of the lessor, s/he will not be able to transfer the tenancy relationship to another party. On the other hand, the lessor may not, unless there is a justifiable reason in a workplace leasing case, refrain from giving such a consent.

The party to whom the tenancy is transferred with the written consent of the Lessor replaces the lessee in the lease agreement and the ex-lessee who has transferred the lease is released from its debts to the Lessor. Moreover, in the case of workplace leases, the ex-lessee who transfers, shall be jointly and severally responsible with the transferee until the expiry of the lease agreement, for a maximum period of 2 (two) years.

- ❖ ***Return of the Leasehold Before the Expiry of the Agreement (TCO art.325)***: According to the Article 325 of the TCO, in the case where the lessee hands back the leasehold in breach of the duration of the agreement or termination period: (i) the lessee's obligations shall survive for a reasonable period within which the leasehold may be leased with similar terms and conditions. (ii) in the case where the lessee finds a new lessee whom the lessor may be expected to accept that he has the capability to pay the rental and is ready to take over the tenancy before such period expires, the obligations of the lessee originating from the lease agreement cease to exist.

Likewise, the lessor shall be obliged to deduct from the rental the costs which the lessor is exempted and the benefits the lessor gained by using the leasehold in other manners or those which the lessor intentionally refrained from gaining.

- ❖ ***Extraordinary Termination (TCO art 331)***: According to the Article 331 of the TCO, each of the parties may at any time cancel the agreement in the case of the existence of important causes that make the continuation of the tenancy unbearable for both parties; by following the legal cancellation notification periods. Moreover; the judge shall decide on the financial consequences of the extraordinary cancellation notification by considering the circumstances and the conditions.

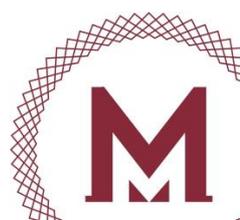


- ❖ ***Prohibition of Tied Up Agreement (TCO art.340):*** Pursuant to the Article 340 of the TCO having been entered into force as of 1 July 2020, in residence and roofed workplace leases, if the conclusion or continuance of an agreement, without lessee's benefit, is tied up to the lessee's obligation that is not directly related to use of leasehold, the agreement shall be invalid.
- ❖ ***Provision of Security by the Lessee (TCO art.342):*** As per the Article 342 of the TCO, in residence and roofed workplace leases, if the lessee is obliged to provide security by the agreement, (i)the security shall be limited to maximum 3 three-month rental fee. (ii)If cash or negotiable papers are decided to be provided as security, the lessee shall pay the money into a forward savings account so as not to be withdrawn without approval of the lessor, or deposit negotiable papers in the bank. (iii)The bank may release such security only by the consent of both parties, upon finalization of execution proceedings or decision of the court. However; if the lessor did not notify the bank in writing within 3 (three) months following the end of lease agreement period that s/he has gone to court related to the lease agreement or has initiated execution or bankruptcy proceedings, the bank shall be obliged to release the security upon the request of lessee.
- ❖ ***Prohibition of Arrangement against the Lessee (TCO art.343):*** After implementation and enforcement of the provisions stipulated under the Article 343 of the TCO, in lease agreements, making changes against the lessee shall be void, except determining the rental fee.
- ❖ ***Determination of the Rental Fee (TCO art.344):*** Within the scope of the Article 344 of the TCO, agreements between parties related to the rental fee for the renewed lease period shall be valid provided that the new rental fee does not exceed the rate of increase indicated by the producer price index. Moreover, this provision shall be applicable also for lease agreements longer than one-year period.

Without considering whether an agreement by the parties exists, the applicable rental fee for the lease agreements longer than 5 (five) years or renewed after 5 (five) years shall be determined by the judge with a view to the rate of increase in the producer price index, the condition of the leasehold and comparable rental fee determined by this procedure may be changed in accordance with the provisions in the previous paragraphs.

If the rental fee has been decided as foreign currency in the agreement, rental fee cannot be changed unless 5 (five) years have passed. Nonetheless the provision of the Article 138, titled "Excessive Difficulty for Performance" is reserved. After 5 (five) years , the rental fee, by taking into consideration the exchange rate fluctuations, shall be determined by the judge with a view to the issues mentioned above.

- ❖ ***Payment Obligations Except Rental Fee and Additional Expenses (TCO art.346):*** In accordance with the Article 346 of the TCO, the lessee shall not be obliged to pay any other obligations than the lease and subsidiary costs. In this regard,



agreements that stipulate any payment of penalty in case of delay in performance of the rental fee or that the upcoming lease costs shall be due are invalid.

