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ELİG
LOKMANHEKİM · GÜRKAYNAK
Attorneys at Law

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Preface to the September 2014 Issue

The third quarter of 2014 witnessed several important court decisions regarding competition law and telecommunications law. On the competition law front, Ankara 6th Administrative Court's decision implicitly signified that the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance is contrary to the Law No. 4054. Regarding telecommunications law, on April 9th, 2014, the Constitutional Court repealed a certain legislation which regulated Information and Communications Technologies Authority's duties over data protection and security matters for the electronic communication sector.

Corporate law front examines the management issues in joint-stock companies, namely the board of directors' delegation of its management duties and board members' right to request information regarding the company. On the medical device law front, the much anticipated Regulation on Sale, Advertising and Promotion of Medical Devices was enacted, clarifying a grey area in the healthcare industry. The section on labor law analyzes the regulatory reaction to the Soma mining tragedy that took place in May 2014 in this issue.

Finally, this issue also examines the B20 Anti-Corruption Working Group's recommendations for the G20, drafting possible ways of collaboration between the G20 governments and businesses in the fight against corruption.

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

September 2014

Corporate Law

Delegation of Management in Joint Stock Companies

Pursuant to Article 365 of the Turkish Commercial Code ("TCC"), joint stock companies shall be managed and represented by their board of directors. On the other hand, TCC allows for the assignment of management authority. Article 367(1) of the TCC provides that the board of directors may delegate its management powers to one or more board members, or even to a third person, partially or completely, provided that the company's articles of association contain a provision which allows this delegation. The board of directors can delegate its management powers by preparing an internal directive. Such internal directive shall organise the management of the company *i.e.* it shall define the duties of the management, indicate their roles and positions, and particularly specify the reporting lines. While issuing the internal directive, the board of directors should consider any legal restrictions on the company, as well as the regulations in the articles of association. Assignments realized through this method solely cover the assignment of management, precluding the assignment of "authority to represent" the company.

In light of the foregoing, the two foregoing conditions should be fulfilled in order for the assignment of the management to be valid:

- The articles of association of the company should contain a provision allowing the board of directors to assign its management authority and

- An internal directive should be issued by the board of directors.

It should be noted that assignment of certain management authorities is restricted by the TCC. Article 375 of the TCC lists the non-delegable duties and powers of the board of directors on a *numerus clausus* basis. Accordingly, the following cannot be assigned:

- High-level management of the company, and giving instructions in this regard,

- Determination of the company's management organisation,

- Establishment of the necessary system for financial planning, accounting and financial audit, to the extent required,

- Appointment and dismissal of managers and persons performing the same function, and authorised signatories,

- High-level supervision of persons in charge of management to confirm whether they are acting in accordance with the law, articles of association, internal regulations and written instructions of the board of directors.

In case the board of directors assigns its management authorities as per Article 367 of the TCC, and in compliance with the provisions of the articles of association, only the executives (*i.e.* the persons who are assigned with the management authority) who exercise these authorities will be liable for the consequences of the same. Nevertheless, liability of the board of directors can also arise if the executive is appointed without due care. In other words, the board of directors should take reasonable care for the election of the executives within the scope of their general obligation of supervision. This obligation is explicitly stipulated in Article 553 of the TCC.

Board Members' Right to Request Information

Scope and limits of board members' right to request information and examine certain documents and commercial books in joint stock companies is governed by Article 392 of the Turkish Commercial Code numbered 6102 ("TCC"). The scope of Article 392 is more extensive than that of its predecessor in the repealed commercial code (Article 331 of the Turkish Commercial Code numbered 6762).

Every board member may request from the management of the company information, direct questions, or hold examinations as to the transactions and operations of the company. Requests made by a board member relating to the submission to the book of records, bookkeeping entries, contracts, correspondence or documents, or examination of these by the board, or directing inquiries to the managers or employees, cannot be rejected. However, a board member can obtain the aforementioned at a board meeting and not by individually and directly questioning the managers. The foregoing rights of a board member cannot be limited or removed; but can be expanded by way of including special provisions to the articles of association and/or through a board of directors' resolution. The right to receive information applies equally to all members of the board. The aforementioned equality cannot be set aside by way of inserting a provision to the articles of association, or by a shareholders general assembly resolution, or a board of directors' resolution.

Similar to board members, at the board meetings, every individual and/or committee holding managerial authority is obliged to share information with the board members regarding the ordinary course of business and certain individual operations.

The aforementioned individual(s) and/or committee(s) cannot withhold any information requested by board members, or avoid any questions.

Moreover, members in order to fulfill their duties can request the chairman of the board to make all company records and files available for examination, if necessary. Board members' authority to obtain information outside the board meetings is subject to the discretion of the chairman of the board. The chairman enjoys discretion on allowing or rejecting members' request to receive or examine information, which was not raised during a board meeting. The aforementioned discretionary power cannot be removed, transferred or limited. However, board members retain the right to apply to the courts in case of chairman's rejection.

In addition to the right granted to the board members for receiving and examining information, the chairman has been conferred with the right to receive information beyond the board meetings and to examine company records and files. The exercise of such right by the chairman is conditional upon the authorization of the board. In other words, without the board's approval, the chairman of the board too cannot receive information or examine company records and files outside the board meetings. The chairman retains the right to apply to the courts against the board's refusal to grant approval.

