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LEGAL INSIGHTS QUARTERLY

December 2013 - February 2014

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Preface to the December 2013 Issue

This December issue focuses much of its attention on the application of provisions of the new Turkish Code of Obligations No. 6098 and the new Turkish Commercial Code No. 6102. Accordingly, on the corporate law front, the issue contains an analysis of certain firms' independent audit requirements and the related obligation to set up websites. Elsewhere, we analyze how the new provisions of the Turkish Code of Obligations impact lease agreements, including leases that were in effect before the new Code came into force. An article on labor law concentrates on the rights of employees to terminate an employment agreement in case of mergers, demergers and other changes in the business relationship. In addition, this issue explores the innovations introduced by the new Draft Law on the Protection of the Consumer and their effect on the relationship between the consumer and the merchant.

On the competition law front, this issue delves into new guidance by the Turkish Competition Board on the meaning of mergers and acquisitions and changes of control. Furthermore, we explore the boundaries of the right of the Turkish Competition Board to examine and use the personal belongings of employees as evidence during investigations.

Finally, the article on white collar irregularities recaps the developments in Turkey relating to bribery law, focusing on the OECD Working Group on Bribery's Phase 1 and Phase 2 evaluations of Turkey's implementation of the OECD Convention on the Bribery of Foreign Public Officials in International Business Transactions, and the expected release of Phase 3 evaluations before the end of the year.

December 2013

Corporate Law

Independent Audit and Web-Site Requirements

In accordance with the Decree of the Council of Ministers on Determination of Equity Companies Subject to Independent Auditing No: 2012/4213 ("Decree"), companies that meet at least two of the following three criteria for two sequential accounting periods would be subject to independent auditing, and will need to appoint an independent auditor:

a) Companies whose assets are worth 150 million Turkish Liras or more,
b) Companies whose annual net sales revenue amounts to 200 million Turkish Liras or more, or
c) Companies with 500 or more employees.

However, a recent amendment to Article 397 of the Turkish Commercial Code published in the Official Gazette of August 28, 2013 will expand the scope of companies that are subject to audit beyond those that meet these criteria. However, the communique regulating the conditions of this audit requirement has not yet been published in the Official Gazette. Therefore, the aforementioned criteria are still in force. The Ministry of Customs and Trade General Directorate of Domestic Trade has issued a directive on April 29, 2013 , stating that such companies which do not meet independent audit criteria should not appoint independent auditors.

According to Article 1524 of the Turkish Commercial Code, companies subject to independent audit are obliged to set up a website and to allocate a certain section of their website for statutory announcements to be made by the company.

The Regulation on the Websites to be Set Up by Corporations ("Regulation") regulates the scope and issues to be announced on these websites, procedures regarding setting them up and what kind of information they should include. In accordance with the Regulation, significant matters that should be announced on the websites of the relevant companies and remain on the web-sites for 6 months are as follows:

a) the Company's trade name, address of the headquarters, subscribed and paid capital, first and last name of the directors and, in the case that a legal entity is appointed as a director, details of the real person representative,
b) first and last name, title and address of the auditor,
c) details of its branch office,
d) announcement for the general assembly meeting on the day it is published in the trade registry gazette at the latest
e) general assembly minutes and, if any, privileged shareholders meeting minutes within 5 days following the day of the meeting at the latest,
f) as per Article 428 of the Turkish Commercial Code, announcements regarding the representatives of bodies, independent representatives and corporate representatives on the date of the announcement,
g) law suits regarding cancellation and nullity of general assembly decisions and their hearing dates within 5 days at the latest, following the duly made announcement as per the company's articles of association,
h) finalized court decisions regarding the cancellation or nullity of general assembly decisions within 5 days at the latest following the registration date,

i) general assembly resolutions regarding the amendment of the articles of association within 5 days at the latest subsequent to its publication on the trade registry gazette,
j) in case another company holds directly or indirectly, 5, 10, 20, 25, 33, 50, 67 or 100 per cent shares in the company at hand, the explanation regarding the purchase or sale of shares that led to the said percentages and that will lead to the increase or decrease of these percentages, within 5 days at the latest, following the realization of these transactions,
k) board of directors' resolutions or board of managers' resolutions regarding signatories and their representation forms within 5 days at the latest following their publication on the trade registry gazette,
l) in joint stock companies, internal directives including the work methods and principles of the general assembly, within 5 days at the latest following announcement of the relevant directive.

There has been an amendment to the Regulation, published in the Official Gazette dated September 21, 2013, that mainly introduces the following amendments regarding the obligation to set up a website:

a) Companies that are part of a group company but not subject to independent audit are not obliged to set up a website.
b) Previously, companies were obliged to comply with their obligation for setting up a website by themselves or through a Central Database Service Provider ("CDSP") ("Merkezi Veri Tabanı Hizmet Sağlayıcı" in Turkish). The Amendment to the Regulation provided an exception to this requirement for group companies. According to the amendment to Article 5 of the Regulation, companies that are incorporated under a group company structure may comply with their obligations for setting up a website through one of the affiliates within the group company (*i.e.* an affiliate may set up websites and fulfil other requirements on behalf of each company within the group company). Authorization to become a CDSP would not be required for such an affiliate, provided that the company is still in the group company.
c) Before the amendment, all companies that are subject to audit had to inform the CDSP regarding the content that was to be included in the dedicated section of the website complying with the Regulation. Now, companies may either provide access to their website from "http://firmaalanadi/bilgitoplumuhizmetleri" (http://companydomainname/informationsocietyservices in English) or ensure direct access to the CDSP.

d) Furthermore, according to the new amendment to Temporary Article 2, companies must prepare a technical report displaying that they are complying with the standards stipulated in the technical guidelines. They must submit this report to the Ministry of Customs and Trade and renew such report every 5 years, provided that the company fulfils the obligation for setting up a website on its own (*i.e.* not through a CDSP). This reporting period is set out as 3 years for the CDSPs.

