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# LEGAL INSIGHTS QUARTERLY

## June 2014 - August 2014

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## Preface to the June 2014 Issue

The second quarter of 2014 started with the publication of two important secondary legislations. Namely, the Council of Ministers amended the Decision on the Determination of Companies Subject to Independent Audit. The Capital Markets Board issued the Material Events Communiqué to update the former principles regarding public disclosures. This issue, *inter alia*, offers a closer look to the conditional share increase, provides explanation to the procedures to follow, including the exercise of beneficiary rights.

The corporate front is not alone in having new secondary legislation. The Competition Authority published its Guidelines on the Evaluation of the Abuse of Dominance Through Discriminatory Practices. Another noteworthy event in this field has been the conditional approval to the merger of the two biggest chain exhibitors in Turkey (AFM/Mars) granted by the Competition Authority.

This issue also discusses the recent developments in the EU data privacy environment and in the pharmacovigilence practices, touching upon recent significant board decisions of Information and Communications Technologies Authority of Turkey on invoices of operators and standardization documents and of the Court of Appeals on "Collusion" arising from fictitious contracts according to Article 2 of the Labor Law, before explaining the practice of electronic retention of title under Turkish law. Finally, in the anti-corruption law field, this issue dissects how amendments in the anti-corruption legislation lead to increased awareness of international business community active in Turkey, forcing them to comply with the rigorous Turkish anti-bribery laws.

***June 2014***

## Corporate Law

### *The New Criteria Concerning Independent Audit*

Decision of Council of Ministers on the Determination of Companies Subject to Independent Audit has been amended by the Decision of Council of Ministers on Making Amendments to Decision on the Determination of Companies Subject to Independent Audit, published in the Official Gazette on March 14th, 2014. The amendments will be effective from January 1st, 2014. Pursuant to the most recent amendments, companies that meet, on their own or together with their subsidiaries and affiliates, at least two of the following three criteria in two consecutive financial terms shall be subject to independent audit, and should appoint an independent auditor as per the Turkish Commercial Code ("TCC").

The three criteria mentioned above are as follows:

(i) Having total assets of seventy five million Turkish Liras or more,
(ii) Having an annual net sales revenue of one hundred and fifty million Turkish Liras or more,
(iii) Having two hundred and fifty or more employees.

At least two of the three criteria should have been met in the last two financial years and not in the current financial year.

Companies being subject to independent audit are obliged to set up a website, and a certain section of this website must be allocated to announcements, which are mandated by law. Further, commercial letters issued by the company, and documents which will constitute the basis for the entries to the commercial books of the company should indicate the company's (i) registry number (and the relevant trade registry), (ii) trade name, (iii) registered address, and (iv) registered website address. This information should be posted on the company's website as well. This website should also include the full names of the chairman and members of the board of directors, and respective amounts of the subscribed and paid-in capital of the company.

Pursuant to the second paragraph of Article 51 of the TCC, failure to comply with the foregoing requirements may lead to an administrative fine of two thousand Turkish Liras.

### *Conditional Share Capital Increase*

Conditional share capital increase is one of the novelties that have been introduced by the TCC, which entered into force on July 1st, 2012. Conditional share capital increase enables joint stock companies to increase their share capital by issuing convertible bonds and/or similar debt instruments, or employee stock option plans. Accordingly, conditional share capital increase enables employees and/or qualified creditors who are holding newly issued convertible bonds and/or similar debt instruments of a company, or its group companies, to become shareholders of the issuer company.

#### Procedures to follow

The process starts with the amendment of the articles of association of the company through a resolution of the general assembly of shareholders. Purpose and subject of this meeting/resolution is not to increase the share capital but to provide grounds for the conditional share capital increase, and to determine the procedural details of the conditional share capital increase. General assembly cannot transfer its authority of determining the conditions and procedure of the conditional share capital increase to any other corporate body of the company. As per Article 465 of the TCC, the following details must be included in the articles of association by way of an amendment in order to give effect to the rights of the beneficiaries of the conditional capital increase: i) total nominal value of the conditional capital increase[1], ii) number, par value, and type of each share, iii) groups who will be entitled to exercise the right of conversion or purchase, iv) privileges to be granted to some of the share groups, v) restrictions on transfers of newly registered shares, and vi) restriction of the statutory pre-emption right of the existing shareholders and the content of such restriction. The said amendment to the articles of association as resolved during the general assembly meeting shall be registered with the relevant trade registry. It should be kept in mind that such provision in the articles of association acts as a guideline for conditional share capital increases therefore, each conditional share capital increase would need its own provision/guideline to be set out under the articles of association of the company. Article 465 (3) of the TCC regulates that any right of exchange or purchase granted before the registration of the amendment regarding the conditional capital increase to the articles of association with the trade registry shall be null and void.