Article 392(4) of the TCC sets forth the application procedure for (i) any action to be brought by a board member against the chairman's rejection of her/his request to receive or examine information, and (ii) any action brought by the chairman against the board's rejection of her/his request to receive or examine information outside a board meeting.

Should the chairman reject a member's request to receive or examine information, the matter shall be submitted to the attention of the board within two days of the rejection. In circumstances where the board is unable to meet, or where the board also rejects the request, the board member can initiate a lawsuit against the decision before the commercial court of first instance of the company's headquarters.

Should the board reject the chairman's request to receive or examine information, the chairman could directly initiate a lawsuit against the decision before the relevant commercial court, without submitting the issue for further approval of the board.

Overall, the novelties presented by the TCC expand the right to receive and examine information compared to the previous code. Moreover, the new legislation regulates responsibilities and prerogatives held by the chairman with regards to the members' right to receive and examine information. Henceforth, it should be noted that the new TCC facilitates the implementation of the right to receive and examine information, which was governed rather inadequately by the previous code, by providing a more comprehensive framework that enables an easier access to the needed information.

The New Communiqué on Private Equity Investment Funds

Capital Markets Board of Turkey ("CMB") continues issuing new secondary legislation. The Communiqué on Principles Regarding Private Equity Investment Funds ("PE Fund Communiqué"), which has been published January 2nd, 2014 and came into force on July 1st, 2014, does cover an area that has been left untapped thus far. The main principles regarding this newly introduced concept, private equity investment funds, are as follows:

(i) The legal status of a private equity investment fund ("PE Fund")

A PE Fund is merely an asset thus has no legal personality whatsover. This applies not only to PE Funds but to all kind of investment funds pursuant to Article 52 of the new Capital Markets Law numbered 6362 ("CML"). Albeit the lack of legal personality, as per the PE Fund Communiqué, PE Funds have management and representation functions. The PE Fund will be represented by the board of directors of its founder (*i.e.* portfolio management companies ("PM Co.") or private equity portfolio management companies ("PEM Co."). Furthermore, third parties may also be granted with the authority to exercise shareholder rights of a PE Fund, arising out of Turkish Commercial Code and/or a shareholders' agreement.

(ii) Founders

CML has paved the way for a more liberated investment fund market by eliminating the restriction on the eligibility of founders of such funds. In the former capital markets law, entities eligible to establish investment funds (*i.e.* banks, insurance companies, intermediary institutions and retirement trusts) had been listed in a *numerous clausus* manner. With the new regulation, any CMB licensed portfolio management company, either independent or part of another financial instutition, will be able to set up an investment fund as this also applies to the PE Funds. According to the PE Fund Communiqué, PM Co. or PEM Co. are authorized to establish a PE Fund.

(iii) Establishing the PE Fund

A PE Fund will be established, for a limited term, upon the approval of the Fund By-law, Issuance Certificate and other documents that may be required by the CMB. The Fund By-law has been described as an adhesion contract (*i.e. contrat d'adhésion*) entered into by and between participation/fund unit holders, on one side and Founder, custodian and portfolio manager on the other. Fund By-law governs the operation (in terms of fudiciary ownership principles), management (in terms of proxy relationship) and custodianship (in terms of Article 56 of CML – "Portfolio custodianship service and liabilities") of the PE Fund portfolio. A Fund By-law must include the following:

a) Name, type and the term of the fund,
b) Name and address of founder, manager, and the custodian,
c) General principles of fund pertaining to investment assets and portfolio management principles, procedures and principles of trading of fund units, principles of management and safekeeping of assets, portfolio valuation principles, principles on expenditures from fund assets, principles on transfer of fund's net income to fund unit holders, principles on unit price announcement periods, conditions of purchase and redeem of the fund units, and principles on qualified fund units if any,
d) Liquidation conditions of the fund,
e) Principles on dividend distribution and performance fee,
f) Principles on qualified fund units, if any,
g) Other contents to be determined by the board (*i.e.* Founder's board of directors).

Investors and PE Fund shall also enter into an investment agreement ("Investment Agreement") which shall cover the issues not stipulated in the Fund By-law or the Issuance Certificate.

(iv) Raising the fund

A PE Fund may offer participation/fund units to investors provided that the Issuance Certificate and other necessary documents have been approved by the CMB. Unlike the Private Equity Invesment Companies, established pursuant to the relevant CMB Communiqué, only 'qualified investors' (as described in the relevant CMB Communiqués and Regulation on Individual Participation Capital) may participate in a PE Fund. The PE Fund raised in this regard has to be utilized in investments according to the principles stipulated in the Issuance Certificate, which shall govern the type of the PE Fund and the terms of issuance.

On the other hand, a PE Fund can invest in a company in a stock swap deal, by exchanging its participation/fund units with the shares of such company. The evaluation of such shares shall be carried out by the CMB authorized institutions as the periodic evaluation of all the PE Fund assets.

