ISSN 2147 – 558X

ELİG
LOKMANHEKİM • GÜRKAYNAK
Attorneys at Law

LEGAL INSIGHTS QUARTERLY

September 2015 – November 2015

Corporate Law

Protection of Creditors and Employees and Personal Liabilities of Shareholders in Mergers

Securities and Capital Markets

A Brand New Capital Structure: Security Investment Companies with Variable Capital

Competition Law / Antitrust Law

Latest Precedents on "Warning to Cease Violation" Mechanism - Diye Danışmanlık and Kayseri Bakers Decisions

The Board Grants Conditional Approval to Lesaffre/Dosu Transaction Following the Phase II Review

The Board Published the Reasoned Decision on the Conditional Approval to the Acquisition by NV Bekaert SA of Steel Tire Cord Business of Pirelli Tyre SpA

Labor Law

Recent Changes in Bylaw on Determination of Authority to Execute Collective Employment Agreement and Strike Vote

Litigation

Constitutional Court Takes a Big Step towards Gender Equality

Internet Law

Regulation on Commercial Communication and Commercial Electronic Communications

Data Privacy Law

European Council Approves Data Protection Regulation Draft

Telecommunications Law

End of Roaming Charges in EU

Medical Device Law

New Regulation on Promotional Activities of Human Medicinal Products

Real Estate Law

Legal Framework of Pre-Emption Right under Turkish Law

White Collar Irregularities

International Developments on Compliance Programs

© 2015 ELIG, Attorneys-at-Law. All rights reserved.

LEGAL INSIGHTS QUARTERLY

September 2015 – November 2015

This collection of essays provided by ELIG, Attorneys-at-Law is intended only for informational purposes. It should not be construed as legal advice. We would be pleased to provide additional information or advice if desired.

Eylül / September, İstanbul

Yayın Türü / Type of Publication
Yerel Süreli / Local Periodical

ELİG Ortak Avukat Bürosu adına Yayın Sahibi, Sorumlu Müdür / Owner and Liable Manager on behalf of ELIG, Attorneys-at-Law

Av. Gönenç Gürkaynak
Çitlenbik Sokak No: 12,
Yıldız Mahallesi
Beşiktaş 34349,
ISTANBUL, TURKEY

Basımcı / Publisher
Detay Mat. San. Tic. Ltd. Şti.

ISSN 2147 – 558X

Preface to the September 2015 Issue

In this issue, the section on corporate law examines a critical matter in mergers, namely the commercial code means for striking the balance between protecting the rights of the creditors and employees of absorbed companies, and giving way to mergers as one of the fundamental tools for inorganic growth of businesses.

On the competition law front, this issue delves into the opinion delivered by the Turkish Competition Board per Article 9(3) of Law No. 4054 on the Protection of Competition in Diye Danışmanlık and Kayseri Bakers cases; the conditional approval granted to an acquirer gaining sole control over an entity in bread improver and dry yeast markets following a Phase II review and the reasoned decision of the Board on a certain acquisition in the steel tire cord, bead wire and hose wire markets.

The labor law section focuses on the amendments introduced to the bylaw determining which unions have the authority to execute collective employment agreements. The litigation section examines a recent Constitutional Court decision where the Constitutional Court upheld gender equality.

The internet law section provides guidance on the much awaited Regulation on Commercial Communication and Commercial Electronic Communications. New pieces of EU legislation proposals are also analyzed in this issue in telecommunications and data privacy sections.

This issue of the Legal Insights Quarterly addresses these and several other topical legal and practical developments, all of which we hope will provide useful guidance to our readers.

September 2015

Corporate Law

Protection of Creditors and Employees and Personal Liabilities of Shareholders in Mergers

Synergies and increase in the assets of the merging companies are aimed at mergers. However, a merger may at the same time result in the increase of the liabilities of the merging companies. Further, in some cases the financial standing of the absorbed company in a merger may not even show positive figures thus such a merger may present a potential risk on the creditors of especially the surviving company. Due to the fact that creditors of the merging entities do not have a veto right against a merger, there arises the need for a specific protection tool for the creditors. A merger may also negatively affect the employees of the merging entities, again especially the ones of the absorbed company. On the other hand, "over-protection" may defeat the purpose of the merger concept so a fairly balanced protection mechanism is essential. This article focuses on the means of protection of creditors and employees, and personal liabilities of shareholders in mergers, as regulated by the Turkish Commercial Code ("TCC").

I. Protection of Creditors

Article 157 of the TCC entitles creditors of the companies participating to a merger with the right to claim security for their receivables, unlike the legislation preceding the TCC, which provided the creditors of the absorbed company with the right to object to the merger, with a more practical approach.

Pursuant to the said article, creditors are entitled to claim security for their receivables within three months following the date on which the merger becomes legally effective (*i.e.* registration of the merger decision with the relevant trade registry). Companies participating to the merger shall notify their creditors of their rights through an announcement to be made in the Turkish Trade Registry Gazette three times, with a minimum of seven-day intervals, and through an announcement to be placed on their websites (provided that they are obliged to set-up a website as per the relevant provisions of the TCC). The announcement should clearly mention that the creditors may request the surviving company to secure their receivables, and shall also indicate the statutory claim period the creditors have.

If creditors of the companies participating to the merger make a claim within three months following the date on which the merger becomes legally effective, for having their receivables secured, the surviving company shall so secure their receivables. In practice, personal guarantees (*e.g.* by shareholders) and collateral guarantees (such as pledge or assignment) are given as security. If a creditor fails to make such claim within the statutory period of three months, such creditor shall be deemed to have waived its right to claim security. Although a creditor may have failed to benefit from such right, the creditor's other rights are reserved.

As an alternative to posting security, the surviving company may choose to pre-pay the payable, if it is evident that the other creditors of the surviving company will not suffer a loss due to such early payment. In such case, a report to be prepared by an expert shall be obtained in order to evidence that the early payment does not jeopardize the rights and receivables of other creditors. Above all, if any dispute arises around the early payment, the court will render a decision on the early payment of receivables.

II. Personal Liabilities of Shareholders

Scope of personal liabilities of shareholders in relation with merger is regulated under Article 158 of the TCC.

Liabilities of the shareholders of the absorbed

company, who were personally liable for the debts of the absorbed company before the merger, shall continue after the merger provided that the obligation underlying such personal liability has been incurred before the announcement of the merger resolution in the Turkish Trade Registry Gazette.

Personal liabilities of shareholders for the obligations of the absorbed company shall be barred by a statute of limitation of three years, starting from the date of announcement of the merger resolution. However, if an obligation becomes due after the announcement date, such statute of limitation period shall commence as of the due date. This limitation does not apply to the responsibilities of shareholders who are personally liable from the obligations of the surviving company.

There is also a special regulation under the TCC concerning bonds and debentures publicly issued by the absorbed company. Personal liabilities of the absorbed company's shareholders for the publicly issued bonds and debentures shall continue until the date of their redemption, unless otherwise was specified in the offering circular.