An alternative to conduct a conditional share capital increase is to issue convertible bonds and similar debt instruments. As per Article 504 of the TCC, "similar debt instruments" are defined as bonds convertible to share, convertible bonds, promissory notes, finance promissory notes, and asset-backed commercial papers. Convertible bonds and similar debt instruments can only be issued by a resolution of the general assembly of shareholders. The decision quorum is seventy five percent of the shareholders.

### Right of First Offer

As per Article 466 of the TCC, any convertible bond and similar debt instrument shall firstly be offered to the existing shareholders pro rata to their shareholding in the company's share capital. Thus, existing shareholders will be given a pro rata priority right to purchase such convertible debt instruments. However, such right of first offer is not available in case of employee stock option plans. This right of first offer can only be abolished or limited by a resolution of the general assembly of shareholders based on presence of justified reasons. Justified reasons must be evaluated with a view to the welfare of the company. For instance, market conditions can be deemed as a justified reason from the company's perspective. Further, such limitation of the right of first offer based on justified reasons should not cause unfair benefit to particular persons nor cause particular persons to control the company.

As per Article 462 (2) of the TCC, in case bonds and similar debt instruments including conversion/purchasing rights are not offered to the existing shareholders first the articles of association of the company must also include the provisions concerning exercise of the conversion/purchasing rights, and guidelines of calculation of the issuance price.

### Beneficiaries' Rights

TCC has set forth provisions to protect beneficiaries of the conditional share capital increase in order to set a balance among rights of the beneficiaries and those of the existing

[1] As per Article 464 of the TCC, such aggregate nominal value may not be more than half of the company's registered share capital. The payment to be made in return of the purchase option must be at least equal to the nominal value of the shares so purchased.

shareholders. The right of conversion or purchase of the beneficiaries shall not be impaired due to any existing restriction applicable to the transfer of registered shares of the company unless such impairment is resulting from a provision set out under the articles of association of the company or guidelines on the conditional share capital increase. Furthermore, such rights shall not be impaired through increasing share capital, granting new conversion/purchasing rights to third parties, or any other way unless the exchange price is reduced or the rights of the existing shareholders are also diluted in a similar way.

**Procedures in Exercising Rights**

Beneficiaries of the conditional share capital increase should exercise their rights by means of a written notice, making a reference to the relevant (amended) provision of the company's articles of association.

Thereafter, the exchange or the purchase will be performed by means of making the underlying payment for the exchange right, or making the settlement for conversion by using a payment/settlement bank for this purpose. There will be no further action required by the beneficiary to conduct the share capital increase/shareholding of the beneficiary.

**Perfection before the Trade Registry**

As per Article 470 of the TCC, the board of directors shall prepare a capital increase statement in order to determine the number of newly issued shares, their nominal values, types, privileges, if any, to be granted to some of the share groups, and status of the registered capital at the end of the accounting period.

As per Article 471 of the TCC, the board of directors shall register the amendment to the articles of association with the relevant trade registry, i.e. "update" the articles of association, and submit the capital increase statement to the trade registry at the latest within three months following the end of the accounting period.

As the last step, the provision regarding conditional capital increase shall be removed from the articles of association directly by the board of directors, without the need to convene a shareholders meeting.

***The New Communiqué on Public Disclosure Requirements***

Following the enactment of the new Capital Market Law ("CML") on December 30th, 2012, the Capital Markets Board of Turkey ("CMB") started issuing new secondary legislation. In the same manner, to *update* the former principles regarding "public disclosures" stipulated in the former Communiqué on Principles Regarding Public Disclosure of Material Event (the "former Communiqué"), CMB has issued the Material Events Communiqué on January 23rd, 2014 (the "new Communiqué"). The main amendments made in disclosure requirements are as follows:

**1. Certain principles as to disclosure of insider information have been changed**

The new Communiqué introduced two essential novelties regarding the disclosure of insider information:

**(i)** As stipulated in both the former legislation and the new legislation, an issuer may opt to defer disclosing an insider information, if it deems such deferral necessary to protect its interests, provided that such deferral will not misguide investors. On the other hand, an issuer is required to either verify or deny a 'rumor or news' concerning the issuer's own insider information. In contrast with the former legislation, under the new Communiqué, an issuer who has previously opted to defer disclosing a potential transaction can no longer remain *silent* if a 'rumor or news' has been shared with public concerning the transaction in hand.

