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LEGAL INSIGHTS QUARTERLY

March 2013 - May 2013

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Preface to the March 2013 Issue

The Turkish legal landscape has witnessed a significant number of legislative developments with the close of 2012 and the beginning of 2013, at both the national as well as the international level. Secondary legislation on commercial books and independent audit call for closer scrutiny of the provisions in the new Turkish Commercial Code in these areas, while the draft legal instruments in the banking law and competition law fields echo the growing inclination of the legislature and the enforcement authorities to mirror their European counterparts, which prove to be useful and influential guideposts.

At the practice-front, the Turkish Competition Authority's announcement on the total number of investigations (which is 189) it conducted in a plethora of sectors since its establishment in 1997 provides a palpable insight into the fast-paced development and growing experience of the Turkish Competition Authority in an emerging market, while a recent European Court of Human Rights decision finds an access ban imposed by a Turkish local court to be in violation of free speech.

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.

March 2013

Corporate Law

Two New Secondary Legislation on Commercial Books and Independent Audit Have Been Adopted

Two of the long-awaited secondary legislation on the New Turkish Commercial Code (the "New TCC") entered into force on July 1, 2012: (1) the Communiqué on Commercial Books and (2) the Decree Determining the Companies Falling under the Independent Audit Requirement.

1. The Communiqué on Commercial Books

The Communiqué on Commercial Books (the "Communiqué") entered into force on the same day it was published on the Official Gazzette of December 19, 2012, numbered 28502. The Communiqué's legal basis stems from Article 64 of the New TCC, which empowers, under paragraph 3, the Ministry of Customs and Commerce and the Ministry of Treasury to determine how commercial books are to be kept, the registry dates to the books, the procedure and principals governing the certifications for the opening and closing of such books, as well as the renewal of certifications. Together with the New TCC, the Communiqué provides legal provisions on share ledgers, general assembly meeting and negotiation books, and minute books for the list of already existing commercial books. The Communiqué also regulates opening and closing of the foregoing.

As per Article 5 of the Communiqué, limited liability companies are not obliged to keep a minute book of the board of directors. The required books to be kept by limited liability companies are a journal book, a general ledger, and an inventory register, along with the share ledger and the general assembly meeting and negotiation book. Furthermore, as per Article 13 of the Communiqué, the minute book of the board of partners may continue to be used as the general assembly meeting and negotiation book, so long as it has sufficient number of available pages.

For limited liability companies, the decisions taken by the director or board of directors as regards the management of the company may be registered to the general assembly meeting and negotiation book; a separate board of directors' minute book may also be kept instead. If a separate board of directors' minute book is kept, the provisions regarding the minute book including the certification for opening and closing will apply to the board of directors' minute book, in which case the decisions of the director or the board of directors may not be registered in the general assembly meeting and negotiation book.

Pursuant to the New TCC and the Communiqué, share ledgers, minute books and the other commercial books, along with the general assembly meeting and negotiation book, should all be certified for opening during the establishment of the company or before these books are to be used. However, a certification for closing is not sought for these books.

As per the New TCC, the certifications for opening of the commercial books are made by a notary public until the end of the month before the first month of the operating year it will be used for. Therefore, the opening of the general assembly meeting and negotiation book or the board of partners' minute

book (which will be used until it is completely filled in accordance with Article 13 of the Communiqué) should be certified.

Pursuant to the Communiqué, the certification for opening of the journal book, general ledger, inventory register and minute book shall be made for each fiscal period. Share ledger and general assembly meeting and negotiation book may continue to be used in the ensuing fiscal periods so long as they have empty pages. In case new books subject to certification are started to be used because the old ones have been fully filled or for other reasons, these new books shall need to be certified before being used. An administrative fine of TRY 4,000 is imposed for those who do not comply with the certification requirements provided by Article 64 of the New TCC.

2. The Decree on the Determination of Companies that will be Subject to Independent Audit

The Council of Ministers Decree No. 2012/4213 on the Determination of Companies that will be Subject to Independent Audit (the "Decree") entered into force on the same day it was published on the Official Gazzette of January 23, 2013, numbered 28537. The Decree's legal basis stems from Article 397 of the New TCC.

According to the Decree, a company, either alone or together with its subsidiaries and affiliates, that fulfill at least two of the following three criteria is subject to independent audit:

a) Total assets amounting to or higher than (150.000.000 TL)

b) Annual net sale revenues amounting to or higher than (200.000.000 TL)

c) Employees amounting to or higher than 500.

Furthermore, the Decree provides two Annexes, each providing a separate list. These lists specify which types of companies are subject to audit. The first Annex simply enumerates six specific industry categories of companies falling automatically under the scope of the Decree without seeking any further criteria, such as those mentioned above (e.g. companies subject to the regulation and supervision of the Capital Markets Board of Turkey, the Banking Regulation and Supervision Agency, the Insurance and Individual Pension legislation, etc.). The second Annex lists seven categories of companies (e.g. companies publishing nationwide daily newspapers, companies subject to the regulations of the Energy Market Regulatory Authority, etc.), and sets forth the above mentioned three criteria in relation to total assets, annual net sale revenues, and number of employees, in varying values for each of the seven categories. A company that fulfills the respective criteria would be subject to independent audit.

The Decree stipulates that companies whose capital is at least 50% owned by the Government, special provincial administrations, trusts established by statute and other public institutions and establishments are excluded from being subject to independent audit. The exception to this is those companies listed in the first Annex of the Decree and those companies that fulfill at least two of the

three criteria set forth in the seventh row of the second Annex of the Decree.