III. Protection of Employees

Mergers have a direct impact also on the rights of the employees of the absorbed company. Article 178 of the TCC, regulating the transfer of company's business activities in case of a split-up or spin-off, shall also apply to the transfer of company's business activities through merger. Employment agreements that the absorbed company is a party to shall be transferred to the surviving company, with all rights and debts attached to them, if the employee concerned does not have any objections against the merger. As explained in more detail below the "employee's objection against the merger" shall however be interpreted as the "employee's right to terminate the employment relation", rather than as a means to block the merger.

If an employee objects to the change in its employer/workplace, the employment agreement shall be deemed terminated by the employee at the end of the legal notice period for termination.

As it is in the case of creditors, employees (inherently qualifying as "creditors" under their employment agreements) may also request the surviving company to secure their receivables that are due as well as the ones that will become due, on the day of transfer of the employment agreements as a result of the merger (*i.e.* day of registration of the merger with the relevant trade registry).

The absorbed company, being the former employer, and the surviving company being the new employer shall be severally liable for the employees' receivables that became due before the date of the merger (*i.e.* day of registration of the merger with the relevant trade registry), and also for the employee's receivables which shall become due within the period that the employment agreement (applicable for agreements executed for a limited period) is to expire under ordinary circumstances or the date of termination due to the employee's objection to the merger.

Personal liabilities of the shareholders of the absorbed company, as discussed above, shall also apply in the case of employment agreements.

IV. Conclusion

Whilst companies largely grow through mergers or acquisitions, mergers will inevitably continue to be a hot topic from the perspectives of creditors and employees since a merger has interactive results on their respective rights. On the other hand, mergers shall not be blocked by lack of consent of creditors and employees. TCC provides means for striking the balance between protecting the rights of the creditors and employees of

absorbed companies, and giving way to mergers, one of the fundamental tools for inorganic growth of businesses.

Securities and Capital Markets

A Brand New Capital Structure: Security Investment Companies with Variable Capital

Capital Markets Board of Turkey ("CMB") issued a new communiqué regarding security investment companies. The Communiqué on the Principles Regarding Security Investment Companies ("New Communiqué") was issued on May 27, 2015 and replaced the communiqué with the same title, which was published not long ago, on August 28, 2013.

The principal aim of the New Communiqué is to enable the 'variable capital company' concept to be applied in practice, which was introduced to Turkish law for the first time by the new Capital Market Law ("CML") published on December 30, 2012.

The main principles governing this newly introduced concept of "variable capital" and the types of portfolio such companies may set-up, are as follows:

I. Variable Capital

As per the New Communiqué, security investment companies may be established with 'fixed' or 'variable capital' whereby a security investment company with variable capital ("VCSI Co.") is defined as a company whose capital is equal to its net asset value. According to the CML, such net asset value is the value of total assets minus total liabilities.

Since net asset value varies according to the financial position of the VCSI Co. even on a daily basis, so does its capital.

However, a minimum initial capital amount (*i.e.* TL 2,000,000) threshold is applicable to VCSI Co., which is 1/10th of the amount applicable to security investment companies with fixed capital ("FCSI Co.").

Capital requirements applicable to VCSI Co.'s are not limited with the above mentioned initial capital commitment. A VCSI Co. shall also raise its net asset value thus its capital to TL 4,000,000 within 6 months following the registration of the VCSI Co. with the Trade Registry. A VCSI Co. failing to satisfy such requirement would be deemed terminated, as per sub-paragraph 1 (b) of Article 529 of the Turkish Commercial Code numbered 6102 ("TCC").

II. VCSI Co. Shares and Share Transfers

As a result of such variable capital amount thus the lack of a fixed nominal value of the capital, shares of VCSI Co. have no nominal value. According to Article 52 of the New Communiqué, the 'per share net asset value' rule will be employed in transfer of VCSI Co.'s shares and such per share value is equal to the total net asset value divided by the number of founders and investors' shares.

There are two types of shares in VCSI Co.'s namely, founders' shares and investor shares. As their titles suggest, the first type is issued in the name of the founders of a VCSI Co. and the latter in the name of the investors. Unlike founders' shares, the investor shares grant their holder only with financial rights but no management rights. Since only the founders are entitled to manage the VCSI Co., validity of the transfer of founders' shares, which may result in change of control, is subject to the approval of the CMB.

On the other hand, investors have a put option against the VCSI Co. and can sell their shares to the company whenever they so require, and such transfer shall be completed within the same day of the exercise of the option.

In addition to the above, the shareholders (*i.e.* founders and investors) in a VCSI Co. have no pre-emption rights regarding newly issued shares.

According to the Article 91 (2) of the New Communiqué, given the unique capital structure of the VCSI Co.'s, TCC's provisions regarding (i) capital, (ii) minimum capital amount, (iii) mandatory content of the articles of association, (iv) capital in-kind, (v) nominal value, (vi) company's acquisition of its own shares, (vii) capital increase and decrease procedures, (viii) capital commitment and the payment thereof, (ix) share transfer limitations, (x) profit-loss calculation and profit distribution, (xi) reserve funds, and (xii) liquidation, will not be applied to VCSI Co.'s.

III. Portfolio Types

In contrast with FCSI Co.'s, VCSI Co.'s may establish their portfolios in accordance with the specialized security type thereto and as per types below, provided that the criteria required for such specific portfolios is met:

a. Debt Instruments Portfolio
b. Share Certificate Portfolio
c. Precious Metals Portfolio
d. Money Market Portfolio
e. Participation Portfolio
f. Variable Portfolio
g. Free Portfolio
h. Balanced Portfolio

Furthermore, and again only applicable to VCSI Co.'s, in case the title of the Debt Instruments Portfolio is to include the maturity date thereto, the following references may be made:

a. "Short-term" for portfolios with a monthly-average maturity term between 25-90 days,
b. "Mid-term" for portfolios with a monthly-average maturity term between 91-730 days, and
c. "Long-term" portfolios with a monthly-average maturity term more than 730 days.

Competition Law / Antitrust Law

Latest Precedents on "Warning to Cease Violation" Mechanism - Diye Danışmanlık and Kayseri Bakers Decisions

In *Diye Danışmanlık* (12.12.2014, 14-51/900-410) and *Kayseri Bakers* (05.03.2015, 15-10/138-61), the Turkish Competition Board ("Board") decided to deliver an opinion per Article 9(3) of Law No. 4054 on the Protection of Competition ("Law No. 4054"), indicating that the relevant undertakings should stop the relevant activities, otherwise further action will be taken pursuant to Law No. 4054. By delivering an Article 9(3) letter, the Board informed the undertakings about the violation of Law No. 4054 and ordered them to cease the violation, warning them that a failure to comply with the 9(3) letter would trigger further action by the Turkish Competition Authority ("Authority").

The Association of TV Broadcasters filed a complaint with the Authority alleging that (i) Yurddaş and Partners ("YP") abused its dominant position in the market for media auditing services by way of facilitating the establishment of a cartel in the market for television channels' advertisement space and (ii) the undertakings receiving media auditing services from YP are engaging in a "buying cartel" concerning the prices for advertising spaces.