**(ii)** The new Communiqué compels issuers to disclose information in a continuous manner. According to a provision introduced by the new Communiqué, an issuer (or a private company falling in the scope of the new Communiqué), must continue providing information on the current status of a previously disclosed event. Pursuant to the former Communiqué, issuers would usually announce the 'commencement of the negotiations' in case of a potential transaction, and refrain from sharing further information until (and if) the transaction enters into the *closing* phase. With the new Communiqué, an issuer must update the public continuously about any development occurred as to the transaction. In case there has been no development, issuer's liability would still continue, this time to inform the public, in sixty days intervals, that there have been no developments, and the reasons thereto.

The disclosure requirements play a pivotal role in mergers and acquisitions concerning public companies, especially during the later stages of a transaction. Therefore, the above changes introduced by the new Communiqué require closer attention in this manner.

**2. Scope of the disclosure requirements has been widened**

The new Communiqué has widened the scope of the legislation by introducing the below changes:

**(i)** The new Communiqué requires private companies offering capital market instruments to 'Qualified Investors' to share certain information with the public, despite the fact that offering of capital market instruments to Qualified Investors has no *public* aspect. The scope of the former legislation with regards to private companies only covered private companies issuing debt instruments to public. The information to be disclosed in this manner considers the corporate information relating to the 'issuer', information regarding general assembly resolutions, issuance of new capital market instruments, and changes in the shareholding structure.

**(ii)** The new Communiqué lowered the threshold regarding the disclosures to be made by the shareholders of a public company with regards to insider information. Under the former Communiqué, 'shareholders who hold a significant portion of shares' were required to disclose any insider information they acquired. The new Communiqué lowered the 'significant shareholding' to 10% shareholding (or 10% shareholding in privileged shares) thus widened the scope of shareholders who might be required to disclose insider information. Same as in the former legislation, shareholder's disclosure requirement will be secondary, and will be triggered only if the public company is unaware of such information.

**3. Other developments**

Apart from the above changes, with the new Communiqué,

(i) Content of the information to be disclosed by companies issuing capital markets instruments other than shares has been expanded,
(ii) Content of the information to be disclosed by public companies as to their general assembly meetings and capital increase resolutions has been widened,

(iii) Content of the 'information policy' to be issued by public companies has been detailed, and
(iv) Public companies are authorized to publicly disclose their 'future projections', however, they will not be required to do so.

## Competition Law / Antitrust Law

### *The Competition Board's Motion Picture Services Inquiry*

The Authority granted conditional approval to the merger of the two biggest chain exhibitors in Turkey (AFM/Mars decision dated November 17th, 2011 and No. 11-57/1473-539). The conditional clearance which was granted with certain commitments provided by the parties was also brought to the High State Court's attention alleging that the provided commitments do not overcome the competition law concerns. The High State Court issued a stay of execution decision about the conditional clearance decision.

Meanwhile, the Authority has also conducted a preliminary investigation regarding the allegations that the motion picture distributors including Warner Bros and United International Pictures are making collusive agreements with chain exhibitors regarding the transformation of digital pictures and aim to exclude independent exhibitors from the market. The Authority's investigation is based on the allegations that Warner Bros is providing certain advantages to chain exhibitors but not to independent exhibitors (Competition Board's decision dated September 27th, 2013 and numbered 13-55/760-319) As a result of this preliminary investigation, the Competition Board decided not to open an investigation; however, the Board signaled that there will be a sector inquiry, especially concerning the AFM/Mars transaction and the digital transition in the motion pictures sector.

According to the Authority's announcement on January 16th, 2014, the sector inquiry intends to determine the potential competition law problems which may arise in consequence of AFM/Mars transaction and its commitments on the competitive dynamics of the market and the digital transition process in the motion picture services market.