Capital Increase in Foreign Capital Companies Facing Technical Bankruptcy

In times of need for quick cash, Turkish companies had been frequently resorting to capital advances. Now, with the new Turkish Commercial Code (the "TCC") and relevant regulations in force, the era of capital advances seems to have come to an end.

1. Before the new TCC

Before the TCC was introduced, a foreign parent company was able to fund its Turkish subsidiary with capital advances, without the need for converting such amount into the capital of the subsidiary for another year. The procedure of a capital increase, especially in foreign capital companies with authorized signatories abroad, requires rather a long time. Therefore, capital advances were the most feasible instruments to meet the short term liabilities for companies that are short of cash.

The frequent use of capital advances against the shareholder loans stems from the following:

(a) **Cheaper money:** Capital advances are not loans and thus no tax and interest will be levied, provided that such amount has been converted into equity within a year;

(b) **A better balance-sheet:** Capital advances strengthen the balance sheet of the company whereas a loan will not have such a positive impact;

(c) **No limits on the amount:** In case the amount of the shareholder loan exceeds three times the registered share capital, such exercise would trigger thin capitalizasion hence transfer pricing provisions. On the other hand, there is no amount limit applicable to capital advances.

Furthermore, as briefly mentioned above, the capital-not-loan' aspect of such capital advance amounts is subject to a 1-year period. In case the capital advance is not converted into capital within a year, such amount will be deemed as a loan from the day it hit the accounts of the company resulting in the levy of tax and interest.

2. What has changed?

(i) Turkish Central Bank Capital Movement Directive

The most essential change in this regard is the end to the free-use of foreign capital advances received by Turkish companies. In accordance with the TCC, the Turkish Central Bank Capital Movement Directive No. 2002/YB-1 was amended on March 29, 2013. According to this amendment, Turkish companies will not be allowed to use foreign capital advances until such advance has been converted into capital. In practice, banks block such amounts until the company duly documents the conclusion of the capital increase.

(ii) General Directorate for Domestic Trade Directive

Secondly, according to the directive issued on January 25, 2013 by the General Directorate for Domestic Trade, companies must submit a CPA report to the trade registry for a capital increase. Such CPA report must indicate, among other items, that:

(a) the previous capital has been fully paid, and;

(b) at least 1/3 of the capital is preserved.

The 1/3 ratio is the well-known technical bankruptcy threshold, which is preserved in Article 376 of new TCC, with a minor change, as it was stipulated in the former Turkish Commerial Code. However, although there is no substantial change made on the technical bankruptcy definition in the new TCC, the above-mentioned new directive leads to a rather significant impact in practice. The abrogated directive numbered 2003/3 had not been explicit on the content of the CPA report to be submitted and thus there was not a unified practice among the trade registries. Now, trade registries do not register capital increase resolutions unless the CPA report indicates at least a 1/3 capital preservation ratio. This practice has also made the following doctrinal debate obsolete: whether the companies facing technical bankruptcy can increase their capital or should the capital be decreased or completed first, as stipulated in the new and former TCC.

3. What to do?

There are three ways to inject cash into such companies:

(i) Decreasing and increasing:

The company may decrease and hence increase the capital. Such decrease and increase occur sequentially, (in other words, the decrease happens only in a theoretical manner). Please note that, if the company is a joint stock company with share certificates previously issued, it is advisable to receive a CPA's opinion on the potential tax implications before concluding such decrease and increase.

(ii) Completing the capital

The other solution is to complete the lost capital. However, this may also not be suitable for companies where the shareholders are not affiliated (such as a joint venture), since the amount to be paid to complete the lost amount is irrevocable and cannot be converted into new shares.

(iii) The practical way:

The capital preservation ratio to be indicated in the CPA report will be higher after the capital advance has hit the accounts of the company. This is because the capital advances are one of the shareholder equity items and the blockage on such amount does not make any difference on the calculation of the shareholder equity vs. paid-in capital ratio. Thus, if the company in technical bankruptcy receives the CPA report subsequent to the receipt of the capital advance, provided that the capital advance amount is enough to raise the ratio above the threshold, the registration of the capital increase would be possible.

Regardless of the method chosen, there is another detail which, if omitted, may lead to a large waste of valuable time. According to the Turkish Central Bank Capital Movement Directive No. 2002/YB-1, capital advances could be sent in foreign currency but they must be converted into Turkish Lira when they hit the accounts. In case the signatories of the foreign capital company are not in Turkey, the documentation is usually drafted and sent to the signatories before the capital advance had been wired. To ensure that the actual capital increase amount in Turkish Lira indicated in the capital increase resolution will be the same after the conversion, the Company should agree with the bank on the conversion rate beforehand. This way, the exact converted amount will be known whilst drafting the resolution. The conversion rate issue must also be considered carefully not only in capital increases in technically bankrupt companies, but also in any capital increase regarding any foreign direct investment.

4. Last note

Since companies may not tap into the blocked new cash injection until the capital increase has been registered, the time spent for the capital increase has become crucial for low-on-cash companies. Furthermore, since a payment difficulty is usually the result of low shareholder's equity, it is likely that most companies facing low-cash status may also be in technical bankruptcy.

However, by way of close collaboration with the CPA and the bank of the company, the hurdles resulting from such changes can be minimalized.

Competition Law / Antitrust Law

New Guidance on What Constitutes a Merger or Acquisition and the Concept of Control

One of the recent developments in Turkish competition law is the promulgation of the Guideline on Conditions Accepted as Mergers and Acquisitions and the Concept of Control ("Guideline") which was published with the Turkish Competition Board's ("Board") decision dated July 16, 2013 numbered 13-45 / RM (9). The Guideline discusses a variety of important topics with respect to mergers and acquisitions, such as negative control, conditions of full-functionality and interrelated transactions. The new guidance creates a significant improvement in terms of clarity by bringing together elements which were discussed in a variety of past decisions.