Competition Law/Antitrust Law

Turkish Competition Authority to Release Draft Guidelines on Horizontal and Non-Horizontal Mergers and Acquisitions for Public Consultation

Tthe Turkish Competition Authority has announced two draft guidelines for public consultation: Draft Guidelines on Horizontal Mergers and Acquisitions ("Draft Horizontal Guidelines") and Draft Guidelines on Non-horizontal Mergers and Acquisitions ("Draft Non-horizontal Guidelines") (collectively "Draft Guidelines"). To date, the Turkish Competition Authority has already promulgated secondary legislation providing guidelines on remedies that are acceptable by the Turkish Competition Authority in merger and acquisition transactions, as well as guidelines on undertakings concerned, turnover and ancillary restraints in mergers and acquisitions. With the addition of the Draft Horizontal Guidelines and the Draft Non-horizontal Guidelines, the Turkish Competition Authority explicitly set forth its perspective on reviewing merger and acquisition transactions. The Draft Guidelines are in line with EU competition law regulations and seek to retain the harmony between EU and Turkish competition law instruments.

The approach of the Turkish Competition Board to market shares and concentration levels would be similar to that taken by the European Commission and be in line with the approach spelled out in the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004/C 31/03). The first factor discussed under the Draft Horizontal Guidelines is that the market shares above 50% can be utilized as evidence of dominant position while the market share of the combined entity remaining below 25% would not require further inquiry into the likelihood of harmful effects emanating from the combined entity. Although a brief mention on the Turkish Competition Board's approach to market shares and Herfindahl-Hirschman Index ("HHI") levels is provided, the Draft Horizontal Guidelines' emphasis on an effects based analysis (coordinated/non-coordinated effects) without further discussing the criteria to be used in evaluating the presence of dominant position indicates that the dominant position analysis still remains subject to Article 7 of Law No. 4054 on the Protection of Competition. Other than the market share and concentration level discussion, the Draft Horizontal Guidelines cover the following main topics: the anticompetitive effects that a merger would have in the relevant markets, the buyer power as a countervailing factor to anticompetitive effects resulting from the merger, the role of entry in maintaining effective competition in the relevant markets, efficiencies as a factor counteracting the harmful effects on competition which might otherwise result from the merger, and conditions of failing company defense. The Draft Horizontal Guidelines also discuss coordinated effects in the market that might arise from a merger of competitors via

increasing the concentration in the market and may even lead to collective dominance. In its discussion of efficiencies, it indicates that efficiencies should be verifiable; they should provide benefit to customers. As evident from the discussions under the relevant topics, the Draft Horizontal Guidelines mirror the Guideline available under EU competition law. The Draft Horizontal Guidelines cover most of the issues concerning mergers in general, which are expected to be addressed in merger notifications, and clarifies its perspective within the meaning of the review process.

As provided under the Guidelines on the Assessment of Non-horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2008/C 265/07), it is provided in the Draft Non-horizontal Guidelines that the Turkish Competition Board is unlikely to find concern in non-horizontal mergers where the post-merger market share of the new entity in each of the markets concerned is below 30% and the post-merger HHI is below 2,000 (except where special circumstances are present). Other than the Turkish Competition Board's approach to market shares and concentration levels, the other two factors covered in the Draft Non-horizontal Guidelines include the effects arising from vertical mergers and the effects of conglomerate mergers. The Draft Non-horizontal Guidelines also lay out various consequences, such as customer restraints, general restrictive effects on competition in the market, and restriction of access to the downstream market.

Turkish Merger Control Thresholds Undergo Revision

Ever since the Turkish Competition Authority replaced Communiqué No. 1997/1 on the Mergers and Acquisitions Subject to the Approval of the Competition Board ("Communique No. 1997/1") with Communique No. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board ("Communique No. 2010/4"), there have been debates in the Turkish competition law circles as to whether the revised jurisdictional thresholds could decrease the workload of the Turkish Competition Authority in relation to merger control cases.

When the figures concerning total number of merger control cases reviewed by the Turkish Competition Authority in 2011, which was the first year during which Communique No. 2010/4 was in force, were revealed, it was clear that the 5 million TL (approximately € 2.2 million and US$ 2.8 million[1]) threshold was too low.

Amendments to the jurisdictional thresholds came immediately. On December 29, 2012, Communique No. 2012/3 on the Amendment of Communique no. 2010/4 on the Mergers and Acquisitions Subject to the Approval of the Competition Board ("Communique No. 2012/3") was published in the Official Gazette, amending the turnover thresholds that a given merger or acquisition must exceed before becoming subject to notification for the purposes of the Turkish merger control regime. As a result of the enactment of Communique No. 2012/3,

[1] Based on the average exchange rate for 2012, as determined by the Turkish Central Bank

Article 7 of Communique No. 2010/4 has been amended in the following manner:

Article 7

1) In a merger or acquisition as defined by Article 5 of this Communique; it is required to obtain the approval of the Competition Board in order for the relevant transaction to have legal validity where;

a) The aggregate Turkish turnovers of the transaction parties exceeds TL 100 million (approximately € 44 million and US$ 56 million) and the Turkish turnovers of at least two of the transaction parties each exceeds TL 30 million (approximately € 13 million and US$ 17 million), or

b) The Turkish turnover of the assets or businesses subject to the acquisition in the case of acquisition transactions, or the Turkish turnover of at least one of the parties in the case of merger transactions, exceeds TL 30 million (approximately € 13 million and US$ 17 million), and the worldwide turnover of at least one of the other transaction parties exceeds TL 500 million (approximately € 217 million and US$ 279 million).