The Authority stated that all stakeholders in the sector are welcomed to send their opinions and suggestions to the Authority during the market inquiry process.

### *The Authority published Guidelines on the Evaluation of the Abuse of Dominance Through Discriminatory Practices*

Article 6 of the Law on the Protection of Competition ("Law No. 4054") provides that "*any abuse on the part of one or more undertakings, individually or through agreements or joint practices with third parties, of a dominant position in a market for goods or services within the whole or part of the country is unlawful and prohibited.*"

The Authority published its Guidelines on the Evaluation of the Abuse of Dominance Through Discriminatory Practices ("Guidelines") to avoid uncertainties concerning the application of Article 6 of Law No. 4054.

The Guidelines provide a general overview on the abuse of dominance by explaining elements such as (i) dominant position, (ii) relevant markets, (iii) entry barriers, (iv) buyer power, (v) abuse of dominance and (vi) reasonable grounds for unequal practices.

Similar to the EU Commission's Guidance No. 2009/C 45/02, the Turkish Competition Board's Guidelines is limited only to the exclusionary abuses and does not include any further information on exploitative and discriminatory abuses. It deals with discriminatory practices by explaining the most common practices in that category, such as (i) refusal to supply, (ii) predatory pricing, (iii) price/margin squeeze, (iv) exclusivity / single brand agreements, (v) rebate systems and (vi) tying agreements.

The Board has not announced any news about coming guidelines on the other categories of abusive practices, i.e. exploitative and discriminatory.

## Labor Law

***The recent decision of 9th Civil Chamber of the Court of Appeals on "Collusion" arising from fictitious contracts according to Article 2 of the Labor Law***

Article 2/6 of the Labor Law numbered 4857 ("Labor Law") defines the "sub-employer relation" established through a subcontract as a relation between a primary employer and a sub-employer, where the sub-employer assumes either primary employer's auxiliary works in relation with the goods and service production, or a part of primary employer's core business which requires a certain expertise by the technological reasons due to the nature of the business and the work. In such a relation, sub-employer's employees are solely assigned to the work specified in the subcontract and no other work of the primary employer, which would be out of the scope of the subcontract.

As explained above, subcontracts are not prohibited under Turkish law, however they are meticulously regulated in order to provide the employees with a certain security as regards their employment rights. Accordingly, in subcontracts, the primary employer and the sub-employer are jointly responsible for employees' rights.

Consequently, Article 12/f of Bylaw on Subcontracting ("Bylaw") regulates that in order for a subcontract to be valid, it shall not have the aim for the primary-employer to avoid employer's obligations foreseen by the Labor Law. In such a case, the agreement is considered collusive as it creates a fictitious sub-employer relation.

Fictitious sub-employer relations (i.e. collusion) are defined under the Labor Law and strictly prohibited. According to Article 2/7 of the Labor Law, employees' rights cannot be restricted by recruiting these employees via a sub-employer, or employees who had been formerly recruited by and worked for the primary employer cannot later be sub-employed. Core business of a primary employer cannot be divided and be assigned to sub-employer unless main work requires expertise due to technological reasons by requirements of the workplace and the work. Otherwise, the subcontract is considered null and void as far as the clauses as regards the employment relation between the primary employer, subcontractor, and employees of the subcontractor are concerned. Such nullity of the agreement automatically results in the primary employer being redefined as the main employer of the employees assigned to the subcontracted work. In such a case, the primary employer is solely responsible for the rights of these employees arising from the said work and the primary employer would not have the option to recourse to the subcontractor in order to claim any compensation due to its sole responsibility.

In light with the above mentioned rules, subcontractors are often entered into invalid subcontracts which constitute "collusion", without being obliged to consider the risks attached to such contracts since the primary employer will be solely responsible for all the risks thus no action will/can be taken against subcontracts. In reality, this practice means that subcontractors benefit from their own fictitious contracts/collusion, in other words, their own contradiction to the law.

That being said; 9th Civil Chamber of the Court of Appeals has recently rendered a decision dated March 3rd, 2014 and numbered 2012/1266 M. 2014/6470 D.[2] ("Decision"). According to the Decision, based on the principal regulating that "no one can benefit from his/her own collusion" even though the subcontract between the primary employer and the sub-employer constitutes "collusion", the sub-employer must be still jointly responsible for the severance compensation of the employee along with the primary employer.