A PE Fund may also issue privileged participation/fund units (*i.e.* qualified participation/fund units). Only rights stipulated within the Fund By-law or Issuance Certificate (*i.e.* privileges regarding management rights or dividend distribution) may be vested in such units.

There is no nominal value per participation/fund unit. Per unit value shall be computed simply by dividing the PE Fund net asset value by the number of participation/fund units.

The participation/fund units may be freely transferred among qualified investors.

(v) Investments

The primary object of a PE Fund is to invest in companies aiming at '*creating or developing tools, instruments, materials and services or new products, methods, systems and production techniques with an industrial, commercial or agricultural implementation potential, or will be able to achieve such objectives with management, technical or* *capital support*' ("PE Target Companies"). Direct or indirect invesments (*e.g.* through special invesment vehicles) made in PE Target Companies, either as equity or debt, will be deemed private equity investments ("PE Investments").

On the other hand, a PE Fund may also invest in non-PE Target Company related assets, such as private and public debt instruments, deposit accounts, repo and reverse repo transactions, warrants and certificates, investment fund participation units, lease and real estate certificates etc. However, the PE Investments ratio shall be at least 80% of the total assets of the PE Fund, whereas such ratio will be reduced to 51% provided that PE Fund provides direct invesments in small and medium-sized enterprises totaling to 10% of the total value of the PE Fund within a single accounting year.

A PE Investment in equity shall be made while entering into a shareholders' agreement by and between the PE Fund and the controlling shareholders of the PE Target Companies.

The PE Fund Communiqué provides the investments (*i.e.* assets) of the PE Fund with a unique protection shield. According to the relevant provision, the assets of a PE Fund cannot be pledged or used as colletaral for any reason. Furthermore, the assets cannot be (i) disposed of for any other reason, (ii) confiscated, (iii) subject to an interim decision or (iv) subject to a bankruptcy proceeding. Such protection stretches also into the collection of public debts.

(vi) Termination and liquidation

A PE Fund will be terminated, hence liquidated, at the end of its term as stipulated in the Fund By-law and Issuance Certificate. Provisions of the Communiqué on Principles Regarding Invesment Funds shall apply to the termination and liquidation process.

Competition Law / Antitrust Law

Turkish Court Decision on the Legal Basis of the Regulation on Fines

(i) The Competition Board's Decision[1]

The Competition Board ("Board") fined two companies active in market for steel straps market on October 30th, 2012, on the grounds that they infringed competition law by entering into a cartel agreement. The investigated parties appealed the Board's decision to the Ankara 6th Administrative Court ("Court").

(ii) The Court's Decision[2]

The Court repealed the Board's fining decision on May 27th, 2014, although it acknowledged that the investigated companies violated competition law through an anti-competitive agreement. The Court repealed the Board's decision depending on the "Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance" ("Regulation on Fines"), the legal basis for the fines the Board imposed on the investigated companies. The Court found that the Regulation on Fines is inconsistent with Law No. 4054 on the Protection of Competition ("Law No. 4054") because it sets (i) a minimum fine limit that Law No. 4054 does not contain, by creating new types of infringements, and (ii) a base level of applicable fine rates.

The Court pointed out that the fine's upper limit is 10% under Article 16 of Law No. 4054 without any other restriction on the fine range. However, Article 3 of the Regulation on Fines defines two types of infringements which do not exist in Law No. 4054: (i) cartels and (ii) other infringements. Also, the

[1] Steel Strap Decision, 30.10.2012, 12-52/1479-508.
[2] 27.05.2014, E.2013/1557-K.2014/636.

Regulation on Fines provides minimum limits for fine rates, which are set differently for cartels and for other infringements. Although the minimum limits defined by the Regulation on Fines do not fall outside the 10% upper limit defined by Law No. 4054, the Court concluded that the Board exceeded its regulatory power by setting out base level fines which is against the companies' interests and in contradiction with Law No. 4054.

(iii) Conclusion

The Court decided that the Board should have calculated the fine per Article 16 of Law No. 4054 by considering the aggravating and mitigating factors. Therefore, the Court repealed the Board's decision. Although the decision is not yet finalized as it may be appealed to the Council of State, it is still very important because the Court implicitly decided that the Regulation on Fines is contrary to Law No. 4054.

The Board clears 3M and Two Cement Companies in Two Separate Investigations on Lack of Evidence Grounds

In two separate, recent decisions on June 25th, 2104, the Competition Board ("Board") cleared first 3M and then two cement companies from allegations of anti-competitive behavior in two investigations ending on the same date. Both cases are candidates to become benchmark precedents on the Board's increasingly-demanding approach to standards of proof. The Board did not levy an administrative fine to the defendants, since the required standards of proof were not met. Gönenç Gürkaynak, Managing Partner of ELIG, Attorneys-at-Law and defense counsel for both companies in their respective investigations, states: "The Board has seen the crucial standard of proof issue we have highlighted in both separate investigations, and avoided an obvious Type 1 error of mistakenly fining compliant companies, even in the face of recommendations of a fining decision by their case handlers in one of these investigations."