The Board asserted that the applicant's allegations on *"facilitating the establishment of a cartel in another market"* would fall within the scope of Article 4 of Law No. 4054, which prohibits anti-competitive agreements, rather than Article 6 of Law No. 4054, which prohibits abuse of dominant position. Although the Board analyzed if there was a buying cartel between the advertisers through the Media Barometer system, it found that there was no need to take an action with respect to this allegation. The Board stated that the relevant documents and statements concerning the alleged boycott belonged to 1998 and 2005, and that the statute of limitations had already expired. The Board could not obtain

any information or documents supporting the allegations for the boycott plan in 2011. As a result, the Board concluded that a full-fledged investigation on the allegations brought forward with respect to the boycott plan was not called for in this instance. The Board found no evidence proving that the information exchange for the Media Barometer price pool constitutes a violation in and of itself. Even though there is no document proving a price fixing agreement among the Media Barometer users, this system could have certain effects on the advertisement unit time prices and payment terms. The Board concluded that there was no document proving the existence of an anti-competitive agreement among the Media Barometer users. However, Media Barometer (i) could have similar effects as an agreement for exchanges of price information given the content, frequency and currency of the information shared by YP, and (ii) raises certain competitive concerns regarding the prices and payment terms in the market for TV advertisement space. The Board noted that even if the number and the position of the Media Barometer users remain the same, the system would still raise competitive concerns. The Board did not initiate a full-fledged investigation because there was no oral or written anti-competitive agreement, so it found sufficient to submit an Article 9(3) letter, indicating that Media Barometer services should cease.

Two of the Board members provided their dissenting opinion on the file. One dissenting Board member argued that Media Barometer could not be described as a buying cartel—it could only be evaluated as an information exchange activity. The dissenting Board member further concluded that the information that was exchanged is not of the type that is competitively sensitive so that the Media Barometer system does not violate Article 4 of Law No. 4054. The other dissenting Board member defended the idea that a full-fledged investigation should have been initiated as in this case where the Board was not convinced that there is no violation of competition laws. The opinion pointed out that the advertisers are parties to an anti-competitive agreement as (i) strategically important and current information was frequently exchanged through the Media Barometer system, (ii) the advertisers estimate future prices using this information, (iii) all of the advertisers have the estimate average price information and inflation and by using such information all of the advertisers expect the same future price and (iv) this price is used as a reference point during the negotiations with the television channels.

Very recently, the 3rd Administrative Court in Ankara rendered a suspension of execution decision regarding the Board's *Diye Danışmanlık* decision in response to the YP's request for suspension of execution and annulment of the decision (E.2015/101, 13.07.2015). The 3rd Administrative Court in Ankara suspended the execution of the Board's decision on the grounds that "the execution of the administrative action subject to this lawsuit would result in damages which are difficult or impossible to compensate for". The decision states that the Media Barometer system does not violate Article 4 of Law No. 4054; therefore, the administrative action of the Board is not in compliance with the law. In light of this recent development, the customers may continue to freely receive the Media Barometer services so long as a new judicial decision is not rendered or an administrative status is not established.

In *Kayseri Bakers*, the Board launched a preliminary investigation against Kayseri Bakers and Flour Producers Association ("Association") and Turkish Bread Producers Federation ("Federation") concerning the allegations that the Association and the Federation obliged bakeries in Kayseri to sell bread at a certain price. The Board aimed to determine whether the Association and the Federation interfered with bread prices. For background, Law No. 5362 and Law No. 5174 provide price tariffs for bread, which prohibit bakeries from selling bread above a certain threshold. During the preliminary investigation, the Board determined that the

Association engaged in certain practices to dictate the maximum bread prices under Law No. 5362 and Law No. 5174 as a fixed sale price. The Board has indicated that bakeries, associations and federations had previously misinterpreted the provisions of Law No. 5362 and Law No. 5174 and they wrongfully had considered such tariffs as a minimum/fixed price. The Board decided to deliver a 9(3) letter to the Association and the Federation providing that the Association and the Federation should appropriately inform their members of the potential consequences of (i) interfering in the bakeries' own sale prices and (ii) imposing obligations on bakeries to sell at a certain price level.

The Board Grants Conditional Approval to Lesaffre/Dosu Transaction Following the Phase II Review

The Board recently issued one of its notable decisions on December 15, 2014 regarding the acquisition by Lesaffre et Compaigne ("Lesaffre") of sole control over Dosu Maya Mayacılık A.Ş. ("Dosu Maya") ("Transaction") (Decision No. 14-52/903-411). The Transaction which concerns the markets for bread improver and dry yeast was first taken into a Phase II review and unconditionally approved by the Board. However, the Transaction was granted conditional approval with the commitments submitted by Lesaffre with respect to the market for fresh yeast.

The decision pointed out that while the Transaction would not raise any competition law sensitivities for the dry yeast market, it would create joint dominance in the fresh yeast market and thus, should not be approved. Furthermore, three applicants (including Industrial Bakeries Association) submitted their objections against the Transactions, arguing that the Transaction is likely to result in rapid price increases and creation of a dominant position. In addition, the applicants also stated that the Transaction would neither create any technical development at the production and distribution level nor increase consumer benefit in the market.

Lesaffre, in an effort to eliminate the competition law concerns arising from the Transaction, has submitted the following commitments: (i) divestiture of distribution assets of 2000 Gıda (the only dependent distributor in the market and exclusive distributor of Öz Maya) and execution of a distributorship agreement with a potential buyer of 2000 Gıda for a minimum period of 3 years and provision of Öz Maya brands by the potential buyer for at least 5 years; (ii) protection of the market presences, price statuses and independent distribution networks of Dosu Maya's fresh yeast brands and expansion of the geographical presence of Dosu Maya in Turkey for at least 5 years; (iii) removal of the territorial exclusivity clauses and the non-compete obligations from the agreements between Öz Maya and its dealers; (iv) conducting regular and effective competition compliance program for at least 3 years (This program will be initiated in 6 months following the approval decision and an annual report will be submitted to the Authority regarding the application of such program); (v) limitation on fresh yeast prices of Öz Maya and Dosu Maya through designated four different maximum invoice prices issued to the dealers for 5 years following the Board's approval decision and submission of a detailed report on the relevant pricing to the Authority every 6 months and (vi) not acquiring Akmaya Pazarlama A.Ş. for 5 years following the Board's approval decision.

Following the Phase II review, the majority of the Board members opted for granting a conditional approval decision to the Transaction, based on the foregoing commitments of the parties. Three of the Board members disagreed with the Board's decision on granting a conditional approval to the Transaction. These dissenting opinions

mainly criticize the majority opinion since they consider that (i) the Transaction would result in creating a joint dominance in the market for fresh yeast and significantly impeding the effective competition in the market and (ii) the commitments are not sufficient enough to eliminate the competitive concerns arising from the Transaction due to the market structure, product characteristics and features of the sales-distribution system.