As can be seen from the foregoing provision, the new regulation on merger control thresholds, after the amendments, no longer seeks the existence of an "*affected market*" in assessing whether a transaction triggers a notification requirement. The parties of a transaction no longer need to check whether the transaction results in an affected market. This amendment is designed to have an impact solely on notifiability analyses. The concept of affected market still carries weight in terms of the substantive competitive assessment and the notification form. Unless and until amended, the provisions of the guidelines regarding the concept of an affected market and the conditions under which a transaction would result in an affected market within the meaning of Turkish competition laws also remain valid and effective.

The first prong of the alternative turnover thresholds remains unchanged. Therefore, a transaction would trigger a notification requirement in cases where "*total turnovers of the transaction parties in Turkey exceed 100 million TL (approximately € 44 million and US$ 56 million), and turnovers of at least two of the transaction parties in Turkey each exceed 30 million TL (approximately € 13 million and US$ 17 million)*."

The second prong of the alternative turnover thresholds has been revised as follows:

- The Turkish turnover threshold has been raised from 5 million TL (approximately € 1.94 million and US$ 2.8 million US$ as of December 31, 2012) to 30 million TL (approximately € 13 million and US$ 17 million).

- The Turkish turnover threshold of 30 million TL (approximately € 13 million and US$ 17 million) will now be sought for *"the transferred assets or businesses in acquisitions, and at least one of the parties to the transaction in mergers"*. Prior to the amendment, the Turkish turnover threshold could be satisfied so long as "*one of the transaction parties*" had over 5 million TL (approximately € 1.94 million and US$ 2.8 million) Turkish turnover and the other transaction party had over 500 million TL

(approximately € 217 million and US$ 279 million) global turnover. After the amendments though, parties to an acquisition will need to seek the Turkish threshold for the target asset/business only. For mergers, the regime has not changed apart from the increase in the amount of the Turkish turnover threshold.

- The amount of the worldwide turnover threshold has remained the same, i.e. 500 million TL (approximately € 217 million and US$ 279 million).

ELIG, Attorneys-at-Law handles approximately 50 merger control filings per year, and it has by far the largest volume of merger control filings of any law firm in Turkey. This allows ELIG to monitor the impact of this revision in the second alternate threshold much better than any other single entity, apart from the Turkish Competition Authority itself. According to ELIG's internal study based on the merger control filings handled since the entry into force of Communique No. 2010/4 two years ago, more than half of the merger control filings would not have been notifiable under the recently revised alternate threshold. To that end, approximately 50% - 55 % potential decrease over the overall number of merger control filings in Turkey can be expected, which should in turn allow the Turkish Competition Authority to focus on those competition law matters which have a more visible nexus with the Turkish markets.

The Turkish Competition Authority Concludes 189 Investigations in 15 Years

The Turkish Competition Authority released a summary of the work it undertook within its 15 years of enforcement to the public. The end result shows a relatively heavy enforcement work in almost all major sectors.

As per the announcement, Turkish Competition Authority has completed and finalized 189 investigations in 15 years, as of the date of its establishment, through its decision making body, the Turkish Competition Board. The investigations were conducted with the purpose of ensuring and protecting competition in the markets.

The top four sectors in which investigation was conducted in the past 15 years have been the sectors for "Transportation", "Nutrition, Agriculture, Food and Beverage", "Construction Equipment", and "Medicine, Medical Services and Products".

Under the main group of "Transportation", in which the Turkish Competition Board conducted a total of 33 investigations, 21 investigations were completed in relation to the land transportation sector, 3 in the air transportation sector, and 9 in the maritime transportation sector.

Under the main group of "Nutrition, Agriculture, Food, Beverage", in which the Turkish Competition Board conducted a total of 26 investigations, 4 investigations were concluded in relation to the bread market, 3 in the yeast market and 19 in different markets including products for soft and alcoholic drinks, milk, fruit, meat, tea, crisps.

Under the main group of "Construction Equipment", in which the Turkish Competition Board conducted a total of 24 investigations, 15 investigations were concluded in the cement/ready mixed concrete market and 9 in markets including mainly plaster and gypsum, ceramics, sand, brick and lock market.

Under the main group of "Medicine, Medical Service and Products", in which the Turkish Competition Board conducted a total of 24 investigations, 8 investigations were concluded in the medicine sector (medicine producers, medicine distributors (retail sale/in the pharmacy level and tender)), 9 in the medical equipment sector (medical imaging devices, medical device maintenance market, diagnostic device market, laboratory instruments markets, medical consumables market) and 7 in different sectors, including medical gas and optics.

Apart from the foregoing sectors, other significant sectors that underwent scrutiny in the past 15 years are as follows: 12 investigations were concluded in the "printed and visual media" sector; 9 investigations were concluded in the "jewelry and moneylender associations" sector; 8 investigations were concluded in the "telecommunication" sector; 4 investigations were concluded each in the "driving courses" sector and in the "banking and insurance" sectors.

Out of the 189 finalized investigations, 146 of them were in relation to agreeements and concerted practices that restrict competition (i.e. Article 4 of Law No. 4054), while 38 of the investigations were conducted in relation to abuse of dominance (i.e. Article 6 of Law No. 4054), and 5 of them fell within the scope of both Articles 4 and 6 of Law No. 4054.