In 3M, the defendant has been cleared from allegations of resale price maintenance, discrimination, and customer allocation. The case was an extension of an older preliminary investigation, which had been closed before turning into a full-fledged investigation in 2007. The Board declined to initiate a full-fledged investigation and decided to close the case by giving a written notice to 3M, instructing it to refrain from engaging in the alleged practices. The High State Court repealed that 2007 preliminary investigation decision, arguing that the Competition Board has to launch an investigation if it cannot establish beyond doubt that the investigated actions did not violate antitrust laws. As a result, the Board launched an investigation in 2013. Following the full-fledged investigation process, the Board did not find any violation on the part of 3M in its decision on June 25th, 2014[3], although the case handlers recommended administrative monetary fines against the defendant, including aggravating factors of recidivism and duration. The reasoned decision is not yet published.

In White Cement, the Board decided not to impose administrative monetary fines against two white cement producers[4]. The Turkish Competition Board cleared the two companies (ÇimSA and Adana Çimento) from all allegations on June 25th, 2014[5]. The investigation was initiated following a complaint that the investigated companies violated the law by acting in concert to fix the prices of white cement. Upon review of the case file, the Board decided by majority that the defendants have not breached Article

[3] 25.06.2014, 14-22/461-203
[4] 23.05.2013, 13-30/408-M
[5] 25.06.2014, 14-22/460-202

4 of Law No. 4054 and decided not to impose any administrative monetary fines. The reasoned decision is not yet published at the time of publication of this article.

Turkish Competition Authority publishes Motor Vehicles Sector Inquiry Report

The Turkish Competition Authority ("Authority") published on May 7th, 2014, the Motor Vehicles Sector Inquiry Report ("Report"), the outcome from the Motor Vehicles Sector Inquiry initiated by the Competition Board ("Board") on May 26th, 2013 with its decision numbered 11-32/674-M.

Similar to the European Commission's approach, the Authority aimed with this sector inquiry to evaluate the effectiveness of Block Exemption Communiqué No. 2005/4 on Vertical Agreements and Concerted Practices in the Motor Vehicles Sector ("Communiqué No. 2005/4") since its entry into force in 2006.

(i) Market for sales of new vehicles

The Authority analyzed inter-brand competition and established that the concentration rate of the market decreased after the entry into force of Communiqué No. 2005/4. The Authority highlighted that there has not been any significant increase in motor vehicle prices since 2005 and that this indicates intense inter-brand competition. The Report compared the profits of the distributors with sales and after sale services and it emphasized the significant increase in multi-branding in the same showroom. Thus the Report indicates that the multi-brand strategy brought by Communiqué No. 2005/4 has been a success in terms of increase in inter-brand and intra-brand competition. It further found that the market is generally dynamic and growing.

(ii) Market for Maintenance-and-Repairs

The Authority observed that the number of authorized distributors increased after the Communiqué No. 2005/4 entered into force. The Authority also highlighted considerable information asymmetries that occur due to technical expertise requirements for maintenance and repair services leading to consumer-related competitive concerns. Furthermore, the Report observes that the turnover of service providers increased over the rate of inflation and that profits remained high in the market. Overall, the Authority concluded that the market is not directed toward a more competitive structure.

(iii) Market for Spare Parts

The Report observes that there was no remarkable increase in the spare parts prices after the entry into force of Communiqué No. 2005/4. Despite Communiqué No. 2005/4 initially meant to ensure an increase in the spare part manufacturers' direct sales to the market, the Authority determined that the direct sales did not develop sufficiently. Combined with the information asymmetries in the eyes of the consumers, the Authority reached the conclusion that competitive concerns continue in the after-sales market for motor vehicles even after Communiqué No. 2005/4 entered into force.

(iv) Conclusion

The conclusions of the Authority are similar to the European Commission's Impact Assessment Report of the Future Competition Law Framework applicable to the motor vehicle sector[6]. Following the impact assessment, the European Commission amended the sector-specific block exemption rules regarding the sales of new motor vehicles, which now benefit from the general block exemption regulation for vertical agreements instead of the sector-specific block exemption. While it may be early to predict how the Authority will respond, the Authority has engaged in debates with experts on the issue.

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[6] SEC(2009) 1052, 22.07.2009

The Authority Initiates a Sector Inquiry in the Cement Sector

The Competition Board ("Board") decided to initiate a sector inquiry into the cement sector in its decision of May 7th, 2014. The Board initiated this extensive sector inquiry to identify the sources of the competitive problems in the cement sector and to introduce structural or behavioural solution proposals for the problems detected at the end of the inquiry.

By way of its announcement of the sector inquiry on its website, the Competition Authority ("Authority") invited every actor in the market (producers, customers, *etc.*) to share their opinions with the Authority. It is not the first time the Authority has conducted a market inquiry concerning a particular market. The Authority initiated sector inquiries concerning other markets such as retail, petroleum products, pharmaceuticals, and motor vehicles (please see above for more information on the Motor Vehicles Sector Inquiry).

(i) Sectorial Evaluations

The main reason behind the Board's decision to initiate an inquiry into the cement sector is cement's importance in the construction industry, one of the most important sectors of the Turkish economy, given its significant contributions to the economy's high growth rate and its connection to other industries.

It is well known by most competition authorities that the cement sector is one of the most cartelized and problematic sectors from a competition law perspective.