The Board Published the Reasoned Decision on the Conditional Approval to the Acquisition by NV Bekaert SA of Steel Tire Cord Business of Pirelli Tyre SpA

The Board recently published its reasoned decision regarding the acquisition by NV Bekaert SA ("Bekaert") of steel tire cord business of Pirelli Tyre SpA ("Target"), where ELIG acted as representative of Bekaert ("Transaction"). On January 22, 2015, the Board granted conditional approval with its decision numbered 15-04/52-25 to the Transaction based on the commitments provided by Bekaert during its Phase II review.

The Board defined the relevant product markets as "steel tire cord", "bead wire" and "hose wire". Although the relevant geographical market was defined as Turkey, the Board, for the purpose of its assessment, also considered the competitive landscape in the worldwide market. The Board evaluated the Parties' market shares and the potential competition, and concluded that Bekaert would be in a dominant position in the markets for steel tire cord and bead wire in Turkey following the completion of the Transaction.

While discussing the approval decisions of the European Commission and Brazilian Competition Authority in detail, the decision emphasized the characteristics and dynamics of the competitive structure of the relevant product markets in Turkey. In this respect, it established that (i) the number of undertakings active in the Turkish market is low in general, (ii) in fact, there are only two undertakings producing steel tire cord in the Turkish market in contrast to the market conditions in the European Economic Area and (iii) the Asian producers which play a significant role in the assessments of the European Commission and Brazilian Competition Authority are not active in Turkey.

In light of the foregoing, the Board determined that the Transaction would significantly increase the market power of the Parties given the structural indications such as concentration levels in the market and market shares. In light of its potential competition assessment, the Board found strong indications that the Parties would become dominant in the relevant markets and restrict competition significantly.

Bekaert submitted its commitments to the Authority in order to eliminate the potential competition law concerns that may arise following the consummation of the Transaction. Bekaert committed to enter into long-term supply agreements with its current customers active in Turkey ("Local Customers") for a period of at most three years. The content of the commitment letter is as follows:

- Bekaert would supply steel tire cord to the Local Customers at competitive prices.
- Local Customers would not be required to make a purchase from Bekaert, i.e. they can engage in business with other suppliers active in the market.
- Bekaert would supply and make delivery to the Local Customers in compliance with and in the amount of their orders.
- Bekaert would provide additional customer service support as well as developing strategies in order to help reduce the costs of the Local Customers.

The Board indicated that the commitments would prevent Bekaert from imposing higher prices or limiting its supply relying on its market power. The Authority sent Bekaert's commitment letter to the local customers for

which they provided positive feedback through their opinion letters. The Board evaluated Bekaert's commitment system to be transparent and foreseeable, and stated that the three-year-period would allow the local customers to switch suppliers and enable potential competitors –especially the Asian suppliers that are planning to enter into the Turkish market– to build competitive pressure on Bekaert.

The Board assessed Bekaert's proposed commitments as sufficient to eliminate the competition law concerns that may arise as a result of the Transaction, and thus granted conditional approval.

Bekaert/Pirelli could be deemed as a benchmark precedent as it involves solely behavioral remedies to (i) ensure uninterrupted supply, (ii) prevent price increases and (iii) enable potential competitors to emerge and thrive in the relevant market.

Labor Law

Recent Changes in Bylaw on Determination of Authority to Execute Collective Employment Agreement and Strike Vote

The bylaw published in the Official Gazette on June 14, 2015 and entered into force on the same day ("Bylaw no. 29386") amended Bylaw on Determination of Authority to Execute Collective Employment Agreement and Strike Vote dated October 11, 2013, numbered 28792 ("Bylaw no. 28792"). The Bylaw no. 29386 decreased the threshold of three percent (3%) to one percent (1%):

- Article 3/1/(ç) of the Bylaw no. 28792 defining "Determination of Authority to Execute Collective Employment Agreement" and Article 4/1/(a) of the same, regulating "authority conditions", were amended. Accordingly, an employee union is entitled to make a collective employment agreement with respect to a workplace or a business, provided that the total number of the union's members is equal to or more than one percent (1%) of all employees working under the same sector with said union.
- According to Article 8/3 of the Bylaw no. 28792, unions having members less than one percent (1%) of all employees working in the same sector shall not be informed of the decision on the determination of a union's authority.
- Articles 10/1 and 10/4 of the Bylaw no. 28792 were also amended. Per such amendment, unions having members less than one percent (1%) of all employees working in the same sector cannot object to the decision on the determination of a union's authority.

Additionally, the Bylaw no. 29386 made insertions to Articles 4 and 9 of the Bylaw no. 28792:

- Pursuant to the insertion made to Article 4, if more than one union has more members than forty percent (40%) of all employees working in an establishment, the union that has the most members shall have the authority to execute collective employment agreement.
- The insertion made to Article 9 regulates that if more than one union meets the authority conditions and member numbers of such unions are the same, Ministry of Labor and Social Security would reject application for determination of authority.

Litigation

Constitutional Court Takes a Big Step towards Gender Equality

Prior to the decision of the Constitutional Court in 2013, equal treatment of men and women was not protected adequately under Turkish law, to the extent of letting the women keep their maiden names after getting married. The only right granted to women under the Turkish Civil Code ("TCC") regarding their surname was to have their maiden name as a second surname in addition to the surname of

their husband. The surname of the married women had no chance to become the family name. Although this was a clear violation of the women's rights, it was not before the Constitutional Court's decision on December 19, 2013 that the Constitutional Court took the first step towards resolving this problem.

The Constitutional Court was presented with an individual application by Sevim Akat Ekşi, a lawyer admitted to the Istanbul Bar Association. After she got married in 2005, she continued to use her maiden name as her surname in her business life and also before public authorities. As one might predict, she faced several problems regarding that personal choice and consequently the hardship she faced while using her maiden name as her surname prompted her to file a lawsuit. After her claims were rejected by the court of first instance, she finally filed an individual application before the Constitutional Court. While applying to the Constitutional Court, she claimed that not being able to use her maiden name constituted gender discrimination and violation of Articles 2, 10, 12, 17, 20, 41 and 90 of the Constitution. The Court found her claim admissible in regard to Articles 17 and 90 of the Constitution.

Before getting into evaluation of the decision, the function and importance of a person's surname has to be examined. It is true to say that the name of a person distinguishes her/him from others, considering that it is the name which comes first when thinking of someone. In this vein, as accepted by several legislations and international organizations, a person's name is one of the elements defining the personality and therefore is closely related to private life. In this regard, the Court not only evaluates the case within the scope of Article 17 of the Constitution, but also refers to Article 8 of the European Convention on Human Rights ("ECHR"). What both articles have in common is that they regulate the right to respect for private life. On this matter the court examines the approach of the European Court of Human Rights, which interprets the term "private life" broadly. This interpretation of private life includes the right to choose one's name. Further the Court mentions that denying women the right to choose their name but granting this right to men is also a violation of Article 14 of ECHR which prohibits gender discrimination. The Court raises Article 90 of the Constitution, which states that international agreements pertaining to fundamental rights and freedoms, to which the Republic of Turkey is party, have to be applied in case of contradiction with the Turkish Law. Accordingly the Court sets forth that, since Article 8 of ECHR and Article 187 of TCC are in contradiction, the law under ECHR should be applied. As a result, the Court found the practice held by the public authorities unlawful and determined that such act violates Article 8 and 14 of the ECHR.