According to the Turkish Competition Authority's announcement, the average completion time for the 189 cases was 434 days (approximately 14.5 months)[2] and 3 case handlers were assigned for each work in average.

A total fine of 865,558,825 TL was imposed for the investigations in 15 years for the investigations that were conducted in different sectors, each of which related directly to the national economy. The maximum amount of monetary fine was imposed in the investigations conducted in the automotive industry, while the second and third biggest monetary fines were imposed in those in the telecommunications and cement/ready mixed concrete sectors, respectively. Additionally, 2011 was the year where the Turkish Competition Board imposed the maximum amount of monetary fine to date (a total of approximately 460 million TL monetary fine).

Furthermore, the Turkish Competition Authority decided for 50 of the cases out of the 189 investigations that there is no need to impose any monetary fine on grounds that either Law No.4054 was not infringed or there was no sufficient evidence to impose monetary fine.

The Leniency Regulation was used in only 4 of the investigation cases. As a result of these investigations, either a montery fine was not imposed upon the 4 undertakings

[2] This period was calculated by considering the average period between the starting date of the investigation and final decision date.

that applied for leniency, or that they received reduction on the monetary fines imposed.

As a consequence of the 189 investigations over the past 15 years, the total number of undertakings that were subject to monetary fine has been 802. 2 individuals were in addition subject to fines, as the Turkish Competition Board determined their role to have determinant effects on the respective violations.[3]

The total number of cases filed against the final investigation decisions of the Turkish Competition Board have been 986; 461 of them were cancelled due to procedural law reasons, and 7 due to substantive law reasons. Out of these 986 cases, the request to suspend the execution of the Turkish Competition Board's decision was accepted in 215 cases, whereas in 19 cases, the request was partially accepted and partially refused. In the remaining 522 cases, the request was denied.

Banking and Finance

Draft Law on Payment and Securities Settlement Systems, Payment Services and Electronic Money Organizations

The Draft Law on Payment and Securities Settlement Systems, Payment Services and Electronic Money Organizations ("Draft Law"), which is yet to be put on the agenda of and be ratified by the Grand National Assembly of Turkey, will regulate a commercial area which was not regulated before under Turkish Law. The Draft Law could be regarded as a framework legislation that consolidates the European Directives EEC 2007/64 and 2009/110[4] under one code.

The Draft Law defines payment and securities settlement systems, payment services, payment organizations and electronic money organizations and imposes certain obligations on these organizations.

The aim of the Draft Law is to introduce legal principles in connection with payment systems, payment services and payment organizations and electronic fund organizations. To that end, it is aimed to extend the usage area of payment systems, payment services and payment organizations, including those already operated by banks as well as electronic fund organizations in Turkey, which are part of the financial system in the world and also regulated by the EU. In addition to these, one of the main purposes of the Draft Law is to provide a legal frame in order to efficiently apply money policies.

The draft law defines payment system as systems with common rules, which have the necessary infrastructure for clearing or settlement transactions conducted to affect any transfers of funds or securities arising

[3] Article 16 of Law No.4054 was amended with Law No 5728 dated 23.1.2008 for imposing administrative fines for administrators and employees of the undertakings and association of undertakings. Therefore, the fines imposed for persons after 2008 were in relation to the substantive aspects of the case.

[4] (1) "*Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market*" stipulates general obligations including the process regarding obtainment of permits and the permitted activities in relation with the payment service providers. (2) "*Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions*" provides regulations which are only relevant to the electronic money issuing payment service providers.

from or in connection with the transfer orders among three or more participants. To that end, schemes with three or more participants and which involve transfer orders have the risk of being deemed as payment system under the Draft Law.

Electronic money, as defined in the Draft Law, is monetary values, which are electronically stored by the electronic money issuing organizations in exchange for the funds accepted by them, used in order to effect the payment transactions defined by the Draft Law and also accepted by natural persons and legal entities other than the electronic money issuing organizations as a payment instrument. To that end, electronic money is a digital equivalent of cash, stored on an electronic device or remotely at a server.

In case a company and its products or services are considered as "*payment services*" and/or "*electronic money*", the companies may face, including but not limited to, new obligations such as obtaining permits from the Central Bank for the aforementioned services, having a fixed minimum capital or equity capital, audits and sanctions (monetary fine and including imprisonment). Further obligations and details pertaining to the foregoing are expected to be governed under a secondary legislation, as stipulated under the Draft Law.

The Draft Law is expected to enter into force this year.

Cyberspace Law/Internet Law

Access Ban Decisions are a Violation of Freedom of Expression, decides the European Court of Human Rights

In its decision of *Ahmet Yıldırım v. Turkey (Case No. 3111/10)*, given on December 18, 2012, the European Court of Human Rights ("ECHR") concluded that Article 10 of the European Convention on Human Rights ("Convention"), which regulates freedom of expression, was violated because the access ban decision of the Denizli Criminal Court of Peace restricted the rights of the Internet users and have a collateral effect upon freedom of expression.