This Decision displays the nature of the Labor Law of which the aim is to protect employees, by entitling employees to address their claims to both primary employers and sub-employers, regardless of whether or not subcontracts constitute collusion. Additionally, due to this Decision, sub-employers would not be able to easily burden primary employers with all risks that may arise from a fictitious contract constituting collusion.

## Medical Device Law

### *Developments in Pharmacovigilance Practices*

On April 15th, 2014, the New Regulation on the Safety of Medications ("Regulation"), which brings a more comprehensive outline regarding pharmacovigilance practices of license holders, has been published on the Official Gazette numbered 28973 and entered into force as of its publication, except for 2 articles. Upon the enactment of the Regulation, the Regulation on Monitoring and Assessment of Human Medicinal Products' Safeness ("Abolished Regulation") has been abrogated. The Regulation, while expanding the license holders' obligations, amends several aspects; namely the competent authority to which the notifications will be addressed, the periodic evolution report on benefits/hazards to be prepared by the license holder and public management of the pharmacovigilance operations.

To that end, we will hereunder be outlining the highlights that the Regulation has embodied.

**Obligations of the licensee:**

Article 5 of the Regulation specifies the license holder's obligations. To begin with, obligations of the product safety representative determined by the Abolished Regulation seem to be partially transferred to the license holder under the Regulation.

Apart from the obligations which have already been adopted under the Abolished Regulation, the license holder shall;

**(i)** constantly monitor the safety of medications,

**(ii)** notify the Turkish Medicine and Medical Device Institution ("Institution") under the circumstances detailed in the Regulation,

**(iii)** keep up-to-date records of the medications, and

**(iv)** prepare a main pharmacovigilance system file as detailed in Article 10, which contains information with regard to enquiries executed routinely and maintain its availability for the Institution when requested. This being said, enforcement of such obligation is postponed for one year as of the Regulation's entry into force, as per Article 36.

[2] Please see http://www.kazanci.com/kho2/ibb/files/9hd-2012-1266.htm

On a separate but related note, the Institution has been introduced as the competent authority by the Regulation for all notifications, instead of the Ministry of Health which has been authorized under the Abolished Regulation.

The Regulation also brought a new form to the license holder's obligation to employ a physician or a pharmacist to be responsible of medicinal products' safety, as regulated under the Abolished Regulation, and amended it as the employment of a pharmacovigilance representative.

**Periodic evolution report on benefits/hazards:**

The Abolished Regulation obliged the license holder to submit a periodic safety update report. Similar to the Abolished Regulation, the Regulation also holds the license holder liable for the preparation and submission of a periodic evolution report on benefits/hazards.

It would be appropriate to note that the circumstances in which the periodic evolution report on benefits / hazards will be requested are more comprehensive and well-structured under Article 18 of the Regulation.

Although Article 18 provides detailed information on the format and content of the report, a template report can also be found as attached in Annex-I of the Regulation.

**Pharmacovigilance regional representative:**

The Regulation delegates a new authority to the contacts named pharmacovigilance regional representatives.

The Regulation defines the pharmacovigilance regional representative as the provincial health vice director of the Ministry of Health who conducts his/her operations in cooperation with the Provincial Public Health Vice Director of the Turkish Public Health Organization and the General Directorate of Public Hospital Authority's Medical Services President. The Regulation further holds this representative liable for the coordination and training of pharmacovigilance contact points located in his/her region, as well as supervision of their operations.

**Enforcement dates:**

The Regulation has entered into force on the date of its publication, April 15th, 2014, except for certain articles the enforcement of which has been suspended.

As per Article 36 of the Regulation, while (i) Article 5(e) governing the license holder's obligation on the main pharmacovigilance system file will enter into effect on April 15th, 2015 (ii) enforcement of paragraph 8 of Article 8, governing the list of medications subjected to additional tracing to be prepared by the Institution has been postponed for until July 15th, 2014.

## Telecommunications Law

***Recent Two Significant Board Decisions of Information and Communications Technologies Authority on Invoices of Operators and Standardization Documents***

Turkish Information and Communications Technologies Authority ("ICTA") has taken certain significant decisions on telecommunications sector. One of the duties of ICTA is the quality management and customer protection for telecommunication sector in Turkey. In order to provide services with a contemporary understanding of management system ICTA regulates, authorizes and supervises telecommunications actors in Turkey as the regulatory authority.