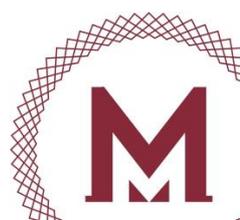
- ❖ ***Limitedness of Grounds of Action (TCO art.354):*** In accordance with the Article 354 of TCO, the provisions included within the lease agreements regarding termination of lease agreement by the way of litigation shall not be amended against the lessee.

By the entry into force of the mentioned articles of TCO, it is envisaged that certain amendments in terms of the commercial lease agreements will be in favor of the lessee. In this context; to interpret the provisions properly, the decisions of the Supreme Court should be taken into consideration as well.



VI. DATA PROTECTION PROCESSES IN POST PANDEMIC WORLD

- ❖ Personal data shall be processed in accordance with the obligations stipulated in the Personal Data Protection Law No. 6698 ("**DP Law**") by data controllers. Accordingly, data controllers had to align their data processing activities with the DP Law until April 7, 2018. However, the data controllers, who have not initiated the compliance process, shall immediately conduct Compliance Projects in accordance with the obligations specified in DP Law.
- ❖ Each data processing activity must be registered to Data Controllers Registry ("**VERBIS**") by the data controllers and the **fulfillment of the obligation is 30 June 2020**. Accordingly, companies that have not registered yet, should complete the process swiftly after Covid-19.
- ❖ In order to fulfill the obligations specified in DP Law, data subjects need to be informed by data controllers with **notification letters** including scope of data being processed, the purpose of the processing, the storage period of each data and whether the personal data is transmitted to any third party.
- ❖ The **explicit consent** of the data subjects should be obtained by the data controllers in terms of processes where data processing purposes are not subject to legal compliance reasons stipulated in DP Law.
- ❖ The **security of the data** should be ensured by the data controller and **all necessary technical and organizational precautions** should be taken. Accordingly, data controllers who prefer to conduct business by home-working model shall ensure that necessary IT measures are taken in order to achieve the highest level of data security.
- ❖ In case an employer as a data controller seeks to measure the **body temperatures of the employees** upon entry to the workplace, or **asks direct questions regarding their health** in order to determine the health conditions within the scope of combating the Covid-19, the employer is obliged to **notify employees** and **obtain their explicit consents**. However, if such health data processing activities are performed through **workplace doctors**, employers are obliged to only **notify** their employees.
- ❖ In case data a controller seeks to measure the **body temperatures of the customers, visitors and suppliers** upon entry to the workplace, or **asks direct questions** regarding their health in order to determine the health conditions within the scope of combating the Covid-19, the data controller is obliged to **notify** related data subject and **obtain their explicit consents**.
- ❖ **Retention and Destruction Policy** should be prepared by data controllers and it should not be forgotten that pursuant to such procedure personal data shall be destroyed in accordance with law during periodical destruction periods.
- ❖ In case **personal data are transferred to third parties**, agreements shall be concluded regarding the protection of the personal data.



- ❖ It should be noted that, **if data are transferred abroad**, data controllers should conclude international data transfer agreements include undertakings published by Personal Data Protection Board or shall constitute Binding Corporate Rules.

In the event of failure to fulfill the obligations determined within the scope of DP Law for the protection of personal data and unlawful data processing, an administrative fine of **TRY 5,000** up to **TRY 1,000,000** may be imposed. In respect of this, aforementioned issues must be taken into consideration during Covid-19 and afterwards.



VII. BOARD MEMBERS' CIVIL LIABILITY THE NEW NORMAL ADOPTION PROCESS

i. Measures on Occupational Health and Safety Should not be Abandoned

As the first step to be taken in accordance with the fight against the Covid-19, necessary measures and precautions should not be ceased at workplaces in respect to occupational health and safety, bearing cruciality in terms of the decisions taken by the board. In this regard; a gradual and progressive way should be followed on easing the measures and precautions in question, in these days in which returns to workplaces have begun and the pandemic has lost its acceleration. Accordingly;

- ❖ Occupational health and safety committees should be gathered and current risk assessments depending on the daily conditions should be made. Also, emergency plans should be revised by evaluating the precautions and measures taken/to be taken.
- ❖ European Agency for Safety and Health at Work advices to constitute a hierarchy of prevention and control measures right after the risk quantifications and evaluations.¹
- ❖ Continuation of the precautions and measures taken regarding the work environment, entries and leaves to/from workplace, business travels and use of dining hall/cafeteria, recreational areas and shuttle vehicles and daily disinfection of workplace, and the diligence to be shown the issues such as maintaining and locationing of disinfections, following the adjustment of hygienic measures, and providing masks should not be abandoned.

ii. Board Meetings May be Conducted Electronically

Pursuant to Article 1527 of the Turkish Commercial Code numbered 6102 (“TCC”) and the *Communiqué on Meetings of Companies to be Conducted Electronically Except General Assemblies of Joint-Stock Corporations* (the “Communiqué”) board may adopt resolutions through meetings to be conducted electronically, without holding physical meetings.