A number of dawn raids have been conducted at the premises of cement producers and huge amounts of fines have been imposed on the undertakings involved either in cartels or other types of competition law infringements in the past. Nevertheless, the sector remains problematic from a competition law standpoint. One of the most significant indications demonstrating the difficult nature of the sector is the high number of competition law infringement complaints. The number of investigations and the amount of fines do not seem to deter anti-competition practices or decrease the number of complaints. Moreover, there has been a noticeable increase in the number of complaints mostly regarding price hikes observed in the sector. The complaints also include allegations such as the allocation of region and/or customer, refusal to supply, and practices which may constitute predatory pricing, a form of an abuse of dominant position.

Due to the homogenous structure of cement itself and the ease of market monitoring among the players in the cement industry, the cement sector is more vulnerable to anti-competitive arrangements compared to any other sector. Therefore, the complaints concerning the anti-competitive behavior are mostly regarding the pricing strategies of the cement producers, which could easily be monitored and followed by the competitors.

(ii) Conclusion

Until 2013, the Authority concluded 15 investigations in the markets for cement and ready-mixed concrete. In 11 of these investigations, the Board imposed administrative monetary fines of totaling TR 94,152,685 (approximately € 32.46 million) on the investigated undertakings. Recently, the Board initiated an investigation against 6 cement producers active in the Aegean region of Turkey, with its decision of June 12th, 2014[7]. These facts clearly reveal the problematic nature of the sector and illustrate the Authority's concerns about this nature.

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[7] 14-21/416-M

Labor Law

Draft Law on Sub-Contractors and Miners Working Conditions

301 miners were trapped after an explosion caused by a fire triggering a collapse at a coal mine in the western Turkish province of Manisa, Soma. Consequently, a new draft law, dated May 30th, 2014, containing significant changes with respect to the Labor Law No. 4857 ("Labor Law"), is proposed to the Turkish Grand National Assembly. The relevant draft law intends mainly to protect the rights of the sub-contractor's employees and increase the working conditions of the miners. Since the draft law is currently being discussed before Planning and Budget Commission, until the approval of the president and the release of the draft law the foregoing information may be subject to changes.

Under Article 18 of the Labor Law, an employer, who employs at least 30 employees, has to state a valid reason when dismissing an employee who has worked at least for six months at a particular workplace and with whom the employer has signed an indefinite-term agreement. An employee may initiate a lawsuit in case the conditions set forth under Article 18 exist. As per the draft law, the miner employees do not have to meet the 6-month seniority condition. Accordingly, a miner who has less than 6 months of seniority and who is dismissed based on a valid reason, may initiate a reinstitution lawsuit under Article 18 of the Labor Law.

It is further stipulated that the miners may not over work, unless the circumstances set forth under Article 42 and 43 of the Labor Law, *i.e.* compulsory and extraordinary circumstances, exist. In case such circumstances exist, then the salary to be paid for every hour exceeding the 36 hours weekly should be calculated by increasing 50% of the hourly salary of the miners. The draft law also stipulates that the maximum working hours of the miners should be 36 hours and the daily working hours should not exceed 6 hours. A 4-day increase in each legal annual leave stipulated under Article 53 of the Labor Law is also proposed with respect to the miners. The rationale behind the said change is the significantly more difficult working conditions faced by the miners in comparison to other jobs.

The draft law also includes new provisions with respect to the rights of the sub-contractors as follows:

- In case there is a sub-contractor relation between the parties, then upon request of the employees or *ex officio*, the employers shall be obliged to control on a monthly basis whether the salaries are paid to the employees' bank accounts through retention of progress payment.
- The duration of the sub-contractor employees' paid annual leave is calculated by taking into consideration the duration of her/his service in the same working place, regardless of whether she/he works for the same sub-contractor or not.
- In the event that the subcontracting is practiced in contrary to the Article 8 of the Labor Law, a fine of two thousand Turkish Liras for each employee shall be imposed separately on employer and sub-contractor or their representatives.
- Sub-clauses of 2, 3, and 4 of the Article 3 of the Labor Law are abolished. Accordingly, the workplace notification, subcontracting registry and notifications to Social Security Institution for the transactions to be made in events of collusive subcontracting are considered adequate.

Medical Device Law

New Regulation on Sale, Advertising and Promotion of Medical Devices

The Regulation on Sale, Advertising and Promotion of Medical Devices ("Regulation") has entered into force upon its publication on the Official Gazette dated May 15th, 2014. The Regulation covers the sale, promotion and advertising activities of medical devices which fall under the scope of the Regulation on Medical Devices, the Regulation on Active Implantable Medical Devices and the Regulation on In Vitro Diagnostic Medical Devices ("Regulations") as well as the entities which conduct these activities.

As a whole, the Regulation sets forth the principles regarding sales centers, advertisements and promotion of medical devices, while outlining provisions on scientific and educational activities and samples.

Some of the most substantial subjects embodied under the Regulation are as follows:

(i) Sales Centers

The majority of the Regulation imposes obligations on sales centers and sets forth conditions as to the authorization and work permit application for entities willing to continue their operations as sales centers, which is a new concept for the legislation on medical devices.