ICTA on a decision of January 2014[3] which is published on April 24th, 2014, granted a board decision stating that the operators are obliged to send the invoice information to the relevant telecommunication service user via SMS, e-mail message, IVR ("Interactive voice response") call or by customer service representative, in case of such user cannot be reached three times in a row by mail services.

Accordingly in cases of the change in the address of the user or wrong records in the address of the user, if the invoice of the services provided by the operator cannot reach the user three times, the operator should present its best efforts to communicate with the user to convey the invoice to the user.

Per Article 3 of the Electronic Communications Law ("ECL"), operator is defined as any legal entity, which has the right to provide electronic communications services and/or to provide electronic communications network and to operate the infrastructure within the framework of authorization. Therefore, such regulation binds a wide scope of actors in the telecommunications sector.

Another significant board decision[4] granted by ICTA in April 2014 is an administrative fine imposed to a telecommunications company. As per 6 (1) of ECL, ICTA is entitled to request any kind of information and documents from the operators, public authorities and institutions, natural persons and legal entities when necessary pertaining to electronic communications and to keep necessary records. Moreover, as per the same provision ICTA is entitled to inspect and/or to have third parties to inspect the conformity of operators to the regulations, which perform activities in electronic communications sector; to set the relevant procedures and principles, in case of inconsistencies to perform the actions suggested by the regulation and to impose sanctions to operators.

As per ECL and secondary regulations ICTA is entitled to guarantee the security of electronic communications and supervise the operators accordingly. According to the Regulation on Security in the Electronic Communications ("Regulation"), the operators are obliged to inform the ICTA within two months, if there is a certain amendment on the certificate of conformity or if the certificate of conformity is renewed. A TS ISO/IEC 27001 and ISO/IEC 27001 standardization requirement are stipulated under Regulation on Security in the Electronic Communications for the operators. Operators are also obliged to prepare an electronic communications security report each year until the end of March and to send such report to ICTA through electronic means. The hardcopy of the electronic communications security report shall be kept for five years by the operator. The content of the electronic communications security report is designated under Article 37 of the Regulation. Under Article 38 of the Regulation, the operator is obliged to inform ICTA in case there is a full-scale breach against electronic communications security.

In a decision of March 12th, 2014 which was published on the official website of ICTA on April 24th, 2014, ICTA imposed an administrative fine for an operator for not providing the required document to ICTA within the legal period. ICTA requested for the operator to send the TS ISO/IEC 27001 or ISO/IEC 27001 standardization documents within the prescribed time period. ICTA first warned the operator for not providing the

[3] Please see http://btk.gov.tr/mevzuat/kurul_kararlari/dosyalar/2014DK-THD-84.pdf

[4] Please see http://btk.gov.tr/mevzuat/kurul_kararlari/dosyalar/2014DK-BTD-141.pdf

relevant documentation. As it is stated that the operator, again, did not send the documents to ICTA in six months as prescribed by the warning letter, ICTA imposed an administrative fine to the operator amounting to 0.1% of the annual income of the operator for the year 2012.

## Internet Law

***Recent Developments in EU Data Protection Environment***

European Court of Justice ("ECJ") rendered two significant decisions in April 2014 that will have an important effect on the legislative framework of data protection in the EU. ECJ declared with its decision (Joined Cases C-293/12 and C-594/12) that EU's Data Retention Directive (Directive 2006/24/EC), which constitutes the framework regulation for data protection in EU and which imposes obligations on the telecommunication companies to store customer data (data on a person's identity, time of the communication, location that the communication took place and frequency of the communication) for up to two years, is invalid. According to ECJ, the Directive interferes in a particularly serious manner with the fundamental rights to respect for private life and protection of personal data.