The Facts of the Case

The petitioner, Ahmet Yıldırım, is the owner and user of the website http://sites.google.com/a/ahmetyildirim.com.tr/academic/ where he publishes his academic works and points of view on different fields. This site was created using the "Google Sites" (http://sites.google.com/) service, a Google module for the creation and hosting of websites. On 23 June 2009, the Denizli Criminal Court of Peace gave a decision ordering, by virtue of Article 8 (1b) of Law No. 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committee through such Broadcasts ("Law No. 5651"), blocking of access to the site http://sites.google.com/site/kemalizminkarinagrisi/benimhikayem/atauerk-koessi/at (hereinafter referred to as the "litigious site"). It was a preventive measure adopted within the framework of a legal procedure filed against its owner, which was accused of an insult to the memory of Atatürk. A copy of the

access ban decision was notified to the Telecommunications Communications Presidency for execution.

On 24 June 2009, upon the response of the Telecommunications Communications Presidency, which states that the access ban decision shall be given for the entire website over its domain name or IP addresses, the Denizli Criminal Court of Peace amended its decision dated 23 June 2009 and decided to completely ban access to Google Sites by virtue of Article 8 of Law No 5651.

The petitioner, Ahmet Yıldırım, objected to the court's access ban decision, as a complete access ban on Google Sites prevented access to the contents of broadcasted on his own website, arguing specifically that a method should have been used such that only the litigious site would be made inaccessible due to the allegedly unlawful content it broadcasted (such as through a URL restriction).

Analyses of the ECHR's Finding of Violation of Article 10 of the Convention

When the matter was brought before the ECHR, it first looked at whether Article 8 (1) of Law No 5651 meets the accessibility and predictability requirements of Article 10 of the Convention, for which the petitioner argued as being negative, since the provision in Law No. 5651 is according too uncertain. According to the well-established jurisprudence of the Court, in order to meet these requirements, the national law must provide a certain protection against arbitrary violation by the public power of the rights guaranteed by the Convention. For issues related to fundamental rights, the law could be contrary to the supremacy of the right, which constitutes one of the fundamental principles of a democratic society confirmed by the Convention, if the power of appreciation granted to the executive had no limit. Consequently, it must define the extent and the modalities of exercising such power with sufficient clarity.

The ECHR observes that, with the access ban decision, Google Sites is held responsible for the content of a site being broadcasted by a third party content provider, but it is not indicated in Articles 4, 5 and 6 of the Law No 5651, which clearly specify the responsibilities of the content, hosting and access providers, that a hosting provider may be held responsible in this way. The ECHR also observed that nothing shows that the judges to whom the objection submitted at the local court tried to evaluate the various interests by considering especially the necessity of a total ban of access to Google Sites. The ECHR finally concluded that the national law (i.e. Law No. 5651) does not provide any guarantee to avoid an access ban decision for a specific website to be used as a means as a general access ban, thereby violating Article 10 of the Convention.

Pursuant to Articles 43 and 44 of the Convention, the ECHR decision is not final as of the date when this issue of the legal insight was published. Parties may request that the case be referred to the Grand Chamber of the Court within three-months as of the date when the Court decided the case (i.e. until March 18, 2013). As soon as a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution.

Electronic Notifications in Turkey

Following the recent improvements in the information technologies and the developments in implementation of National Judiciary Informatics System ("UYAP"), which was a project initiated as a part of the e-government project in 2000, it became a necessity to produce regulations and implementations that enable faster, safer and traceable official communications through electronic channels.

In this respect, Article 2 of Law No. 6099, which was published on the Official Gazette and entered into force on January 19, 2011, added Article 7/a to the Notification Law No. 7201 (the "Notification Law"). With this provision, it became mandatory to send official notifications to joint stock companies, limited liability companies and limited partnerships divided into shares, through electronic channels. This obligation is not yet compulsory for real persons and other legal persons as it is a new development and as everyone is not yet capable of using an electronic notification address, but they are allowed to use these official electronic notification services at their own request.

The electronic notification addresses regulated in the Notification Law are not just defined as any electronic notification addresses; they are defined as "*convenient electronic notification addresses*." This definition was specifically preferred by the legislators, as they assessed the possibility of various difficulties regarding electronic addresses that are based outside Turkey, and that cannot be monitored and inspected. Accordingly, the legislators wanted to restrict the scope of what must be understood from electronic notification addresses.

Furthermore, the Notification Law does not set aside other official notification procedures even if the entity, whether real person or legal person, chooses to receive official notifications through electronic channels. In cases where any impediments for electronic notification occur, for example when the technical infrastructure is harmed, or electronic notifications are precluded for any reason, other official notification procedures will nevertheless be applied.

The Notification Law draws the general frame for official electronic notifications, and a regulation was contemplated to be drafted for the remaining details that are not regulated, as also stated in the last paragraph of the relevant article of the Notification Law. In this respect Regulation on Electronic Notification (the "Regulation") entered into force on January 19, 2013 with the Official Gazette numbered 7201. The Regulation sets forth in detail the procedures and principles of official notifications that are made through electronic channels.

Article 7 of the Regulation sets out that the addressees, to whom it is compulsory to send official notifications through electronic channels, are obliged to declare an electronic notification address in their transactions before the authorities that are authorized to send official notifications. The electronic notification addresses that are declared must be "*convenient*" (i.e. electronic notification to that address should be duly made). In the event that the electronic notification address is not "convenient", the official notification is

sent through other official notification procedures, with an annotation indicating that the electronic notification address declared to authorities is inconvenient.

Moreover, all the addressees that are using electronic notification services are obliged to obtain a registered e-mail address as per Article 5 of the Regulation. These addressees are obliged to obtain a registered email address from authorized authorities (i.e. TNB Registered Electronic Mail Service Provider & Trading Inc. or the General Directorate of Post and Telegraph Organization (PTT)) for the time being.