The Guideline provides that a merger occurs when (i) two or more independent undertakings terminate their legal personality and come together to form a new undertaking or one undertaking terminates its legal personality and is absorbed into the legal personality of another undertaking, or (ii) even though the relevant undertakings maintain their legal personhood, the economic activities are pooled together within a single economic unit under a single economic management.

An acquisition, on the other hand, occurs when one or more undertakings or one or more people already controlling at least one undertaking obtain the direct or indirect control over the whole or part of one or more undertakings. The acquisition of direct or indirect control can occur via purchasing shares or assets, with an agreement or other ways. The occurrence of a change of control is imperative for a transaction to constitute an acquisition. The Guideline provides that such change of control should be permanent, however. Agreements that result in a change of control may be deemed within this category if 1) the term of the agreement is sufficiently long, or 2) the agreement is renewable. A change of control need not imply a change in the ownership of the shares or assets of an undertaking, and sufficiently long-term agreements (such as lease agreements, etc.) which provide such rights may also create a change in control.

The Guideline discusses two types of control: sole control and joint control. For both types, such control may be de *jure* or *de facto*. A case is considered de *jure* if the acquired legal rights directly permit the exercise of control, such as, for example, acquisition of enough voting rights to appoint a sufficient majority in the Board of Directors for controlling strategic commercial decisions. On the other hand, even if de *jure* control is absent, an undertaking may be deemed to possess *de facto* control based on the totality of circumstances. For example, a minority shareholder who has consistently been able to influence the votes of a majority of shareholders in past shareholder meetings may be deemed to possess *de facto* control.

Both sole and joint control can also be wielded in a "negative" manner. Negative control refers to the ability of an undertaking to create a determinative effect on the commercial conduct of an undertaking by possessing veto rights with respect to its strategic commercial decisions. Where only one shareholder can veto such decisions (even though it cannot take such decisions by itself), such shareholder has negative sole control. However, such negative control is more commonly observed for cases of joint control which are defined by two or more parents possessing the capacity to create deadlock. In conformity with the Competition Board's past decisional practice, the Guideline distinguishes veto rights which provide "negative control" from veto rights which merely aim towards the financial interests of minority shareholders. Typical examples of veto rights which provide joint control are those with respect to the acceptance of budget, the business plan, significant investments or the appointment of senior executives. These can be contrasted with veto rights with respect to changes to the articles of association, increasing or decreasing the share capital of the company or liquidation or sale of the company, which do not provide joint control.

The Guideline also discusses other instances of joint control such as equality in voting rights or decision-making organs or minority shareholders acting together with respect to the use of voting rights. It goes on to provide that where there is no consistent majority and a majority of votes is obtained by differing groups of shareholders in different cases (i.e. a case of "shifting alliances"), none of the shareholders have joint control.

The Guideline also goes into different cases of changes in the nature of control of an undertaking. In case one or more new controlling shareholders join the shareholding structure and this leads to a shift in control, *i.e.* from sole control to joint control, such transaction will be subject to notification, even if the new controlling shareholders replace the current shareholders instead of being added. Secondly, in case current controlling shareholders leave the structure and this leads to a shift in control, *i.e.* from joint control to sole control, such transaction will also be subject to notification. Transactions that do not lead to a shift in control, such as changes in the share proportion and/or from negative control to positive control, will not be subject to notification.

Another important topic in the Guideline is the concept of full-functionality of a joint venture. This concept is examined under four aspects (i) whether the joint venture has sufficient resources to operate independently on the market (*i.e.* the joint venture must have a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff, and assets), (ii) whether the joint venture's activities are beyond one specific function for the parent companies (*i.e.* the joint venture is not full-function in case where it solely takes over one specific function within the parent companies' business activities without its own access to or presence on the market), (iii) whether the joint venture's sale purchase relations is only limited with its parents (*i.e.* the joint venture achieves more than 50% of its turnover with third parties, this is an indication of full-functionality) and (iv) whether the joint venture is able to operate on a lasting basis. It should also be noted that a concentration within the meaning of Article 5 (3) of the Communiqué No. 2010/4 on the Mergers and Acquisitions Subject to the Permission of the Competition Board would arise in case where a change in the activity of an existing non-full-function joint venture occurs, so that a full-function joint venture is created.

Use of Personal Belongings as Evidence in Antitrust Investigations

The Competition Board has recently discussed the admissibility of an individual's personal belongings as evidence in Competition Law investigations. There is no settled Competition Board precedent as to the eligibility of the personal belongings as evidence yet. Nevertheless, the discussion about this issue requires the consideration of different legal principles.

Article 38 of the Turkish Constitution, which contains principles regarding offences and penalties, states that "unlawfully obtained information may not be admitted as evidence." Accordingly, the Competition Board cannot use unlawfully obtained information as evidence in its investigations. For instance, Competition Board decisions cannot rely on evidence that was collected during on-site inspections by individuals other than Competition Authority experts or by experts who have not produced authorization certificates as per Article 15 (2) of the Law No.4054 on Protection of Competition. Similarly, the Board cannot rely on any kind of attorney-client communication collected by the Competition Authority as per Article 36 of Attorney Act No. 1136.[1] In accordance with this article, the Competition Board experts have refrained from conducting on-site inspections in the offices of in-house counsel located within the company's premises, as in the Gazeteler Decision numbered 07-62/742-269 and dated July, 26, 2007.