Despite the Court's decision, Article 187 of TCC is still in force. There are two ways of rectifying this discrepancy between Turkish and international law. Either the legislator will amend the article accordingly or the article itself (unlike this case where its execution was examined) has to be brought up to the Constitutional Court with an unconstitutionality claim. Considering that the Court has given its opinion on this matter, the burden of taking the next step through gender equality is on the legislative branch. But whether it will wipe out this speed bump stands as a question mark.

Internet Law

Regulation on Commercial Communication and Commercial Electronic Communications

Regulation on Commercial Communication and Commercial Electronic Communications ("Regulation") is published in the Official Gazette on July 15, 2015, and directly came into force.

Regulation is not applicable for the following communications:

- Commercial electronic communications

of the operators, falling within the scope of the Law No. 5809 on Electronic Communication, sent to their subscribers and users in order to exclusively introduce and market their own goods and services or to introduce their operations,
- Communications which the foundation universities sent to their students and their parents,
- Communications which the professional organizations with public institution status together with public benefit societies and tax exempt foundations sent to their members in relation to the operations of the commercial businesses belonging to them,
- Briefing communications on the broadcasting services which the institutions, broadcasting in accordance with Law No. 6112 on Foundation and Broadcasting Services of Radio and Television, sent in order to inform and educate the public and
- Communications which government, local administrations and other governmental entities sent in order to inform the public.

Although the draft regulation stated that the consent should be taken in a separate form, the Regulation in force stipulates that consent may be obtained through including a clause inside a contract (*i.e.* subscription, sales or membership contracts) as long as the consent includes certain specifications. The consent should be (i) obtained by adding the clause before the positive declaration of intention or signature, (ii) under the title “electronic commercial communication”, (iii) minimum in 12 font size and (iv) obtained by providing an option to reject the commercial communication.

As per Article 7 of the Regulation the consent should be obtained as follows:
- Consent can be obtained in writing or through all kinds of electronic communication tools.
- The consent should include the positive declaration of intention showing that the recipient accepted to receive electronic commercial communication as well as the name, surname and electronic communication address of the recipient.
- If the consent is obtained physically, the signature of the person, who provided the consent, is required.
- In case the consent is obtained through electronic communication channels, the information attesting that the consent is obtained will be transmitted to the electronic communication address of the recipient within the same day by providing the option to reject.
- Consent should not be requested through sending an electronic commercial communication to recipient’s electronic communication address.
- Positive declaration of intention cannot be included to the consent text in a preselected form.
- Burden to prove that the consent is obtained is on the service provider.

Pursuant to the first paragraph of Provisional Article 1 of the Regulation, prior to effective date of the Regulation, prior consents comprising the recipient’s positive declaration of intention for receiving commercial electronic communications, are valid.

Paragraph 4 of Provisional Article 1 of the Regulation states that, prior to effective date of the E-commerce Law, within three months upon the publication of Regulation (*i.e.* October 15, 2015) and for once only, if there is a general consent for sending commercial electronic communications and if commercial electronic communications are sent to the recipient based on this consent; commercial electronic communications can be sent to recipients with the purpose of receiving prior consent of the addressees who received commercial electronic communications. In this communication, the sender of the general consent should be also provided. If the recipient does not respond to the request for consent, the request is deemed to be rejected.

Pursuant to Article 5 of the Regulation, the service provider should obtain consent for electronic commercial communications it sends to the electronic communication addresses of the recipients for promoting, marketing its goods and services, promoting its business or increasing its recognition through contents of celebration or wishes. The consent is valid until the recipient uses his/her right to reject.

Article 6 of the Regulation regulates consent-free situations. Consent-free situations are as follows:

- No additional consent is required for the electronic commercial communications regarding modification, usage and maintenance of goods and services, if the recipient gave contact information to receive communication.
- There is no obligation to obtain prior consent for communications regarding the status of recurring subscription, membership or partnership, notifications of collection, debt reminding, information update, buying and delivery etc. and in cases of obligation to provide information imposed on the service provider under relevant legislations. However, in these notifications, goods or services cannot be marketed or encouraged.
- Prior consent is not required for electronic commercial communications sent to electronic communication addresses of merchant or artisan recipients. However, if the merchants and artisans use their right to opt-out stipulated under Article 9 of the Regulation, electronic commercial communications cannot be sent without their consent.
- Companies providing brokering services under capital market legislation do not have to obtain prior consent for electronic commercial communications they send to their customers to provide information.

According to paragraph 7 of Article 7 of the Regulation, service provider might use the consent it obtained for goods and services offered as a promotion if they are related to its own goods and services. However, this promotion relationship should be based on a contract. Paragraph 9 of Article 7 of the Regulation regulates that the service provider cannot assert recipient's electronic commercial communication consent as a prerequisite to the goods and services it provides.

Article 8 of the Regulation stipulates that all electronic communications should be in accordance with the following conditions:

- The content of the electronic commercial communication must be in accordance with the prior consent obtained from the recipient.
- The title and content of the electronic commercial communication shall include "MERSIS number" (a specific number provided to companies upon registration) and trade name for the merchants and should include name, surname and national identification number for artisans. Service provider may also include other information identifying itself such as trademark or business name.
- The electronic commercial communication conveyed through limited areas such as SMS, should include MERSIS (a specific number provided to companies upon registration) number for merchants and shall include name, surname and national identification number for artisans. Service provider may also include other information identifying itself such as trademark or business name.
- The electronic commercial communication should include at least one of the accessible contact information such as service provider's phone, fax or SMS number and e-mail address, depending on the type of electronic commercial communication tool.
- If the nature of the electronic commercial communication cannot be understood clearly from its content, it shall include a wording identifying its nature such as promotion, special offer or information. This wording should be included at the beginning of the

message for communications through SMS, in the subject section for the communications conveyed through e-mail messages and in the beginning of the conversation for voice calls.

- If the electronic commercial communication has promotions of sale and gift or games or contents organized for promotion, this nature of the communication should be clearly stated.
- The term of validity of the promotions and conditions the recipient needs to fulfill to take advantage of the promotions, should be provided through URL address or through an easily reachable method such as client services number clearly, without creating any doubt.

Article 9 of the Regulation stipulates that recipient can reject receiving commercial electronic communication without any reasoning. Recipient's notification of rejection invalidates prior consent on the communication channel which the notification was made through. For recipient's notification of rejection, a service provider should provide the recipients, in its commercial electronic communications, with an accessible contact address such as customer services number, text message number or an URL address dedicated to notification of rejection. Notification of rejection is sent through the same communication channel which is used in the delivery of commercial electronic communication on the condition that notification of rejection should be easy and free of charge to convey. Option for notification of rejection should be provided in all commercial electronic communications sent to the recipients. Recipients exercising the right to reject receiving commercial electronic communications do not constitute an impediment for notifications which are compulsory in accordance with the legislation which the service provider is subject to.

Article 10 of the Regulation states that the service provider should stop sending commercial electronic communications to its recipient in three business days upon the service of the recipient's request to reject to receive commercial electronic communications.