Litigation

Abrogation of Article 3 of Civil Procedure Law No. 6100

On February 16, 2012, the Turkish Constitutional Court ruled to abrogate Article 3 of the Turkish Civil Procedure Law No. 6100 ("Civil Procedural Law") with its decision of February 16th, 2012 and numbered 2011/35 E. and 2012/23 K.

Article 3 of the Civil Procedural Law reads as follows:

"Cases concerning compensation of pecuniary or non- pecuniary damages borne from loss of physical integrity partly or wholly or from the death of person to be caused by any kind of administrative action and transaction and other reasons that the administration has been liable for, are ruled by the courts of the civil court of first instance. This provision is even applied in cases concerning compensation of the same kind damages arising from reasons which fall outside of administration's obligations. Provisions of the Labor Courts Law dated January 30th, 1950 and numbered 5521 are reserved."

The Turkish Constitutional Court abrogated the foregoing provision based upon the following legal rationale and the well-established rules of law:

Article 3 of the Civil Procedural Law provides jurisdiction to the civil courts of first instance regarding those cases related to compensation of pecuniary or non- pecuniary damages borne from loss of physical integrity partly or wholly or from the death of a person that is to be caused by any kind of administrative action and transaction, and other reasons that cause the administration's liability for those damages.

Pursuant to Articles 125 and 155 of the Turkish Constitution No. 2709 ("Constitution") and the previous rulings of the Constitutional Court, administrative courts have jurisdiction over administrative disputes, whereas civil courts have jurisdiction over civil disputes. Based on this distinction, it is not admissible for the legislator to enjoy absolute power of discretion in authorizing civil jurisdiction for those disputes which in fact fall under the jurisdiction of administrative courts, unless such authorization is realized based upon just cause and common good.

Given that the foregoing article embodies the jurisdiction of civil courts of first instance for those cases solely concerning compensation of pecuniary or non- pecuniary damages borne from loss of physical integrity partly or wholly or from the death of person, this regulation gives way for an administrative act which causes damages beyond the provision's scope to

be brought before administrative courts, while the very same administrative act shall be separately brought before civil courts in respect of the damages which fall under the provision's scope. In other words, the provision can very well result in a certain administrative act to be brought before both an administrative court as well as a civil court, provided that such act causes damages which fall under and beyond the scope of the provision at the same time.

Considering the fact that civil and administrative courts fundamentally rule under different principles and guidelines, the settlement of compensation cases regarding the administration's act through different jurisdictions does not serve common good in any way, ergo legislator's discretion in steering away from the general rule of jurisdiction ("*administrative dispute before administrative jurisdiction / civil dispute before civil jurisdictionI"*) lacks just cause which is vital for such discretion to be admissible.

Due to the foregoing reasons, Article 3 of the Civil Procedural Law was found to be in volation of Articles 125 and 155 of the Constitution, and the Turkish Constitutional Court consequently decided to abrogate the respective provision.

Employment Law

Employers' Obligations under the Law on Health and Safety

With the publication of the Law on Health and Safety (the "LoHS"), in the Official Gazette on June 30, 2012, important obligations have been laid out concerning employers. The following is to provide a brief insight regarding the obligations and duties imposed under the LoHS on employers.

(i) The obligation to employ specialized personnel for the maintenance of health and safety around the workplace: As per Article 6 of the LoHS, an employer is obliged to appoint labor safety experts, workplace doctor and other health personnel among its employees and to provide equipment and workplaces thereof. While the former regulation mandated the employer to assign a workplace doctor only if it has 50 or more employees, Article 6 of LoHS renders a workplace doctor mandatory for all workplace of all danger classes.

Pursuant to Article 3 of the LoHS, workplace doctor refers to the doctor appointed by the Ministry of Labor and Social Security ("Ministry"), who is specialized on occupational health and safety whereas safety experts may be engineers, architects or technical personals as well should they are appointed by the Ministry and have the required occupational health and safety certificates.

As per Article 38 of the LoHS, obligations cited above will be applicable for (i) public institutions and workplaces with less than 50 employees and classified as less dangerous after two years as of the publication date of the LoHS (i.e. June 30, 2012), (ii) workplaces with less than 50 employees and classified very dangerous and/or dangerous after one year as of the publication date of the LoHS, and (iii) other workplaces after six months as of the publication date, which is currently applicable for those workplaces.

(ii) The obligation to develop contingency plans for possible emergency scenarios by taking into account the working environment, equipment and workplaces' conditions: Pursuant to Article 11 of the LoHS, the employer shall take protective precautions, compose an emergency planning and carry out necessary measures in order to prevent any potential situations posing any kind of risk. As such, the employer has to make arrangements with respect to first aid, emergency response, fire and rescue-evacuation procedures. That being the case, the employer is obliged to employ qualified and experienced personnel on those fields and also provide the required equipment and materials for that purpose.

(iii) The obligation to keep a record and to make notifications in case any work accident and/or occupational disease are realized: As per Article 14 of the LoHS, the employer shall (i) record all work accidents and occupational diseases and keep a report of the necessary examinations, (ii) examine and record the incidents occurred in the working place which have not resulted in the injury or death of an employee, but have damaged the working place or the working equipment or borne potential to damage the employee, working place or the working equipment.