Sales centers are defined in Article 4 of the Regulation as "the premises where the medical devices are distributed or sold".

(ii) Managing Director

The Regulation obliges sales centers to employ a managing partner having liabilities specified in Article 10 such as notifying the Turkish Medicine and Medical Device Institution ("Institution") and the importer or the manufacturer once an adverse event is reported.

(iii) Advertising and Promotion

Without any doubt, the most important provisions introduced by the Regulation pertain to advertising and promotion principles of medical devices, which were not governed previously under Turkish regulations.

The Regulation specifies that medical devices that should be specifically used or applied by healthcare professionals and the medical devices which are subject to reimbursement cannot be directly or indirectly subject to advertisements in public media channels including the Internet through programs, movies, TV series, news and similar means.

Having said that, (i) publications made in newspapers and magazines, announcing the launching of a new medical device to healthcare professionals, with the approval of the Ministry of Health or the Institution, and (ii) device information posted on the sales centers' websites are specified as exceptions to this provision.

Restrictions in advertising and promoting the medical devices are set forth by Article 16 and Article 18 of the Regulation. According to the Regulation,

(i) Medical devices which are not in line with the Regulations cannot be sold and advertised.

However, devices bearing a sign indicating that such device will not be presented for sale or use until it meets the requirements of the Regulations can be displayed in commercial fairs and exhibitions,

(ii) Titles of the Ministry of Health, its affiliate, supporting institutions and participants in the device's study process cannot be used without prior consent, during advertisement and promotional activities,

(iii) Advertisements and promotions shall not cause damage or threaten the safety of patients, users and environmental health,

(iv) Medical devices shall not be advertised or promoted through means such as draws and lotteries, and

(v) Medical devices shall not be advertised or promoted in a way which would lead to unfair competition or damage the users' interests or provide incorrect, misleading, exaggerated or unproven information.

(iv) Scientific and Educational Activities

Although the enforcement of Article 21 has been postponed for 1 year until May 15th, 2015 as per Article 37 of the Regulation, Article 21 sheds light on another major subject as to the principles of scientific and educational activities.

As specified in the article, scientific and educational activities pertaining to devices shall not be used for purposes other than transmitting the current information or presenting new information to healthcare professionals and technical staff of the healthcare institutions who work in the field of medical devices.

Parallel to the provisions imposed on license holders under the Regulation on the Promotional Activities Medicines for Human Use, as per Article 21(2) of the Regulation, sales centers can sponsor healthcare professionals and technical staff of the healthcare institutions who work in the field of medical devices, for their attendance in scientific meetings such as congresses or symposiums provided that (i) the meeting is related with their area of practice, (ii) healthcare professionals and technical staff of the healthcare institutions who work in the field of medical devices can benefit from 3 sponsorship during a year; only two of these three sponsorships can be granted by the same sales center and can be used for a meeting held abroad and (iii) the sponsorship can only be granted to the organizations hosting the meeting.

However, these limitations do not apply to researcher meetings of national and international multi-centric clinic research supported by sales centers, and which will be held in Turkey or abroad, according to sub-article 4 of Article 21.

The regulation also prohibits manufacturers, importers and sales centers from organizing and sponsoring scientific and educational meetings in coastal resorts between the dates of May 15th and October 15th and also in ski centers between the dates of November 15th and April 30th.

In addition to the foregoing, as per sub-article 6, activities such as congresses, symposiums and seminars to be organized or sponsored by sales centers throughout the year, shall be communicated to the Institution in the annual program form before the end of previous year.

Telecommunications Law

Regulation on Network and Information Security in Electronic Communications Sector

Regulation on Network and Information Security in Electronic Communications Sector ("Regulation") is published in the Official Gazette on July 13th, 2014 and became effective on the same day. Regulation replaces the Regulation on Security of Electronic Communications of 2008 which was also published by Information and Communications Technologies Authority ("ICTA").

Among its other competencies and responsibilities, ICTA is responsible for taking necessary measures and coordinating the continuity of electronic communication in light of any security threats or vulnerabilities. Having said that, the Turkish Constitutional Court rendered a decision on April 9th, 2014, cancelling the specific provision (Article 51) of the Electronic Communications Law ("ECL") which regulates the authority of the ICTA on data protection and security matters for the electronic communication sector.

The reasoned decision of the Constitutional Court is published on the Official Gazette on July 26th, 2014. The Constitutional Court based the decision on Article 20(3) of the Constitution, which stipulates data protection as a constitutional measure and that the measures should be regulated by the laws. Recently published decision will be effective on January 26th, 2015. Until then, Article 51 of the ECL and the Regulation will be valid and binding.

Data protection and security for electronic communication in Turkey seems to have entered a new era, due to the Turkish Constitutional Court's decision which cancelled the authority of the ICTA with respect to regulating and supervising the data protection and security matters in the electronic communication sector. Secondary regulations of ICTA regarding data protection issues will also be annulled following the effective date of the Turkish Constitutional Court's decision on January 26th, 2015.