In this regard; **conducting board meetings electronically** to provide the will of company by avoiding physical meetings, is within the realm of possibility. Accordingly;

- ❖ Provided that being regulated under the Articles of Association (“AoA”) boards of stock companies may conduct meetings entirely electronically.
- ❖ While some members of the board provide physical participation, others may participate in the meeting electronically.
- ❖ In scope of the Communiqué, the necessary infrastructure and technical requirements envisaged in terms of Electronic Meeting System should be provided.

Additionally; there is an information system established by the Central Registry Agency (“MKK”) under the name of Electronic Board System (“e-YKS”) through which board meetings being valid in law may be conducted electronically.

¹ https://oshwiki.eu/wiki/Hierarchy_of_prevention_and_control_measures



iii. **Board Resolutions May be Adopted Without Holding Meetings (*duly Circular Resolution*)**

Pursuant to Article 390 of the TCC, boards may also adopt resolutions by means of obtaining written approvals of (*unless a particular quorum is stipulated*) at least the majority of total member number to the proposal including a certain subject appeared in the form of resolution submitted by one of the members.

In this regard, validity of the resolution adopted without holding a meeting through **circular** or **circulating** the proposal being in the form of resolution depends on the issues below:

- ❖ There should be no member of the board in joint stock company demanding on conducting a meeting.
- ❖ The same proposal being in the form of resolution should be made to each board member.
- ❖ While having all of the approvals on the same document is not necessary, each document bearing the signatures relating to the approvals should be attached to the resolution book of the board or such document should be converted into a resolution containing signatures of the members accepting and then attached to the resolution book.

iv. **Meetings of General Assemblies May be Conducted Electronically**

Pursuant to Article 1527 of the TTC and *Regulation on General Assembly Meetings of Joint Stock Companies to be Conducted Electronically* (the “**Regulation**”) general assemblies may also adopt resolutions by means of conducting meetings electronically, instead of holding physical meetings. Participation in electronically, suggesting a proposal, expressing an opinion and voting electronically bear all the legal consequences of physical participation and voting.

In scope of the İstanbul International Finance Centre Project Action Plan Nr. 49; an information system has been established through which preliminary preparations and legal procedures regarding general meetings can be carried out by electronic means and any transaction during the meeting can be performed via the electronic platform and software provided by the MKK.

v. **Financial and Operational Management**

Pursuant to Article 369 of the TCC, board members and the third parties are obligated to perform their duties **with care expected from a prudent merchant** and **caring the interests of the company in compliance with the principle of good faith**. The Turkish Supreme Court ruled an instance regarding the duty of care that “Board members of the Company should act like a prudent merchant and show the adequate deliberation and care. In other cases, for instance if they do not carry out the duties intentionally or carelessly for which they are responsible as per the law, board members have joint liability.”

In scope of the regulatory compliance, minimizing the risks and quick corporate governance practices during the Covid-19 spiral, certain important duties fall to board members. In this regard, apart from comprehending the role and obligation of accountability of board in terms of



supervising the company on the crisis management, it is recommended to take the points stated below into consideration;

- ❖ Company's existing reporting and information systems that are used by the board to provide oversight could be enhanced. In this way, disruptions in flow of information could be avoided and material business risks and red flags resulting from the COVID-19 pandemic could be monitored in a timely manner.
- ❖ In scope of the Article 360/II of the TCC, it is regulated that boards may form **committees and commissions** with the aim of monitoring the state of play, reporting on the issues presented, enforcing resolutions or internal control in which board members may be involved as well. However; it should be remembered that in these cases, still board bears the legal liability.
- ❖ Efforts on the feasibility of the disaster plan regarding the employee availability, functionality of IT systems, cybersecurity and communication protocols should be made.
- ❖ It is considered that authorization regarding necessary and urgent works required for the company's continuity of board members whose terms of office have expired as the general assembly meetings could not be held is valid.
- ❖ Supply chain stabilization may be provided by diversifying suppliers, and substitution providers that are able to solve bottlenecks may be preferred instead of the ones having difficulties due to the Covid-19 outbreak.
- ❖ After the examinations and assessments to be conducted on stocks and sales, studies may be carried out on ensuring the balance by keeping a safe level of stock and reducing the risk.