Likewise, according to Article 20 of the Turkish Constitution regulating the right to privacy and Article 15 of Law No. 4054, the personal belongings of employees cannot be used as evidence within the framework of on-site investigations. According to Article 15 (1) (a) of Law No. 4054, the Competition Board is entitled to examine the books, any paperwork and documents of undertakings and associations of undertakings, and to take copies if needed. As is clearly seen, the provision literally entitles the Competition Board to examine and collect information such as documents, paperwork, books relating to the undertakings and the association of the undertakings but does not authorize the Competition Board to take employees' personal belongings as evidence. Therefore, personal belongings that are found on the premises during the on-site inspection are not included within the scope of Article 15 of the Law No. 4054, and should not be used as evidence in Competition Board decisions. Indeed, as a general matter, the Competition Board has stated in its Mey İçki Decision numbered 11-57/1476-532 and dated November 17, 2011 that *"(...) the free evaluation principle of evidence in criminal law is also valid for investigation processes of the Competition Authority. However, (...) this does not mean that Competition Board decisions can be based on such unlawfully obtained evidence. (...) Along with the increasing number of decisions made in accordance with the Article 6 of the European Convention on Human Rights regarding right to a fair trial, the Competition Board's application of criminal law principles have increased. The Competition Board decisions should consider the legality of the evidence."*

Unfortunately, there is no specific competition law precedent assessing the legality of the use of personal belongings as evidence yet. Nevertheless, in a recent case, the issue of personal belongings as evidence and their admissibility has come up in an oral hearing. The Competition Board's reasoned decision on the matter is yet to be issued.

[1] BUDAK, A.C, AT Konsey ve Komisyonunun Yeni Rekabet Tüzükleri ve Rekabet Kanunu'nda Yapılan Değişiklikler Işığında Delillerin Toplanması ve İspatı, Perşembe Konferansları, p.147.

Labor Law

Review of Article 178 of Turkish Commercial Code

Article 178 of the Turkish Commercial Code No. 6102 ("Commercial Code") regulates the transfer of business relations within Turkish law. Although Article 6 of the Labor Code No. 4857 ("Labor Code") and Article 428 of the Turkish Code of Obligations No. 6098 ("TCO") also provide general frameworks for workplace transfer, Article 178 of the Commercial Code sets forth specific rules applicable to merger, demerger/scission and change in type operations. Due to the fact that the Commercial Code is of lex specialis nature and Article 178 of the Commercial Code is even more beneficial for employees and public policy as opposed to the Labour Law and the TCO, the Commercial Code prevails over the Labour Law and the TCO. Therefore, Article 178 of the Commercial Code is applicable to workplace transfers resulting from merger, demerger/scission and change in type operations.

As per Article 178 of the Commercial Code, employment agreements are transferred to the transferee along with all rights and debts arisen until the transfer day, provided that the relevant employee does not object to the transaction. In fact, requiring the consent of employees became obligatory only after the Commercial Code came into force, since both the Labor Law and the TCO stipulate that the employment agreements are transferred to the transferee automatically without employee's consent.

The Commercial Code provides the possibility for the transferred employees to object to the transfer and to unilaterally terminate their employment agreements upon expiry of their notice periods. If the employee objects to the transactions mentioned in the Commercial Code, then the employment agreement would be terminated at the end of the legal period of dismissal and the transferee and the employee would be liable to fulfil the terms of the employment agreement until the expiry date. Thus, the employment agreement of the employee would not be terminated due to the resignation of the employee resulting in the entitlement of the employee to severance pay. Under the Labor Law, the transfer of the workplace is not considered as a reason for termination with cause and the only possibility the employees have if they do not want to work with the transferee is to resign by complying with the notice period. Therefore, under the Labor Law, the terminating employees would not be entitled to severance pay.

In the light of the foregoing, Article 178 of Commercial Code is explicitly in favour of employees since it provides the employees with the right to object to the transfer of their employment relationship to the transferee employer in case of merger, split or transformation of commercial companies that constitute a workplace transfer. Nevertheless, the consent of the employee does not constitute a pre-condition of the transfer of the workplace within the Labor Law, the TCO or within the Commercial Code.

Since pursuant to the doctrinal writings the employees who object to the merger transaction may be entitled to contractual and legal receivables arisen from the Labor Law, the doctrinal writings recommend to have the prior consent of the employees regarding the merger transaction. Importantly, unless otherwise decided or unless it is evident from circumstances, the employer cannot transfer the rights arising from the employment agreements to a third party.

Furthermore, similar to the regulation of the Labor Law and TCO, the former employer and the transferee employers are severally liable (i) for the employees' receivables due

before the legal transaction and (ii) for the employee's receivables which are due within the period that will pass until the date the employment agreements is expired under ordinary circumstances or the date it is terminated due to the employee's objection.

On a separate note, as per the relevant article, transferred employees may request additional guaranty for their receivables due on transfer date and the shareholders of the transferor entity, who were liable for company debts before the operation, continue to be severally liable for debts that arise from employment agreement and that (i) are due until the day of transfer; and (ii) would become due if employment agreements were terminated under ordinary circumstances; or (iii) arise until employment agreement is terminated due to employee's objection.

Law of Obligations

Questioning the Implementation of the Turkish Code of Obligations In Light Of the Current Court Decisions on Landlord/Tenant Rights

There have been numerous discussions and questions on the innovations introduced by the new Turkish Code of Obligations ("Code"), which took effect on July 1, 2012, and replaced a code dating to 1926 ("Abolished Code"). Although a year and a half has passed since the entry into force of the new Code, it remains a considerable challenge to determine which provisions are applicable in specific circumstances. As such, court decisions subsequent to the Code's enforcement date have gained importance from a practitioner's viewpoint.