As an extension of that obligation, the employer shall notify the Social Security Institution ("SSI") regarding working accidents and/or occupational diseases which are notified by the health care servers or workplace doctor within three business days as of the realization of accident and/or the learning date of the occupational disease. In case of an occupational disease, the workplace doctor is obliged to forward those cases to the health care services authorized by the SSI and those services shall notify the SSI within ten days at the latest whereas in case of a workplace accident, the workplace doctor is required to notify the accident to SSI within ten days at the latest.

(iv) The obligation to provide medical examination for employees: By virtue of Article 15 of the LoHS, the employer is obliged to provide medical examination for its employee as they (i) start to work, (ii) are assigned to a different position, (iii) request such examination pursuant to their return after recovering from a workplace accident, occupational disease or sickness and (iv) within specific periods which are determined by the Ministry with respect to the characteristics of the employees, the occupation and the danger class of the workplace. The financial burden of such examination lies solely on the employer, and the medical records of the employee are deemed confidential.

(v) The obligation to inform employees on crucial aspects to maintain the health and safety in the workplace: As per Article 16, the employer should inform its employees of (i) the risks posing a threat to health and safety in the workplace, (ii) the protective and preventive measures to be taken against those risks, (iii) their rights and obligations, and (iv) the people who are in charge in cases of emergency and extraordinary situations, disasters, fire, evacuation and are in charge of first aid.

(vi) The obligation to educate employees on occupational health and safety: The employer is obliged to provide additional

educational training programs for its employees involved in workplace accident or had an occupational disease and those programs shall basically focus on the reasons of the relevant accident or sickness, on how those events might be averted and protective measures to be taken for that cause. Additionally, the relevant additional trainings shall also be given to employees who restarted work after being away from work for six months for any reason. The financial burden of such trainings shall not be reflected on employee's salaries in any way and such trainings shall be realized during working hours.

(vii) The obligation to assign an employee's representative on issues in connection with occupational health and safety: Pursuant to Article 20, the employer shall assign one or more employees as an employee representative for occupational health and safety issues by way of election among the employees or by appointment in case an election fails to determine the representative. An employee representative is authorized to (i) participate in the works related to health and safety in the workplace, (ii) oversee the work pursued for the maintenance of health and safety, (iii) request for the implementation of necessary measures, (iv) make suggestions in that context, and (v) represent the employees in such matters.

For workplaces employing 2 to 50 employees, one representative; for workplaces employing 51 to 100 employee, two representatives; for workplaces employing 101 to 500 employees, three representatives; for workplaces employing 501 to 1000 employees, four representatives; for workplaces employing 1001 to 2000 employee five representatives; and for workplaces employing 2001 and more employees, six representatives shall be assigned.

(viii) The obligation to establish a Board of Occupational Health and Safety: Under Article 22 of the LoHS, the employer is mandated to establish a Board of Health and Safety should it have a workplace which has 50 or more employees and runs continuously for longer than six months.

The employer is required to implement the decisions taken by the Board of Occupational Health and Safety in accordance with legislation on occupational health and safety. Composition, assignments and authorities, operating rules and procedures of the Board of Occupational Health and Safety are to be determined through a regulation issued by the Ministry.

Obligations that have been mentioned under paragraphs (ii) through (viii) above are currently applicable to all workplaces.

White-Collar Irregularities

The DOJ and the SEC Release the Resource Guide to the Foreign Corrupt Practices Act

The release of the long-awaited Resource Guide to the US Foreign Corrupt Practices Act ("FCPA") ("FCPA Guide") on November 14, 2012 by the US Securities and Exchange Commission ("SEC") and the US Department of Justice ("DOJ") has provided insight for businesses and individuals with respect to

various enforcement issues on the FCPA, by setting out detailed analyses on FCPA provisions.

As explained in the Foreword of the FCPA Guide, the FCPA itself, which was enacted in 1977, is an important statute for combating corruption across the world. The FCPA has introduced various sanctions for private persons as well as companies for engaging in the act of bribing public officials. This is most relevant in jurisdictions where US companies conduct business and where making illegal payments to public officials in order to secure business and obtain benefit are prohibited and punishable. The FCPA Guide provides helpful information on various issues including the scope of the FCPA's anti-bribery and accounting provisions, what must be understood from the term "foreign official", what constitutes proper and improper gifts, travel and entertainment expenses, the nature of facilitating payments, and what constitutes an effective compliance program.

Some of the important issues the FCPA Guide provides insight on can be summarized as follows:

- The FCPA's applicable scope is determined by the broadly interpreted "business purpose test", where the statute is deemed applicable only to payments intended to induce or influence a foreign official to use his position "in order to assist … in obtaining or retaining business for or with, or directing business to, any person" (15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).), clarifying that FCPA does not cover every type of bribe paid around the world for every purpose.

- With respect to the applicability of FCPA to foreign nationals and companies, the FCPA Guide provides that individuals and companies may be held liable for conspiring to violate the FCPA—i.e., for agreeing to commit an FCPA violation—even if they are not, or could not be, independently charged with a substantive FCPA violation. Additionally, a foreign company or individual may also be held liable for aiding and abetting an FCPA violation or for conspiring to violate the FCPA, even if the foreign company or individual did not take any act in furtherance of the corrupt payment while in the territory of the United States.