vi. Regulatory Compliance Should Always be Considered

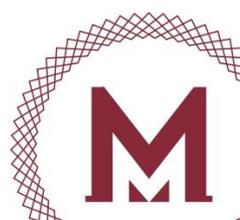
Plenty of measures and precautions regarding economic and social areas to prevent the Covid-19 outbreak and weaken its effects, it should not be overlooked that apart from the relevant regulations that need to be complied with, the legislative obligations that companies cannot refrain from abiding by are still remaining.

These obligations abovementioned should not be discarded during the pandemic period. Accordingly, the following points should be considered:

- ❖ Publications issued within the scope of the legislation relating to the field of commercial activity should be followed precisely.
- ❖ It should not be forgotten in case administrative fines due to the agreements, concerted practices and decisions limiting competition, abuse of dominant position or mergers and acquisitions are imposed on undertakings or associations of undertakings, an administrative fine up to five percent of the penalty imposed on the undertaking or association of undertakings shall be imposed on **managers** or **employees** of the undertaking or association of undertakings who are found to have a decisive influence in the infringement.

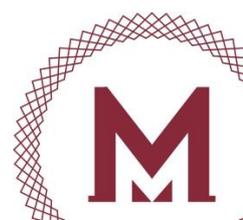


- ❖ The employer's obligation to inform in accordance with Personal Data Protection Law no. 6698 (the “KVKK”) is still remaining. In case of processing of health data during the implementation of the measures, the employers still have an obligation to inform their employees. As the health data are counted as special personal data within the scope of the KVKK, the employer should obtain explicit consent of the data subject to process the data in question.
- ❖ It is regulated that in case the taxpayer and the responsible is a legal person, the duties assigned are to be performed by the legal representatives, and as a result the failure of the duty to be taken by the legal representative, the taxes and related receivables that could not be collected from the legal person are to be taken from the assets of the legal representative. In the period of pandemic, tax liability should not be forgotten.
- ❖ Companies may resolve to distribute only 25% of the net profit gained in the 2019 fiscal until 30 September 2020. Also, companies cannot resolve on distribution of the previous years' profits and voluntary reserves. Moreover; Companies' General Assemblies cannot grant board of directors the right to distribute advance dividend. (*companies bearing some certain qualifications are excluded*)
- ❖ Internal directive to be issued by the board should be published on the company's website.
- ❖ In the decisions to be taken within the scope of the Covid-19 pandemic, attention should be paid not to abuse or use domination illegally within the group of companies. In cases where certain conditions do not occur, the affiliated company should not be directed to take legal actions such as profit reduction or transfer, business, assets, funds, employee, receivables and transfer of debts.
- ❖ Apart from the routine functioning of the market mechanism, it should be strictly followed that the prohibition to be offered for sale without any justification beyond its costs, in a way that negatively affects the purchasing behaviour of the consumer and against the requirements of professional care.
- ❖ Duties stemming from deterioration of the financial situation should be carefully monitored. In case of a state of necessity, it is necessary to comply with the obligation to issue an interim balance sheet both on the basis of the continuity of the business and on the possible sales prices, to notify the commercial court upon request and to seek bankruptcy.
- ❖ It should not be forgotten that in the scope of the legislation, all of the private legal persons, including the ones established through law, bear the obligation to make notifications electronically.
- ❖ In terms of the early detection and management of the risk of companies whose shares are publicly-traded, the board is obliged to establish an expert committee, to operate and develop the system in order to determine the risks that endanger the existence,



development and continuation of the company, to implement the necessary measures and remedies, and to manage the risk.

Boards should also take care of filtrating the plans from the filter of law, envisaged in the period of Covid-19 in order to minimize the financial loss and to complete the transaction process to the new normal successfully, in which the greatest responsibility is belonged directly to them. In this regard, carrying out the duties with prudence expected from a prudent executive and caring the interests of the company in compliance with the principle of good faith constitute the elements should always be taken into consideration as reference principles by the boards seeking solutions.



CONCLUSION

In these unusual times that we are experiencing due to the Covid-19 pandemic, it is obvious that retailers need to be more prudent and cautious on solving deadlocks and minimizing possible losses in respect thereof regulatory compliance. In this regard; issues examined within the scope of our study are evaluated with a proactive approach and commercial vision from the law perspective.



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