Under Article 1 of the Law on the Enforcement and Execution Procedure of the Turkish Code of Obligations ("Law on Enforcement"), the provisions of the Abolished Code still apply to any act or transaction (e.g. an agreement) executed before the enforcement date of the new Code, *i.e.* July 1, 2012, except for matters with regard to (i) default, (ii) termination and (iii) liquidation arising out of such transactions. For matters pertaining to default, termination or liquidation, the provisions of the new Code shall be effective. Accordingly, in the area of landlord/tenant law, articles such as 304/I (a lessee's right to terminate an agreement due to defect in property on time of delivery), 305/II and 306/II (a lessee's right of termination due to ensuing defects), 325 (return of the leased property before the expiration date), 316II-III (a lessor's right to terminate the agreement due to the lessee's breach of obligation regarding careful usage and respectful behaving towards neighbors), 322 (sublease and assignment), 324 (disuse of the property), 327-336 (termination of the general lease) and 347-356 (termination of the leases of residential and roofed workplaces) of the new Code will be applicable to transactions that took place before July 1, 2012, according to the doctrine.

As seen in various recent decisions of the Court of Appeals ("Court"), for conflicts regarding default of a lease agreement executed before the enforcement date of the Code, Article 315 of the Code on the default of the lessee prevails instead of Article 260 of the Abolished Code on the same matter.

Although there were no striking changes made in the provision, Article 315 of the Code, unlike its predecessor, mandates that the lessor must provide written notice before terminating the agreement in case the lessee goes into default. Accordingly, the Court underlined in its decision numbered 2013/691 and dated March 5, 2013 that, although the relevant lease agreement was executed prior to July 1, 2012, the Code must be applied to matters relating to default and maturity as per Article 1 and Article 2 of the Law on Enforcement.

Therefore, the Court canceled the court of first instance's decision which did not rely on the provision regarding a written notice.

A controversial issue relating to the enforcement of the Code is Article 347, regarding the termination of a lease agreement. The Article provides the lessor with the right to terminate a lease agreement with a definite term at the end of each year by serving a written notice three months prior to the expiration date without cause only if such agreement was already renewed for ten years. In other words, after the tenth renewal year, the lessor can terminate the agreement without cause at the end of each year provided that the lessor complies with the three-month notice period. Having said that, Provisional Article 2 of the Law on Enforcement limits the implementation of this provision by regulating that for agreements which were executed before the enforcement date of the Code, (i) if the ten-year period has not yet expired and the remaining period is less than five years, the implementation of the last sentence of Article 1 of the Law on Enforcement and Execution (regarding the application of the Code for matters pertaining to default, termination or liquidation) shall be postponed until July 1, 2017 and (ii) if the ten-year period has expired, the implementation of the last sentence of Article 1 of the Law on Enforcement and Execution shall be postponed until July 1, 2014. Implementation of Article 347, along with many other clauses in the Code regarding leases, still remains obscure since decisions of the Court remain silent on the issue.

Another executional aspect of the Code has been governed by the Law No. 6217, on the Amendment of Certain Laws for the Acceleration of Judiciary Services. The Provisional Article 2 of this law states that Articles 323 (the assignment of lease), 325 (return of the leased property), 331 (termination due to extraordinary circumstances), 340 (correlative agreements), 342 (guarantee of the lessee), 343 (rental fee), 344 (determination of the rental fee), 346 (prohibition to agree against the benefit of the lessee) and 354 (limitation on the eviction reasons) of the Code shall be postponed until July 1, 2020 in case of workplace leases in which one of the parties of the lease agreement is a merchant within scope of the Turkish Commercial Code or is a legal entity under private or public law. Up until July 1, 2020, the provisions of the relevant agreement on these matters will apply as agreed by the parties. In case the agreement is silent on these points the conflict is resolved in line with the Abolished Code. One of the most crucial amendments is made on the enforcement dates of Article 346 of the Code, which strictly prohibits the imposition on the lessee of any payment obligation other than rental fee and side costs. The same provision also states that agreements that impose a penalty or maturity of the prospective rental payments in case of a failure to pay the rent on time are void. Even though the provision grants protection to lessees against lessors, merchants or legal entities will be deprived of such protection until July 1, 2020. To that end, the Court shed light on Provisional Article 2 in its decision numbered 2013/663 and dated March 6, 2013, declaring that, should the parties add a penalty or a maturity clause in the lease agreement, it is crucial to determine, first of all, whether the lessee is in the nature of a merchant or a legal entity. If the answer is yes, as seen in relevant case, Article 346 will not be applicable and thus, the lessee shall be responsible for the penalty or maturity, as governed under the agreement.

In a nutshell, considering the comprehensive revisions made under the Code, as well as lack of relevant jurisdiction, adaptation to the new provisions of the Code will remain an ongoing process for a long time ahead.

The Draft Law on the Protection of the Consumer

The Draft Law on the Protection of the Consumer ("Draft Law"), expected to be ratified by the Grand National Assembly of Turkey in early 2014, will abrogate the current Law No. 4077 on the Protection of the Consumer ("Law No. 4077") and considerably expand the scope of consumer protection laws. The Grand National Assembly of Turkey ("GNA") accepted the Draft Law on November 7, 2013. The Draft Law will be published in the Official Gazette or re-sent to the GNA by the President of the Republic within fifteen days following the receipt of the Draft Law by the President. The Draft Law will be effective 6 months after the publication date. Instead of making excessive amendments in the Law No. 4077, the legislators preferred to draft an entirely new law based on new legal perspectives and the developments in the consumer market. Although the Law No. 4077 itself is relatively recent (ratified in 1995 and amended in 2003), it failed to satisfy the practical needs of the consumers and the markets and it was not adequately parallel with the European standards. The legislature now aims to; (i) harmonize consumer rights with those regulated by several European directives and European Union advices, (ii) integrate the consumer law with the new Turkish Code of Obligations ("TCO") and the new Turkish Commercial Code, and (iii) to fill the legal gaps in areas that lacked detailed regulation with the Draft Law. Although the Draft Law is more comprehensive than the Law No. 4077, it only outlines the most basic and important issues and leaves technical details to be stipulated by regulations to be issued by the Ministry of Customs and Trade ("Ministry"). Several matters including, among others, distant sales contracts, consumer loans and package tour contracts are yet to be regulated by the Ministry.