Article 12 of the Regulation regulating protection of personal data states that service provider and intermediary service providers are responsible for the protection of personal data and should take possible steps to prevent others from using personal data unlawfully. Data owner's consent should be obtained in order to share the personal data with third parties, process it or use the data for other purposes. The records pertaining to commercial electronic communications should be kept by the service providers for one year and should be provided to the Ministry of Customs and Trade, if requested.

Article 14 of the Regulation states that complaints regarding electronic commercial messages should be made at least within 3 months starting from the receipt of the electronic commercial message. Administrative fines set forth under the Law No. 6563 on Regulation of Electronic Commerce are applicable in case of noncompliance with the Regulation.

Much-debated Regulation on Commercial Electronic Communications is expected to end the commercial communications through, for instance, e-mails, SMS messages, phone calls popping up out of nowhere, as it requires prior explicit consent from the persons who are not merchants or artisans and the consent to be given with a positive declaration. Technology merge, high visibility and easy access made this regulation become a necessity at certain points. Having said that, discussions on the regulation's effects on both businesses and consumers in practice still continue.

From a consumer's perspective, even if the number of commercial electronic communications decreases, the regulation

may lead to vast amount of communications sent for obtaining prior consent, which would practically not prevent unwanted communications. Businesses especially the ones whose target audience are consumers may have difficulties in promoting their goods and services due to the strict opt-in provisions. Additionally, the regulation introduces many details, which requires changes to business structures for compliance. Still, it became effective immediately without granting a transition period, and lack of such a period led to concerns among businesses.

Data Privacy Law

European Council Approves Data Protection Regulation Draft

The European Council approved the Regulation of the European Parliament and of the European Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data ("GDPR").

The next stage is for the European Commission, European Parliament and European Council to reach a consensus on the final text of the regulation. The discussions commenced officially on June 24, 2015, and are currently scheduled to produce the final version of the GDPR by December 2015.

In January 2012, the European Commission proposed a comprehensive reform of data protection rules in the EU. The completion of this reform is considered as a policy priority for this year. The objective of this new set of rules is to give back EU citizens control over their personal data, and to simplify the regulatory environment for businesses. The data protection reform is deemed a key enabler of the EU Digital Single Market which the Commission also prioritized. The reform aims to allow European citizens and businesses to fully benefit from the digital economy, by providing a technologically neutral legislation, so that it does not go out of date and enable sustainable innovation to thrive under the new legislation.

GDPR is intended to replace the now outdated Directive 95/46/EC, which can no longer meet the challenges of globalization and the use of new technologies, two years after the date of GDPR's publication. The twofold aim of the GDPR is to enhance data protection rights of individuals and to improve business opportunities by facilitating the free flow of personal data in the digital single market. More than 90% of Europeans are concerned about mobile apps collecting their data without their consent. GDPR is an important step to finalize EU data protection rules to help restore that confidence.

Nine out of ten Europeans say they are concerned about mobile apps collecting their data without their consent; seven out of ten are concerned about the potential use that companies may make of the information disclosed. The GDPR aims to put citizens back in control of their data, notably through:

A right to be forgotten: The GDPR envisages the deletion of data when individuals no longer want their data to be processed, and provided that there are no legitimate grounds for retaining it.

Easier access to person's own data: The GDPR requires more information to be provided to individuals, on how their data is processed and this information should be available in a clear and understandable way. Moreover, a right to data portability stipulated by the GDPR aims to make it easier for individuals to transfer their personal data between service providers.

The GDPR will introduce principles such as "Data protection by design" and "Data protection by default" into EU data protection rules, meaning that data protection safeguards

will be necessary to be built into products and services from the earliest stage of development, and that privacy-friendly default settings will be the norm – for example on social networks or mobile apps.

With the new rules under the GDPR, individuals will always be able to go to their local data protection authority. The aim is to improve the current system in which individuals living in one Member State have to lodge a complaint with a data protection authority of another Member State, where the company is based. At the moment, when a business is established in one Member State, only the Data Protection Authority of that Member State is competent, even if the business is processing data across Europe. This makes it simpler for citizens – who will only have to deal with the data protection authority in their member state, in their own language. The GDPR gives citizens the right to take a company processing their data to court in their home Member State. Everyone, therefore, will have a right of administrative and judicial redress.

The GDPR will require that prior to giving consent; data subjects must always be informed of their right to withdraw consent. The information that must be provided to data subjects regarding the processing of their personal data will remain extensive, similar to Directive 95/46/EC, including specifying the legitimate interests pursued by the controller or the statutory or contractual requirements that are being relied on to justify processing (if this is the case). It will also be obligatory to provide data subjects with an explanation of the various rights they have in relation to the data.

Data is the currency of today's digital economy. Collected, analyzed and moved across the globe, personal data has acquired enormous economic significance. According to some estimates, the value of European citizens' personal data has the potential to grow to nearly €1 trillion annually by 2020. The European Council sees Europe's high standards of data protection as a business opportunity.

The GDPR will establish a single, pan-European law for data protection, replacing the current inconsistent patchwork of national laws. After the GDPR enters into force, companies will deal with a single legislation on protection of personal data, not 28. The financial benefits of unified data protection legislation throughout the EU are estimated at €2.3 billion per year. Moreover, companies will only have to deal with one single supervisory authority, not 28, making it simpler and cheaper for companies to do business in the EU; and easier, swifter and more efficient for citizens to get their personal data protected. The GDPR also includes a new "Big Data" / further processing provision, setting out the factors to be considered in determining whether the secondary purpose is compatible with the original purpose, and the possibility for processing for incompatible purposes in certain limited circumstances.

The GDPR's jurisdiction will also reach outside the EU, with extraterritorial jurisdiction tied to the offering of goods or services to, or the monitoring of, data subjects in the EU. Non-EU controllers that satisfy this jurisdictional nexus will need to appoint an EU representative "unless the processing is occasional and unlikely to result in a risk for the rights and freedoms of individuals". Moreover rules for international transfers of data are streamlined, through simplified approval of binding corporate rules. This will foster international trade while ensuring continuity of protection for personal data.

Telecommunications Law

End of Roaming Charges in EU

On June 30, 2015, the European Parliament and the Council of Europe reached an agreement regarding the European Commission's proposal, which was pending for two years, for having a single market for telecommunications. The negotiations conducted between these three institutions took 12 hours and parties agreed on proceeding with new rules to end mobile phone roaming fees and ensure net neutrality across the European Union.

The parties agreed to end the roaming charges in the European Union in June 2017 following the amendments to the European Union's regulatory framework for electronic communications, which are expected to be completed in 2016. According to this agreement the citizens of the member states will be traveling around the European Union by having connection and billing as if they are in their home country. The national boundaries will collapse for the European Union citizens in terms of their communications and roaming fees charged by the operators will finally come to an end. This was actually a result of the European Commission's endeavors for decreasing roaming charges, for at least the past ten years. The roaming charges had already been decreased by 80% since 2007. Consumers will make the same payment for the phone calls they make, text messages they send and the mobile data they use while they travel across the European Union when these terms come into force in 2017. There will be no difference in calling a friend within the home country and calling a friend in another European Union member state both in price and quality. Therefore, this agreement was well received by all consumer organizations in the European Union.