Despite the foregoing decision of the Turkish Constitutional Court, ICTA has recently published a Regulation regarding network and information security in electronic communications sector in Turkey. Article 1 of the Regulation has a disclaimer stipulating that process and protection of personal data are not within the scope of this Regulation. It appears that the disclaimer in the said article aims to protect the recently published Regulation from being annulled by the effectiveness of the Turkish Constitutional Court's decision.

Regulation covers network and information security obligations of the operators in the electronic communications sector, and obliges them to maintain certain measures for cyber-attacks.
Under Article 6 of the Regulation, operators must establish Information Security Management System ("ISMS") which is defined as the activities for maintaining confidentiality, integrity, accessibility of the information in a systematic way.

Operators must also maintain an ISMS policy which is approved by the management of such operator. ISMS policy should at least cover the following items:

(i) Definition of information security, general aims and scope,

(ii) Guarantee of the management of the operator with respect to maintaining information security and for supporting security activities,

(iii) Principles of risk assessment,

(iv) Classification of the assets and

(v) General information about the practices of security policy, procedures, rules, principles and standards.

One of the aims of the Regulation, regardless of its disclaimer in Article 1, is to protect personal data in the operator's system, which currently makes it quite similar to the secondary legislation that will be annulled once the Turkish Constitutional Court's decision becomes effective on January 26th, 2014 in this respect.

Real Estate Law

New Regulation on Preparation of Spatial Plans

Spatial Plans ("Regulation") is published on the Official Gazette dated June 14th, 2014 and has entered into force concurrently. Following the enactment of the Regulation, the Regulation on the Principles of Construction Plans and the Regulation on Environmental Plans have been abrogated.

The Regulation does not only introduce a new gradual planning structure but also brings new terms to land use and settlement such as spatial strategy plans, integrated coastal area plans and long-term growth plan.

This article aims to offer an introductive insight into new subjects brought by the Regulation.

(i) Newly Introduced Notions

There is no question that the Regulation broadens the concept of planning by dividing the planning structure into different stages and regulating them under separate provisions. Those newly introduced notions are described in Article 4 of the Regulation and are as follows:

- Integrated coastal area plans: These are plans which examine the coastal areas by taking into consideration all sectorial activities and plans including social and economic matters, along with their interaction areas; harmonizes the functions and activities in coastal areas with targets addressed to them; aims the protection of coastal ecological system and natural resources; involves infrastructure plants as to transportation types as well as spatial targets, strategies, action proposals and administration plan and are prepared in line with specified scales.

Integrated coastal area plans are kept outside of the spatial planning alignment by virtue of Article 6 of the Regulation, which adds that integrated coastal area plans form basis to zoning plans.

- Spatial strategy plans: These are plans which associate national development policies with regional growth strategies on a spatial level; evaluate them by considering social and economic potentials, targets and strategies of regional plans and also transportation relations and physical thresholds; determine spatial strategies regarding integration of underground and ground sources to the economy, protection and improvement of natural, historical and cultural values along with habitation, transportation system and urban, social and technical substructure; harmonizes sectorial spatial policy with strategies and are prepared in line with specified scales.

Significance of the spatial strategy plans in the new structure is evident from Article 7 regarding general planning principles. According to this provision, major projects requiring a regional or national decision making process should formerly be evaluated under spatial strategy plans.

- Long-term growth plan: This is an ecosystem friendly plan in which technical, social, economic activities and managing models are determined in order to protect, improve and maintain sustainability of resources in the long term by considering the characteristics of protected areas such as national parks, natural parks, nature reserve areas, wetland areas and zoning.

(ii) Spatial Planning Alignment

Article 6 of the Regulation sheds light on levels and relations between spatial plans, specifying that spatial plans are prepared as spatial strategy plans, environmental plans and zoning plans depending on the their covered surface and purpose. Accordingly, planning alignment in a descending order consists of; (i) spatial strategy plan, (ii) environmental plan, (iii) land use plan and (iv) implementary development plan.

(iii) Authority of the Ministry under the Regulation

Following the enforcement of the Regulation, there have been plenty of discussions arguing that the Ministry of Environment and Urban Planning ("Ministry") gained substantial and unusual authority on preparation, approval and audit of plans.

Under the abrogated Regulation on Environmental Plans, competent authority for the audit of authorized plans used to be the Ministry of Environment and Forestry[8] as well, pursuant to Article 14. In parallel, Article 35 of the Regulation once again grants such authority to the Ministry.

Apart from the foregoing similarity, one of the most crucial aspects of the Ministry's dominance over the Regulation presents itself in Article 35, which requires spatial plans as well as their revisions, amendments or additions to be submitted to the Ministry and grants the Ministry the authorization to evaluate the spatial plans and make the necessary assessment. As per the same article, the Ministry is also responsible from detecting the plans, which do not comply with the regulations published by, again the Ministry itself. Article then continues with a notification addressed to subnational administrations for them to take the necessary actions as to such breach.

[8] In 2011, the Ministry of Environment and Forestry has been divided as (i) the Ministry of Environment and Forestry and (ii) the Ministry of Environment and Urban Planning.