The Draft Law now expands its scope of application to all types of consumer transactions and practices where a contract may or may not be present, to the benefit of the consumers. It also explicitly states that, among others, independent contractor agreements, contracts of carriage, brokerage, insurance, mandate and banking services are consumer contracts.

Some of the most substantial amendments brought with the Draft Law are as follows:

• **Defective goods and services:** The Draft Law redefined the term "defective good" in accordance with the European Union Directive. The new definition includes delays in delivery and incorrect installation of the good. Similarly, the Draft Law stipulates that delayed start in providing services constitutes a defect. Unlike the Law No. 4077, the consumer does not have a time limitation to notify the defect to the seller or the provider. Moreover, defects that appear within six months after the delivery of the good to the consumer are considered existing at the time of delivery and that the seller has the burden to prove that the good was not defected when delivered.

The consumer has four optional rights if a good is defective, as in the Law No. 4077. However, the consumer's right to demand a free of charge repair of the good or the service and the re-provision of the service is only available as long as it will not bring exorbitant costs for the seller or the provider. Similarly, the consumer can only ask the good to be changed with a non-defective equivalent if it is possible. As to defective services, the consumer will have a new option: free of charge repair of the work resulted from the provision of the defective service.

The Draft Law also clarifies an issue widely discussed under the Law No. 4077 and now stipulates that the seller is also liable for defects found in second-hand goods and second-hand real estates used as residence or for vacation, for a maximum period of one year and three years respectively.

• **Unfair Terms:** In line with the TCO, unfair terms that are incorporated in a consumer contract without negotiation and that favor the seller or the provider will be invalid under the Draft Law. Contract terms that are not clear or that might have more than one meaning will be interpreted in favor of the consumer.

• **Time Limitation for the Right of Withdrawal:** The Draft Law expands the time limitation for exercising the right of withdrawal up to 14 days, save for installment sales contracts where the consumer can exercise its right within 7 days only.

• **After-sales services:** The Draft Law requires the manufacturers or importers to obtain a certificate of competency from the Ministry for the goods listed in the regulation to be issued by the Ministry. In the event the importer ceases its commercial activity after the sale, the seller, the manufacturer and the new importer will be jointly and severally liable for the provision of after-sales services for the term of guarantee.

• **Consumer Loan Contracts:** In light of the European Union Directive 2008/48/EC, the definition of "consumer loans" has changed so as to include all loan contracts which provide postponement of payment, loans or other means of financing in return of interest or similar benefits. This provision includes credit card agreements so long as the payment is postponed for a minimum period of three months or the creditor offers a similar option of paying in installments. Along with this new definition, the legislator requires the creditor to provide the consumer with the information form prior to the contract. The consumer may exercise its right of withdrawal within 14 days and repay the creditor within 30 days following the notification of withdrawal. The Draft Law allows the creditor to change the interest rate in consumer loan contracts for an indefinite term, provided that the creditor notifies the change to the consumer 30 days prior to the day the change will take effect, in writing. Moreover, early payment by the consumer will not generate any compensation towards the creditor.

• **Arbitration Committee for Consumer Problems:** Disputes up to the monetary limit of TL 2,000.00 will be brought before the district arbitration committee and those up to TL 3,000.00 before provincial arbitration committee. In metropoles disputes between TL 2,000.00 and TL 3,000.00 will be resolved by provincial arbitration committees. Application to the arbitration committees does not preclude the consumer from also applying for alternative dispute resolution mechanisms. However, decisions of district and provincial arbitration committees are binding upon the parties. The parties can object to the decisions of the committees before the consumer courts.

• **Punitive provisions:** The Draft law has developed and expanded the scope of the penalties. Compared to the Law No. 4077, the provisions are more detailed and extensive Also, the judicial and administrative fines are increased. Parties may file a lawsuit against the penalties within 30 days following the receipt of the decision, unlike the Law No. 4077 where the term is only 15 days.

In addition to the substantial amendments, the Draft Law introduces new tools and approaches as listed below:.

• **General Principles:** The Draft Law defines the general principles applicable to the entirety of the contracts stipulated therein, where relevant. The general principles are as follows: (i) all contracts required to be in written form will use 12-font size and be clear, simple, readable and comprehensible; (ii) contract provisions may not be changed to the detriment of the consumer during the term of the contract; (iii) the consumer will not be charged any extra fees not stipulated as part of the contract, (iv) all charges and costs due to consumer will be given to the consumer in writing annexed to the contract; (v) all deeds will be in the name of the holder and a separate deed will be issued for each installment; (vi) personal guarantees covering the obligations of the consumer will be considered as ordinary guarantee and those covering the obligations of the other party as joint guarantees unless specified otherwise in other legislations; (vii) compound interest shall not apply to consumer transactions including cases of consumer default; and (viii) the Draft Law shall apply to participation banks taking into consideration profit shares.

• **Goods and Services Not Ordered by the Consumer:** Pursuant to the Draft Law, the consumer shall not be under the obligation to send back the goods or services that he/she did not order, or keep the same in a good condition. Moreover, the silence of the consumer does not automatically implicate the acceptance of the goods or services.

• **Responsibility from Defective Goods or Services:** The Draft Law states that the seller will not be bound by the statements contained in the advertisement of the good or services provided that he proves that (i) he is not aware of the statements, or (ii) he cannot be expected to be aware of the statements, or (iii) the content of the statement has changed at the time of the execution of the contract or (iv) there is no lien of causality between the decision to make the contract and the statement.