Having said that, the Groupe Speciale Mobile Association ("GSMA"), which is an association of mobile operators, reacted against this agreement by arguing that prohibiting roaming charges might have unexpected negative consequences in the development of the telecommunications sector. A number of leading companies in the European telecommunications market declared that the roaming charges are usually used for the infrastructure investments and prohibiting roaming charges and may therefore disrupt such investments for the telecoms infrastructure. They also pointed out that the loss incurred due to prohibition of roaming charges may inevitably be recovered through increasing prices of other services that the consumers attach great importance to, *i.e.* may result in waterbed effect.

Currently GSM operators in the European Union adopt "Ramsey pricing" policy rule, which proposes that the price markup to be inverse to the price elasticity of demand and the more elastic the demand for the product, the smaller the price markup. This policy is currently adopted in the Turkish jurisdiction as well and therefore roaming prices are quite higher than their expenditure for the consumers in Turkey.

European Union is about to overcome this burden on the European citizens by determining the wholesale prices between the operators in different member states and may interfere in their prices. However, the regulatory authority in Turkey, Information and Communication Technologies Authority, may not interfere in a foreign operator's prices offered to the Turkish operators in their own countries. Accordingly Information and Communication Technologies Authority refrains from controlling wholesale prices in Turkey. This transition from high roaming prices to free roaming apparently requires a supra-national regulatory authority's interference and supervision, such as the European Union, and national regulatory authorities fail to pull roaming charges down on their own discretion.

The recent development in the European

Union is clearly a significant step forward to a digital single market. The agreement is promising for the European citizens and the free movement of information within the union, although there are serious oppositions and criticism against these terms. However, the agreement still has to be confirmed by member states and has a long schedule before it is implemented throughout the European Union.

Medical Device Law

New Regulation on Promotional Activities of Human Medicinal Products

On July 3rd, 2015, the New Regulation on Promotional Activities of Human Medicinal Products ("Regulation"), has been published on the Official Gazette numbered 29405 and entered into force as of its publication, except for 3 articles. Upon the enactment of the Regulation, the Regulation on Promotional Activities of Human Medicinal Products which was published on the Official Gazette numbered 28037 on August 26, 2011 ("Abolished Regulation") has been abrogated.

At first glance, one might say that the legislator preserved most of the provisions of the Abolished Regulation in their current form. That said, there have been significant amendments at certain aspects on scientific and educational activities and new provisions on advertisements and promotion of human medicinal products.
Some of the most substantial subjects embodied under the Regulation are as follows:

I. Scientific and Educational Activities
Criteria on scientific and educational activities remain to hold a remarkable importance for practices of many manufacturers. In this respect, the Regulation brought a number of changes that will have certain impacts on such practices.

- change in the limitation for attendance to scientific meetings:
As per the amendment made with Article 7 of the Regulation, health care professionals who will attend to national or international scientific meetings will be able to benefit from 4 sponsorships during a year; only 2 of these sponsorships can be granted by the same license/permit holder and only 2 of these can be used for a meeting held abroad. The Regulation, apart from the Abolished Regulation which allowed license/permit holders to grant maximum 3 sponsorships to health care professionals, has increased the number of sponsorships that can be granted during a year. Also, healthcare professionals are exempt from this limitation for attendance to scientific meetings which are organized or supported by the Ministry of Health.

- exemption for manufacturing plants located in Turkey:
In parallel with the Abolished Regulation, the Regulation prohibits license/permit users to cover attendants' transfer and accommodation expenses for their product promotion meetings, except for the expenses of speakers. That said, following enforcement of the Regulation, license/permit holders are allowed to provide financial support accordingly with Article 7(2) of the Regulation, for visits to their manufacturing plants located in Turkey.

- new intervals for meetings in coastal resorts and ski centers:
The Regulation also changes the time interval during which organizing and sponsoring meetings in coastal resorts and ski centers is permitted. To that end, license/permit holders are not allowed to organize and sponsor meetings in ski centers between December 1 and March 1. As for coastal resorts, the prohibited period during 2015 and 2016 will be between June 1 and September 1 and during 2017 and following years between June 15 and September 15.

- use of informative presentations/videos prepared in order to raise awareness on pharmacovigilance:
Lastly the Regulation, with the amendment made in Article 7, brings the obligation for license/permit holders to use informative presentations or videos prepared in order to raise awareness on pharmacovigilance by the Turkish Medicine and Medical Device Institution ("Institution") in organized or supported meetings. In this respect, the banners and brochures shall be placed in prominent places. However, the enforcement of the foregoing provision has been postponed until January 1, 2016 as per Article 16 of the Regulation.

II. Promotional Activities Through Intermediary Firms
Article 11 of the Regulation clearly adopts the view that license/permit holders can conduct promotional activities through intermediary firms by way of contractual engagement. In such a case, the license/permit holders and the intermediary firms will be jointly liable for transactions to be carried out.

As per Article 11(6) of the Regulation, for the promotional activities conducted through intermediary firms, the license/permit holders shall:

(i) submit the agreement or any amendment thereto, to the Institution within 30 days following its execution date,
(ii) make the necessary submissions to the Institution for all transactions related to the promotions carried out through intermediary firms,
(iii) keep record of representatives' names, practice regions and their start-of-business and end-of-business dates as well as names of relevant healthcare professionals and promoted products and shall submit these information to the Institution when required,
(iv) maintain and keep all documents related to this provision for a period 5 years.

In addition, as per Provisional Article 1 of the Regulation, license/permit holders shall submit the agreements previously signed with the intermediary firms before the enforcement date of the Regulation, to the Institution within 6 months as of July 3, 2015.

Real Estate Law

Legal Framework of Pre-Emption Right under Turkish Law

Pre-emption right, along with other property based statutory rights such as right of redemption and right to recover property, is accepted as one of the limitations to ownership right and can be both (i) statutory and (ii) contractual. In case one of the joint owners of a property sells her/his share entirely or partially to a third party, other joint owners can exercise their pre-emption rights by way of filing a suitcase for purchasing the subjected share as Article 732 of the Turkish Civil Code ("TCC") indicates.

I. How to Use the Pre-Emption Right
In order to use their pre-emotion rights, TCC requires the joint owners to file a suitcase against the new owner of the property within 3 months following the receipt of the notice regarding the sale transaction or, in any case, within 2 years following the sale (Article 733 of the TCC).

The 3-month period shall start once the notice regarding the sales transaction, sent through notary public[1], is received by the joint owners.

[1] As accepted by the Court of Appeals the joint owner shall be informed by serving an official notification through notary public. Unofficial notifications will not be sufficient for starting the 3-month-term (YHGK T. 13.4.2005, E. 2005/6-230, K. 2005/244, 6. HD T. 1.12.2008, E. 2008/1029, K. 2008/13429).

II. Pre-Emption Payment
Pre-emption payment consists of the sales price of the property as registered at the Land registry and the Land registry charges paid by the new owner.