Data Retention Directive was enacted in the EU in 2006 in the aftermath of the terror attacks in New York, Madrid and in London, which brought up the public's security concerns against the individuals' privacy rights. However in the light of the recent leaks of certain whistleblowers, such as Edward Snowden, the privacy concerns prevailed in the eyes of the policy makers and courts throughout the world. ECJ first determined in its decision that by requiring the retention of data and by allowing the competent national authorities to access those data, the directive interferes in a particularly serious manner with the fundamental rights to respect for private life and to the protection of personal data. The court also stated that retention of data and use of these data without the end user being informed, might lead to serious doubt that there is a constant surveillance on individuals' private lives. The ECJ then assessed whether this interference is legitimate in terms of fundamental rights. ECJ concluded that retention of data required by the Directive does not itself adversely affect fundamental rights related to private life and protection of personal data, and genuinely satisfies an objective of public benefit for fighting against serious crimes, terror and public security. However, the ECJ further determined that by adopting the Data Retention Directive the EU legislator exceeded the limits of authority in terms of the principle of proportionality, and did not ensure that the interference is limited to what is strictly necessary. Since the Directive is now found invalid, EU members are currently working on drafting a new data protection law.

The other significant decision rendered by the ECJ in April 2014 was regarding the obligation of the Member States to ensure independence of data protection authorities (Case C-288/12). The case before ECJ was regarding a decision given in Hungary to create a new national agency for data protection, and replacing the existing Data Protection Commissioner's Office as of 2012. This resulted in termination of the Data Protection Commissioner's term of service, who was appointed in 2008 for six years, before its expiration date. The new legislation also vested the Prime Minister and President with the authority to dismiss the new supervisor, which would replace the Data Protection Commissioner, on arbitrary grounds. Accordingly, the European Commission launched proceedings with respect to infringement of independence of data protection supervisors, since independence of data protection supervisors is protected under the EU legislation. Hungary then once again amended its national legislation on April 3rd, 2012 in order to provide independency of the data protection agency in accordance with the EU law, however maintained and insisted on termination of existing Data Protection Commissioner.

ECJ found that termination of the supervisor's duty was against EU law and indicated that independence of data protection supervisors is strictly required for ensuring an effective data protection for the individuals. Viviane Reding, Vice-President of the European Commission stated in her comments on this decision that "Lack of independence means lack of effective supervision and oversight, and a lowering of the level of data protection". Accordingly ECJ ruled that the mere risk of political influence through state scrutiny is sufficient to hinder the independent performance of the supervisory authority's tasks. This decision displays ECJ's approach and significant importance attached to independency of data protection supervisors and its keen interest in interfering in such national attempts against the EU law. Besides, although Turkey does not have an established data protection authority, in terms of EU law, this decision would constitute a good reference for the Turkish legal environment, particularly in the essence of the current political conjuncture in Turkey.

## Real Estate Law

### *Electronic Retention of Title*

In Turkey, the principles with respect to the registration of title are stipulated within the extent of Turkish Civil Code. Although there is no provision which allows to record the registration of title in electronic instruments, significant reforms have been brought within The Law on Duties and Organization of General Directorate of Land Registry and Cadastre No. 6083 ("Law No. 6083") regarding electronic registration of title. Article 9 of the Law No. 6083 stipulates that the general directorate is entitled to decide whether the registration of title or archive would be recorded electronically or not. Furthermore, the Statute on Registration of Title Deeds dated August 17th, 2013 ("Statute") is comprised of the provisions stipulating the electronic registration of title. Therefore the electronic registration of title gained its legal basis both in the Law No. 6083 and the Statute.

According to the Article 12 of the Statute, the records of the title deed will be kept in Turkish land registry and cadastre information system ("TIS"). The information kept in TIS is based on registry of title records. The records kept within the TIS are the information which has been obtained after the registration of title records are initiated to be kept electronically.

The non-official transactions, i.e. submission of documentation or records copies may be completed as per Article 13 of the Statute, by filing an electronic application and using electronic signature or identity authentication.

The courts, the prosecutor offices, the enforcement offices and public organizations may obtain the records of title deeds from TIS, by issuing a protocol.

In order to inquire information from TIS, an agreement to be issued by the directorate should be signed. This agreement shall stipulate the type and the control of the access, intended use of data restrictions with respect to the third party's use and the outcomes of the use for wrong purposes. The owners and the right owner of a real estate may access to the information through TIS according to the conditions to be stipulated within the relevant agreement. The meta-data may be accessible for the public. In case of the TIS's uses for wrong purpose, TIS would be access banned.

The Statute also ensures the security of the information within TIS as per Article 15. According to the relevant article, inquiry data and queries' information are recorded and kept for 2 years.