• **Scope of Application of the Right of Withdrawal:** While the Law No. 4077 applies only to doorstep and distant sales, the Draft Law expands its field of application and provides wider consumer protection. With the entry into effect of the Draft Law, the right of withdrawal will also apply to (i) installment sales contracts, (ii) consumer loan contracts, (iii) prepaid real estate sales contracts in addition to the existing types of contracts.

• **Prepaid Real Estate Sales Contracts:** Pursuant to the Draft Law, the prepaid sales must be registered at the land registry and the contract must be prepared by the notary public. The real estate must be delivered within 36 months following the date of the contract. The consumer may cancel the contract retroactively until the delivery of the real estate and the seller may only claim the compensation of up to 2% of the contract price.

• **Unfair Commercial Practices:** The Draft Law prohibits unfair commercial practices along with unfair advertisement. Unfair commercial practices may consist of, among others, giving misleading information to the consumer about the goods or service. The seller or the provider accused of exercising such practice has the burden to prove that the practice is not unfair.

• **Informing the Consumer:** The sellers' or the providers' obligation to inform the consumer is more clearly explained in the Draft Law for consumer loan, housing finance and prepaid real estate sales contracts. The sellers or the providers must indicate in writing all fees and costs that they will charge to the consumer. Since the Draft Law requires all written contracts and information to have a minimum font size of 12, the consumer will not be aggrieved by unexpected cost and expenses that the seller or the provider omitted to mention or indicated in an unreadable manner.

• **Pyramid Schemes:** The Draft Law prohibits pyramid schemes where the participants are expected to invest money and to bring more participants for the prospects of earning more money.

Data Privacy Law

Recent Amendments on the Regulation on Security for Electronic Communications

A new regulation amending the Regulation on Security in the Electronic Communications Sector ("Regulation") has been open to public opinion since September 9, 2013 and it will be pending in that status until October 9, 2013. The recent amending regulation brings some significant changes to the relevant electronic communications regulation which was published in the Official Gazette of July 20, 2008.

The Regulation introduces certain brand new definitions, concepts and governmental bodies to the Regulation on Security in the Electronic Communications Sector which are also new for the Turkish law system such as certificate authority, information security management system ("ISMS"), information security management system standard, information system, information integrity, accessibility, critical infrastructure, critical information, risk evaluation, risk processing, risk based analysis and Cyber Security Board.

As a governmental step for maintaining cyber security in Turkey, a cabinet decision regarding conducting, managing and coordinating national cyber security activities came into force on October 20, 2012. Moreover, on June 20, 2013, another decision on the national cyber security strategy and an action plan for the years 2013-2014 came into force. Under the decision of October 20, 2012, a Cyber Security Board was established in Turkey. The Cyber Security Board of Turkey is entitled to determine the governmental precautions regarding cyber security, to approve national cyber security strategies and procedures and principles and to maintain the national cyber security and coordination. One of the foundational regulations for the amending Regulation is the cabinet decision of October 20, 2012 regarding conducting, managing and coordinating national cyber security activities.

The obligations of operators are extended by the amending Regulation. All the operators commencing their activities in Turkey are obliged to fulfill the obligations listed under Section 2 of the amending Regulation. Moreover, the Regulation introduces additional obligations on the operators which are explicitly stipulated under Article 5 (2) of the Regulation (*i.e.* operators providing infrastructure operation services, operators which are operating under concession agreements, mobile phone service operators, mobile phone operators providing services for air vehicles, Internet service providers, mutually used radio service operators, fixed phone service operators, virtual mobile network service operators, satellite communication service operators, satellite and cable TV service operators) and whose annual sales are above TL 15,000,000.

All operators are obliged to establish an ISMS, containing all of its services, infrastructures and networks. The management body of the operator is obliged to publish an ISMS policy stipulating the understanding of the relevant operator of the concept of information security under Article 7 of the amending Regulation. Operators must monitor and keep their system record files for two years, including but not limited to files such as user identities, login and logout history of the users, system changes, and special authorizations of certain users.

Non-disclosure agreements will also be mandatory once the amending Regulation becomes effective. The amending Regulation stipulates the minimum requirements for the non-disclosure agreements which will be signed between the operators and its employees as well as between operators and third parties.

As we have stated above, certain operators which are explicitly stipulated under Article 5 of the amending Regulation have some additional obligations that are designated under Section 3 of the amending Regulation. Under Article 36, an operator must obtain a certificate of conformity from the certification authorities. The operator which is obliged for certification for the first time must obtain a certificate of conformity within one year following the end of the year when the obligation status of the relevant operator has changed. Operators are obliged to inform the Information and Communication Technologies Authority ("ICTA") within two months, in case there is an amendment to the certificate of conformity or in case of the certificate of conformity is renewed.

Operators are also obliged to prepare an electronic communications security report each year, at the end of March, and to send such report to ICTA through electronic means. The hardcopy of the electronic communications security report must be kept for five years by the operator. The content of the electronic communications security report is designated under Article 37 of the amending Regulation. Under Article 38 of the amending Regulation, the operator is obliged to inform ICTA in case there is a full-scale breach against electronic communications security.

White Collar Irregularities

Monitoring the Implementation of the OECD Anti-Bribery Convention in Turkey and the Up-Coming Phase 3 Report

Targeting the supply side of corruption in international business dealings, the OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions ("Convention") was signed in December 1997 and entered into force in February 1999. So far, 34 OECD member states and six non-member states have adopted the Convention. Turkey, as an OECD member state, signed the OECD Convention in December 1997 and ratified it in July 2000. Mainly, the Convention requires signatories to criminalize the bribery of foreign public officials under their local legislations and to take measures to establish the liability of legal persons for the same offence. Article 12 of the Convention entitled "Monitoring and Follow Up" foresees a system of reviewing the implementation of the Convention in each signatory state through the OECD Working Group on Bribery in International Business Transactions ("Working Group"), which will objectively assess the implementation degree of the specific country through a report, and subsequently make recommendations on how to best improve implementation.