- The FCPA Guide does not accept receiving any type of gift and benefit as an FCPA violation, and notes that items of nominal value (such as cab fare, reasonable meals and entertainment expenses, or company promotional items), are unlikely to improperly influence an official, and, as a result, are not items that have resulted in enforcement action by DOJ or SEC. Appropriate gift-giving is considered as gifts that are given openly and transparently and those that are properly recorded in the giver's books and records.

- While the FCPA Guide reflects upon the definition of the foreign official, it notes that the FCPA broadly applies to corrupt payments to "any" officer or employee of a foreign government and to those acting on the foreign government's behalf, and adds that the term "instrumentality" should be broadly interpreted. As such, the term "instrumentality" can cover state-owned or state-controlled entities.

- The FCPA Guide indicates that the bribery provisions of the FCPA are not applicable to

"facilitating payments", but that the books and records provisions of the FCPA may trigger an enforcement action if such payments are not properly recorded in an issuer's books and records.

- The FCPA Guide provides a "red flag" list that is associated with payments made through third parties or intermediaries, which includes items such as excessive commissions to third-party agents or consultants, third-party "consulting agreements" that include only vaguely described services, the third party is related to or closely associated with the foreign official, and the third party is merely a shell company incorporated in an offshore jurisdiction. The FCPA Guide notes that implementing an effective compliance program which covers due diligence steps to mitigate such red flag issues may help businesses reduce FCPA risks they may encounter.

- The FCPA Guide also highlights that the FCPA holds an individual criminally liable provided that the individual has acted "willfully", a term that has not been defined under the FCPA itself. According the FCPA Guide, the term "willfully" is to be construed in line with court understandings, which refers to an act committed voluntarily and purposefully, and with a bad purpose (i.e. with the "knowledge that a defendant was doing bad act under the general rules of law"). In other words, in order to be found guilty, a defendan must have acted in a bad purpose (i.e. with the knowledge that his conduct is unlawful).

While the FCPA Guide may be considered as helpful in evaluating compliance issues for businesses and clarify various provisions in the FCPA, it still remains a guide and the views of the DOJ and the SEC remain to be interpreted in future enforcement actions.

Real Estate Law

Recent Developments on the Land Registry Law

The two main provision regulating the acquisition of property by foreign persons, be it foreign natural persons or foreign legal persons, under the Land Registry Law No. 2644 (the "Land Registry Law") were amendmended in May 2012.

Articles 35 and 36 of are the two main articles regulating the foreigners' right to acquisition of real property in Turkey. Article 35 regulates the acquisition of real property by foreign natural persons, whereas Article 36 regulates acquisition of property by foreign legal persons.

a) Acquisition of Real Property by Foreign Natural Persons

The most striking change brought by the latest amendments is the removal of the reciprocity condition for the acquisition of real property by foreign natural persons. Prior to the amendment, Article 35(1) of the Land Registry Law stipulated reciprocity as being one of the conditions for acquisition of real property and restricted real right by foreign natural persons in Turkey. Article 35(6) of the Land Registry Law stipulated that both legal and de facto status should have been taken into consideration when determining whether reciprocity regarding the relevant matter did exist between Turkey and the country in question. Article 35(6) of the Land Registry

Law further stipulated that countries, which did not allow personal ownership of real property, should have granted the same rights to citizens of Turkey, as they grant their own citizens, for acquiring real property.

Another novelty which was introduced by the latest amendments concerns the maximum surface area of real property and the independent and continuous restricted real right that foreign natural persons may acquire. While the previous legislation determined the area of acquisition as 2.5 hectares, the amended provision increases the relevant amount significantly and regulates that the total surface area that a foreign natural person may acquire is 30 hectares per person, country-wide, and that it may not exceed 10% of the square measure of the town in which the real property is located. Additionally, the Council of Ministers is granted the right to double the relevant area if it is deemed necessary.

Lastly, as a result of the amendment, foreign natural persons who acquire real property without any buildings on it should submit the project which they will develop on the acquired real property to the approval of the relevant ministry. The relevant ministry will thereafter send the respective project to the land registry, where the real property acquired is registered, for the respective project to be annotated to the explanations as part of the land registry. Thereafter, it is the relevant ministry's responsibility to follow up on whether or not the promised project has been realized. The amendment does not introduce any sanction as to what would happen in case the project is not realized with the way in which it was promised or if the project is not realized at all.

b) Acquisition of Property by Foreign Legal Persons

The current provision adopts a more detailed definition of those who are subject to Article 36 of the Land Registry Law. This is among the prominent novelties brought about with the amendments. The previous provision simply stipulated that companies that have legal personality and that are established by foreign investors in Turkey, or in which foreign investors own shares may acquire and use real property and restricted real right in Turkey to carry out the activities mentioned within the Articles of Association of the relevant company. The current provision, although preserving the main principles, stipulates that companies with a legal personality, and that are established in Turkey, in which (i) foreign natural persons, excluding those that fall under the scope of Article 28 of the Turkish Citizenship Law, (ii) foreign legal persons established duly by foreign laws, and (iii) international organizations, that own 50% or more shares or have the power to appoint/dismiss the majority of the persons who have the right to govern in the company, may acquire and use real property and restricted real right in Turkey in order to carry out the activities laid out under the Articles of Association of the relevant company.

Another matter regulated for the first time by the current amendments is the pledge on immovable property: Article 36 shall not be applicable in transactions which are considered credit under the banking legislation or the acquisition of immovable property by banks to collect their receivables.

The overall public response to the foregoing amendments has been positive, and these amendments are expected to ease investments from especially the Gulf Countries, Russia and Turkic states.

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