## Anti-Corruption Law

***The Rising Awareness Leads to an Increase in the Numbers of Anti-Corruption Related Internal Investigations in Turkey***

Within the last two decades compliance with the anti-bribery laws in companies' domestic and international business transactions became a top priority. This is due to the entry into force of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Convention") 1999, which also paved the international legislative and business environment for the more rigorous application of the US Foreign Corrupt Practices Act ("FCPA"). In addition to these, another extraterritorial anti-bribery legislation, the UK Bribery Act ("UKBA") was enacted in 2010. These pieces of legislation not only require the bribe giver to be a resident (for real persons) or established (for legal persons) within their territory, but being listed on a national stock exchange (for the FCPA), or carries a part of its business in the relevant jurisdiction (for the UKBA) suffices for their enforcement. All of these combined, put significant pressure on multi-national companies to enable their compliance with national and extraterritorially applicable anti-bribery legislation.

Having signed the Convention on 17th December 1997 and having ratified it on 26th July 2000, Turkish anti-bribery legislation has been significantly shaped in light of the Convention and other international developments in the field. Within scope of Turkey's compliance efforts with the Convention, Turkey has (i) criminalized bribery of foreign public officials, (ii) repealed the leniency provision applicable to bribery of foreign public officials and (iii) widened the scope of the definition of foreign public officials. In 2009, Turkey, inserted Article 43/A to the Law No. 5326 on Misdemeanors in order to increase corporate liability in case of including, but not limited to foreign bribery. The relevant article provides that in case the organs, representatives or persons who are assigned with duties to carry out the company's activities commit the crimes stated in the relevant article (e.g. bribery, bid rigging etc.), the company will be subject to an administrative fine.

On July, 2012 Article 252 of the Turkish Commercial Code No. 5237 was amended once again for the criminalization of private commercial bribery. Accordingly, if a benefit is provided, offered or promised, or if the respective individuals request or accept such benefit, or if such is mediated, and if benefit is provided to another individual due to the following relationship, the general provisions regulating domestic bribery are applicable to individuals acting on behalf of the following entities: (i) professional organizations that are public institutions, (ii) companies that have been incorporated by the participation of public institutions or entities, or professional organizations that are public institutions, (iii) Foundations that carry out their activities within a body of public institutions or entities, or professional organizations that are public institutions, (iv) associations working for the public interest, (v) co-operatives and (vi) publicly traded joint stock companies.

These amendments in the anti-corruption legislation lead to increased awareness of international business community active in Turkey, forcing them not only to comply with the FCPA or the UKBA, but also with the rigorous Turkish anti-bribery laws. As a result of this newly raised awareness and liability regarding anti-bribery matters, there is a rise in the number of the internal investigations. However, one point the companies should master even before conducting internal investigations is having an effective compliance program in place that deters and detects violations of anti-bribery laws.

Although having a working compliance program is a challenge, most international companies choose to use a company-wide, one-size-fits-all compliance program that will be used on different business cultures. This is not to advise that companies should have completely different compliance programs in different jurisdictions they are active in. In fact, the compliance program of a multi-national company should uphold and be based on the same principles in every jurisdiction. This being said, the permeability of the compliance program would be significantly increased if it was adapted to the cultural context of the relevant jurisdiction. Therefore, the multi-national companies active in Turkey should adopt their compliance programs to the Turkish jurisdiction if they wish to decrease the possibility of violation to a minimum.

Turkey's geographical location as a hub between European, Asian continents and the Middle East region, has led to Turkey having a hybrid culture as a mixture of Western and Eastern cultures. The same is applicable to the business culture. Perception of employees regarding what constitutes bribery, the relationship between the employees, the business cultures, the language, the gift giving habits, extravagant hosting and entertainments expenses, the resistance to execute undertakings prohibiting bribery and corruption, the senior-junior relationships, the effectiveness of whistleblowing systems are all crucial aspects of the compliance program of any company that are culturally susceptible.

The sensitivity and comprehension of the abovementioned becomes even more significant when a multi-national company in Turkey is run by a foreign national who does not understand the culture of the business environment. Since a compliance program is best promoted through a tone from the top via the company's leaders, the familiarity with the local context is utmost significant, in case of an expatriate manager. Therefore, when exporting business branches to different jurisdictions, it is paramount for companies to seek the help of third party counsels who are familiar with the culture of the relevant jurisdiction.

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