In 1998, the Working Group adopted principles (with amendments in 2009) to be employed during the assessment procedure. Accordingly, monitoring should be realized in an effective manner so as to render the assessment coherent and systematic, each participant should be assessed in an equal manner, coordination with other departments of the OECD should be realized where it requires their specific

expertise, and the Working Group will balance the request of confidentiality from states undergoing evaluation and the need for public disclosure. Furthermore, the principles articulate that Phase 3 evaluations should be realistic and not overly burdensome.

The Working Group realizes the monitoring of signatories of the Convention in two phases. Phase 1 of the monitoring process assesses the adequacy of the local legislation adopted within the scope of the Convention with the standards of the Convention. During this phase, which includes both the involvement of the monitored state along with other signatory states, initially a questionnaire is sent to the monitored state. The monitored stated is required to fill the questionnaire with sufficient detail so that the Working Group can grasp a complete picture of the legal climate in the relevant country. Once the monitored state completes the questionnaire, the Working Group analyses the relevant data and provides recommendations to the monitored state. Subsequently, Phase 2 evaluations focus more on the enforcement mechanisms put in place with regard to the legislation adopted within scope of the legislation adopted within scope of the Convention. This being said, process-wise the only difference between Phase 2 and Phase 1 is the on-site visits paid to the monitored state subsequent to that state's completion of the questionnaire. In these visits, members of the Working Group get the chance to contact judiciary and law enforcement authorities of the monitored state and obtain their view on the implementation of the Convention.

In December 2009, the Working Group put into force a permanent cycle of monitoring, instead of the 2 cycles which were originally planned, in order to increase the effectiveness of the fight against corruption by way of the Convention. The first cycle of monitoring will be realized between 2009-2014 and it is called Phase 3. Phase 3 will determine the progress the state has made since the Phase 2 report was issued and will analyze the changes in local legislation as well as enforcement efforts. It is important to note that while civil society does not formally take part in the evaluation phases, their views with regard to the private sector will be taken into account.

The Working Group adopted Turkey's Phase 1 report in 2004, which was generally favorable with some space for improvement defined. Accordingly, the Working Group considered it a positive step that Turkey had criminalized bribery of foreign public officials in January 2003. This being said, the Working Group deemed that the definition of the offence was complicated and recommended its simplification. Another positive step with regard to the implementation of the Convention was on the introduction of criminal liability of legal persons. The report also pointed out that the granting of full immunity to the perpetrators of the offence, if they disclose that they have committed bribery before the authorities became aware of the situation, could lead to a loophole in the enforcement of the anti-bribery provisions. In addition, Turkey had criminalized the "giving" of bribes but not "offering or promising" to give bribes. The Working Group had urged Turkey to also criminalize "offering or promising" to give bribes. The Working Group thought that Turkey had not met the standards of the Convention when it came to the definition of "public official" on the grounds that Turkey's definition was too narrow. Finally, on the matter of sanctions, the Working Group determined that Turkey should amend its statute to impose deprivation of liberty sentences for simple bribery.

Subsequently, the Phase 2 report on Turkey was adopted on December 2007. Although

the Working Group hailed Turkey's cooperative efforts during Phase 2, the report has a negative mood, generally due to the repealing of the article that introduced criminal liability for legal persons and a lack of enforcement actions. In addition to these, the Work Group cited the lack of state efforts to ensure the participation of the private sector and civil society organizations during the evaluations, the lack of public awareness activities and a lack of priority in addressing bribery of foreign public officials. As such, the Working Group scheduled a Phase 2bis examination for Turkey which was adopted on June 2009. The Phase 2bis report was generally positive and noted that investigations which were closed during the Phase 2 report were re-launched by the time Phase 2bis was being drafted. In addition, Phase 2bis witnessed the highest level of participation by the private sector. However, the negative parts of the report reiterated concern over the lack of criminal liability of legal persons. In fact, the Working Group explicitly stipulated that Turkey was not complying with Article 2 of the Convention on criminal liability of legal persons. Another point of criticism was on the lack of authority to open a criminal investigation of institutions which are tasked with the investigation of corrupt practices.

In March 2010, the Working Group adopted a Follow-Up Report on the Implementation of the Phase 2 and Phase 2bis Recommendations. The report generally appreciated the progress realized by Turkey, such as the awareness-raising activities with regard to bribery of foreign public officials, an increase of enforcement actions and the implementation of criminal liability for legal persons with the amendments made to the Code of Misdemeanors No. 5326. The Working Group stated that Phase 3 examinations on Turkey expected the continuation of the strong efforts taken to implement the Convention.

However, in its progress report in 2011, the global non-governmental organization Transparency International categorized Turkey as a state which had "little or no enforcement" of the Convention. The report cited that Turkey had undergone five investigations, including of companies like 3M, Mercedes Benz Turk and Siemens Sanayi ve Ticaret A.S., but had initiated no cases with regard to the bribery of foreign public officials. Transparency International further stipulated that the lack of criminal liability for legal persons is among the factors preventing the effective implementation of the Convention in Turkey. Transparency International recommended that Turkey clearly define the concepts of gifts and bribery as well as delineating the difference between them.

Although there is no clear indication when the Phase 3 report on Turkey will be published, it is probable that the report will be published at the end of 2013, since the Working Group has targeted to finish Phase 3 reports of all signatories to the Convention by 2014. It is evident that the amendments to Article 252 of the Turkish Criminal Code No. 5237, which is the main article regulating bribery under Turkish law, will be deemed as positive steps towards Turkey's implementation of the Convention, including the amendment's criminalization of private-to-private bribery. This being said, it is expected that the main point of criticism emphasized by the Phase 3 report will again rest on Turkey's lack of enforcement actions with regard to the bribery of foreign public officials.

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