White Collar Irregularities

The B20 2014 Anti-Corruption Working Group Recommendations

In July 2014, the Anti-Corruption Working Group of B20 ("ACWG") submitted its report to the B20 2014 which includes three overall and five task force specific recommendations. Generally, these recommendations set out that (i) the OECD and UN anti-corruption conventions should be enforced by the member governments and (ii) a collaborative approach should be created between the businesses and governments in the fight against corruption, focusing on the enhancement of self-reporting procedures and the adoption of collective action methods. Recognizing that corruption would be the world's third largest, if it was an industry, the businesses of G20 states urge the governments that they expect rigorous enforcement of anti-corruption legislations, targeting both supply and demand sides of corruption.

The overall recommendations of the ACWG include (1) the harmonization of regulations and providing incentives to responsible business, (2) harmonization of beneficial ownership transparency regulations and (3) enforcement of the regulations enacted in national states by virtue of the OECD and UN anti-bribery conventions. Under the first recommendation, ACWG points out that governments are enforcing divergent approaches towards business attempts to tackle with corruption such as the adoption of compliance programs and self-reporting. One example to this would be that many governments are far from regarding compliance programs or self-reporting as mitigating circumstances unlike *e.g.* the US and the UK approach. To that end, ACWG, welcoming the opportunity to align business interests with that of the G20 governments, recommends that a working group should be formed, which would map the regulation asymmetries in different jurisdictions and propose regulatory changes. This recommendation is reiterated under the recommendations directed at Human Capital Taskforce, recognizing that divergent attitudes adopted towards compliance programs and self-reporting is a disincentive for using businesses' potential for shaping the culture and behavior of the supply side of corruption.

Under the second recommendation, the ACWG proposes G20 governments to adopt coherent national laws regarding beneficial ownership of companies, in line with the G8 core principles of transparency of ownership and control of companies. This recommendation is reiterated in relation to anti-money laundering and business conduct rules, under recommendations directed at Financing Growth Taskforce. In addition, the report advises that rules pertaining to transparency of ownership of companies should also be harmonized across jurisdictions.

Under the third recommendation, the ACWG criticizes the inconsistent approaches to enforcement of anti-corruption legislations across jurisdictions. Accordingly, such inconsistent enforcement, much like the inconsistency in the contents of the anti-corruption legislations, creates another disincentive for businesses to tackle with corruption in their processes. To that end, the ACWG recommends G20 governments to create high level reporting mechanisms[9], to ensure cooperation between different national anti-cooperation agencies and render the enforcement procedures publicly available. This way, not only the national enforcement of anti-corruption laws would be consistent, but it could also lead to a degree of predictability in international level of enforcement.

[9] A high level reporting mechanism is a collective action initiative such as an ombudsman or an independent anti-corruption agency, which would function above the relevant ministries and public agents of the national state.

Recognizing corruption at the borders as a barrier to trade, ACWG recommends the Trade Taskforce, predominantly interested in the advocacy of international trade, to combat corrupt practices at the border and address corruption in trade negotiations. According to the fourth recommendation made specifically for this taskforce, the ACGW recommends the G20 governments to implement the Trade Facilitation Agreement[10], especially with regard to faster and more efficient customs procedures and in the implementation of one-stop and automated customs procedures. Under the fifth recommendation, the ACWG urges the G20 governments to include anti-corruption clauses in Preferential Trade Agreements[11]. These clauses could require the signatories to comply with OECD and UN anti-corruption agreements.

The ACWG addresses public procurement, infrastructure and foreign investment issues under its recommendations for the Infrastructure and Investment Taskforce, recognizing that governments should promote transparency and integrity in infrastructure projects in order to create a level playing field. Accordingly, under its sixth recommendation, the ACWG advises G20 governments to enforce the best practice procurement processes published by G20, UN, OECD and the World Bank. In addition, the ACWG reiterates its recommendations regarding the establishment of high level reporting mechanisms in relation to public procurement projects. Under the seventh recommendation, the ACWG focuses on possible incentives the

[10] The Trade Facilitation Agreement is an international agreement executed between the World Trade Organization member states, aiming the acceleration and efficiency of customs procedures.

[11] Preferential Trade Agreements are agreements between countries which reduces the tariffs for certain products for countries which are the counterparty to the relevant agreement.

governments could use to allure businesses into complying with anti-corruption best practices in investment projects. These incentives are (i) positive recognition by the government to companies who comply with best practices in bidding processes, (ii) encouragement of verification of the quality of anti-corruption compliance programs, (iii) use of collective action methods such as integrity packs[12] or independent anti-corruption monitoring of specific projects and (iv) encouragement of anti-corruption capacity building practices over the supply chains of companies. The final recommendation of the ACWG suggests that B20 should draft an international model investment treaty that would require governments looking to attract foreign investment to engage in capacity building of public officials and install the aforementioned high level reporting mechanisms.

Overall, with the 2014 recommendation, the ACWG lays the foundations for a collaborative framework between the governments and the businesses in the fight against corruption.

[12] An integrity pack is a legally binding contract executed between the public institution and the bidders of the procurement process initiated by the public authority in order to prevent corruption of the public procurement process.

ELİG
LOKMANHEKİM • GÜRKAYNAK
Attorneys at Law

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ELİG
LOKMANHEKİM • GÜRKAYNAK
Attorneys at Law

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