The joint owner claiming the pre-emption right will deposit the payment to the account, in due time to be determined by the Court.

This said, parties are allowed to determine the price and the payment terms under an agreement for contractual pre-emption rights.

III. Restrictions for Exercising the Pre-Emption Right
Certain circumstances where the pre-emption right cannot be exercised can be listed as the following:
- co-ownerships and commonhold as per Article 8 of the Property Ownership Law,
- compulsory sales by action as per Article 733(1) of the TCC,
- donations and barter agreements,
- expropriation of the property and building,
- mergers and investment of the share on the property right as capital,
- by way of inheritance.

IV. Contractual Pre-Emption Right
Contractual pre-emption right, apart from the statutory pre-emption, is granted willingly by the owner itself and requires the registration of its annotation to the land registry in order to be binding on third parties.

Protection of the annotation registered to the land registry lasts for 10 years as per Article 735 of the TCC and, as a result, contractual pre-emption right can be claimed against new owners for 10 years following its registration of the annotation to the land registry. However, this rule does not prevent the contractual parties (*i.e.* owner and beneficiary) from determining a longer period for the survival of the pre-emption right. In such a case, period exceeding the 10-year interval will stand as a right "in personam".

As a final note, contrary to statutory pre-emption right, contractual pre-emption right can be granted between the joint owners of a property.

White Collar Irregularities

International Developments on Compliance Programs

The historical development of transnational regulations concerning corruption that already began in late 1970s with the entry into force of US Foreign Corrupt Practices Act ("FCPA") (1977) followed by the execution OECD Convention on Combating Bribery Foreign Public Officials in International Transactions ("Convention") (1997) as well as the UK Bribery Act ("UKBA") (2010) forces multinational companies to comply with both domestic law of business operations and extraterritorial anti-bribery legislation. Turkey has also kept pace with these changes and has signed and ratified several European and international conventions to combat bribery. Having signed the Convention on December 17, 1997 Turkish anti-bribery law is substantially improved beginning with the criminalization of bribery of foreign public officials and increase of corporate liability by sanctioning legal entities and criminalization of private commercial bribery. This is true for many countries in the world. With the entry into force of the Convention, many countries improved their anti-corruption legislations.

One of the main discussions of the improvement of anti-corruption laws is what effects, if any, should anti-corruption compliance programs have in legislative systems. In the most extreme case, this means whether compliance programs should be taken as a defense for corruption crimes, the middle way suggests that compliance programs can

be taken as mitigating factors during the investigation/adjudication phases. The other end of the scale suggests that compliance programs should not have any effect on the investigation/adjudication phases. Recent years witness a proliferation of legislation towards the Anglo-American approach where compliance programs are regarded as defense/mitigating factor. One of the latest countries that introduce legislation on with this approach is Brazil.

Although some markets, such as Turkey, does not yet recognize compliance programs as legal tools in the regulatory level, it is becoming harder each day for multi-national companies to ignore the necessity to adopt compliance programs due to international developments in the field.

I. Compliance Programs

A compliance program is an internal preventive tool to ensure the law-abidingness of a company from top management down to the lowest staffing levels and to monitor the corruptive activities at all levels. Every company should come up with their own compliance program as compliance programs can best deliver results when adapted to the challenges of each company/sector/jurisdiction etc. This being said, multiple national legislations in the field suggest that, as a skeleton, the anti-corruption compliance program should have the following elements:

(i) the existence of a clear anti-corruption policy and the top management's commitment to this policy, (ii) the existence of a company code of conduct and compliance policies and procedures, (iii) the compliance program should be enforced by an autonomous manager, who has at his/her disposal sufficient resources, (iv) a risk assessment procedure that is repeated periodically and for each jurisdiction and sector, (v) strengthening of the compliance culture through trainings, (vi) implementation of the compliance program through incentives and disciplinary measures, (vii) exercising scrutiny over third parties through due diligence procedures, (viii) employing confidential reporting mechanisms and internal investigations, where necessary, in order to effectuate the "detect" function of the compliance program, (ix) periodically reviewing and updating the compliance program, (x) engaging in due diligence during merger and acquisition processes.

II. Effects of Compliance Programs

USA was the pioneer in implementing the idea that compliance programs should be assessed as mitigating factors. This idea is embodied in Principles of Federal Prosecution of Business Organizations, which stipulates that under some circumstances, it might be more advantageous for institutions to enter into plea agreements with companies (deferred prosecution agreements, non-prosecution agreements) rather than prosecuting them. The existence of an effective and pre-existing compliance program is stated as one of the factors to consider. Hence, when deciding whether to prosecute a company, both Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC") can, in accordance with the effectiveness of a company's compliance program (along with other factors such as whether the company self-reported) enter into a deferred or non-prosecution agreement, and in rare cases even decide not to prosecute the company, because the employee who engaged in the corrupt behavior was a rouge employee and the company did everything it could prevent the employee from engaging in a corrupt act.

Similar to the decision not to prosecute mentioned above, according to Section 7 of the UKBA, the existence of "adequate procedures designed to prevent" corrupt behavior is deemed as a defense for companies. Russia on the other hand

introduced legislation one step forward in 2013 that mandated companies active in its territory to develop and implement anti-corruption measures.

The latest addition to the jurisdictions that give a consequence to compliance programs is Brazil. According to the Decree enacted within scope of the Clean Companies Act of 2013, the authorities can consider compliance programs as mitigating factors, in addition to factors such as cooperation during an investigation and self-reporting. The decree then lists the non-exhaustive exemplary elements of a compliance program, a reiteration of the elements of a compliance program mentioned above.

III. Companies Active in Turkey

The above explanations demonstrate that more and more countries adopt compliance programs as legislative tools to their legal systems. At the moment Turkey does not link any legal consequences to compliance programs. However, taking into consideration the international legal developments it would be prudent especially for multinational companies to have sound compliance programs in place regardless of the jurisdiction that they are active in.

ELİG
LOKMANHEKİM ⬩ GÜRKAYNAK
Attorneys at Law

ELİG is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations.

Our legal team consists of 60 lawyers. While we take pride in being able to assist our clients in almost all fields of law, the main focus of our practice consists of corporate law, mergers & acquisitions, competition law, EU law, banking and finance, litigation, technology, media and telecommunications law, Internet law, data protection and privacy law, energy, oil and gas law, administrative law, real estate law, white collar irregularities, and intellectual property law.

As an independent Turkish law firm, ELİG collaborates with many international law firms on various projects. Furthermore, ELİG is able to serve its clients' interests also in Ankara and İzmir, through its cooperation with local law firms in these two major cities.

We are very sensitive about conflict of interest checks, and ethical professional conduct. One of our founding partners, Mr. Gönenç Gürkaynak, is a member of New York Bar and the Law Society of England and Wales (non-practising), in addition to his attorney status at the İstanbul Bar since 1998.

All members of ELİG team are fluent in English.

Çitlenbik Sokak No: 12 Yıldız Mah. Beşiktaş 34349, Istanbul / TURKEY
Tel: +90 212 327 17 24 • Fax: +90 212 327 17 25
www.elig.com