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Preface to the June 2015 Issue

The corporate law section analyzes the corporate governance issues that might arise during mergers and acquisitions, especially relating to share transfer limitations, contractual undertakings of sellers, conditions precedent and financing restrictions.

Competition law front discusses a significant case, that of Mauri Maya, who was granted full immunity after its leniency application, submitted after the initiation of the preliminary investigation and after dawn raids took place. This issue also delves into the Coca-Cola decision given by the Competition Board on the issue of de facto exclusivity. The annual Mergers and Acquisitions Overview Report for 2014 is also analysed in this issue.

The labor law section focuses on Omnibus Bill No. 6645 which entered into force on April 23, 2015, amending certain aspects of the Labor Law No. 4857 with respect to paid leaves, night shifts and working hours of mining workers. The litigation section examines an issue close to the heart of international commercial transactions — private international law.

This issue, the internet law section analyzes the long awaited Draft Law on Data Protection which was finally submitted before the Turkish Grand National Assembly. The article determines an anomalous exception which is contrary to the *raison d'etre* of the draft law and the EU directive that it is based on.

The law of obligations section examines The Law on Regulation of Retail Trade which regulates the activities of entities falling within the ambit of the said law.

The white collar irregularities front delves into the elements of what makes a compliance program ready to detect and deter; and determines whether the convergence of these elements decreases the need for localization.

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.

June 2015

Corporate Law

Corporate Governance Tips for Mergers & Acquisitions

The term "corporate governance" can be briefly defined as (i) rules introduced by the articles of association of companies, regulations on representation and binding of a company, and (ii) mandatory rules of law, which regulate the day-to-day activities, relations between the shareholders, responsibilities and obligations of the directors as well as the shareholders. A provision in the articles of association of the target company in an merger and acquisition ("M&A") transaction may derail the contemplated transaction. Moreover, following the completion of the transaction minority or majority shareholders and directors may face difficulties and be restricted while running the operations of the company. For these reasons, it is very important to be able to plan the closing and post-closing corporate governance issues of the target company in an M&A transaction.

An M&A transaction can as well be structured in the form of a "share transfer". In accordance with the Turkish Commercial Code numbered 6102 ("TCC"), as a general rule, in joint stock companies, except as otherwise provided under articles of association of a company, shares can be freely transferred.

Notwithstanding the foregoing, according to Article 491 of the TCC, registered shares that have not been totally paid-in, may only be transferred upon the approval of the target company (exceptions to the rule being, share transfers realized by means of inheritance, marital property regime between spouses, or enforcement procedures). In spite of this restriction, the TCC provides that the target company can only refuse to approve the share transfer in the event that the transferee's financial ability raises doubts and thesecurity requested by the target company is not provided by the transferee, if any.

According to Article 491 of the TCC; the articles of association may stipulate that registered shares can only be transferred by obtaining the company's approval. As a very specific mandatory rule of the TCC, Article 493 (7) provides that the articles of association cannot aggravate restrictive conditions for share transfers. However, the articles of association may grant rights to the non-transferring shareholders such as right of first offer, tag-along or drag-along rights.

According to Article 493 of the TCC, the target company may block the share transfer based on an "important reason" (which must be related to the "economic independence of the company", or "composition of the shareholders") as stated under the articles of association, or by offering to purchase the said shares from the transferring shareholder on their actual value at the time of the purchase request, on behalf of the company, its shareholders or third parties.

The transferee may request the commercial court of first instance placed in the company's headquarters to determine the actual value of the sale shares. In case the transferee does not reject the amount determined by the court within one month of the determination, the transferee is deemed to have accepted the company's purchase offer.

According to Article 494, if approval of the company to the share transfer cannot be obtained, ownership of the shares and all rights related thereto shall remain with the transferor. In case the company does not reject the share transfer within three months as of the request date, the approval is deemed to be obtained.

As far as share transfers in limited liability companies are concerned, there are similar restrictive provisions in the TCC. However, as share transfers in limited liability companies present tax disadvantages for the selling side, these types of companies almost never become the subject of M&A transactions which are formulated through share transfers.

In light of the above, by closely observing the requirements of the articles of association and the TCC, required closing actions, approvals or waivers, as the case may be, should be regulated under the conditions stipulated in the precedent section of the share purchase agreement.

Joint stock and limited liability companies are prohibited from acquiring their own shares (also known as "share buybacks") or placing pledges thereon. Transactions in violation of this prohibition are considered null and void pursuant to Article 379 of the TCC. Main purposes of the prohibition under the TCC are to preserve the company's share capital, to protect the interest of the creditors, and to prevent unequal treatment among the company's shareholders. There are certain exceptions to these prohibitions under the TCC. Furthermore, companies are not allowed to provide advance funding, loan or security to third persons who contemplate purchasing their shares (the term "prohibition of financial assistance" is also used interchangeably) as per Article 380 of the TCC.

A joint stock company is permitted to acquire or place pledge over its own shares if the total amount of the shares offered for acquisition or as security does not exceed one tenth of the company's share capital, or its issued capital. The board of directors of the joint stock company should be authorized by the general assembly of shareholders to acquire or place pledge over the joint stock company's own shares. The term of the authorization granted to the board of directors cannot exceed five years, uninterrupted. As per the said general assembly resolution, authorizing the board of directors, the general assembly of shareholders shall also determine value of the shares that can be acquired or accepted as pledge, together with the lower and upper limits of the value of those shares.

In addition to the prerequisites explained above, net asset worth of the company following the deduction of the consideration paid for the acquired (or pledged) own shares' should at least be equal to the sum of the share capital and reserve funds of the company, which have to be preserved in accordance with the TCC regardless. Only the shares that are fully paid-in can be acquired or accepted as security by the company.

Exceptions to the foregoing rules are regulated under Article 382 of the TCC. According to the said article, companies may acquire their own shares without being subject to the conditions and restrictions set forth above if a share buyback is made (i) through a decrease in share capital, (ii) as a result of global succession, (iii) in virtue of a legal obligation for acquisition, (iv) as a result of an enforcement procedure initiated for collection of the company's receivables, provided that the concerned shares are fully paid-in, or (v) if the company is engaged in trade of securities.

Even though the TCC allows share buybacks under certain conditions, companies are not entitled to hold such shares perpetually. Acquired own shares must be disposed of as soon as possible, and without causing any loss to the company and in any event, within three years following their acquisition. In the event that a company's own shares are acquired (or accepted as a pledge) in breach of the principles indicated above, such shares must be disposed of (or the pledge should be released, as the case may be) within a maximum period of six months commencing from the date of their acquisition or acceptance as pledge. Unless shares are disposed of in either of the two ways stated above, then the shares must be immediately redeemed by way of decrease of capital.

Financial assistance, as prohibited, is defined as a transaction aiming at provision or grant of an advance, loan or security, entered into by the company with a person who is contemplating to acquire the shares in that company. Prohibition of financial assistance as introduced by TCC under Article 380 serves the same purpose with prohibiting the transactions such as advance funding, loan or security to third parties by the company for the purchase of its shares, and unlawful financial assistance shall be deemed null and void.

There are two exceptions to the prohibition of financial assistance. One is related to transactions which are entered into by credit and financial institutions as a part of their ordinary course of business. The other exception is related to advance payment, loan or security provision transactions through which company acquires its own shares for employees of the company or those of its subsidiaries. However, if (i) transactions identified above as exceptions have the effect of reducing the reserves of the company below levels the company is required to preserve pursuant to applicable law, (ii) rules pertaining to expenditure of legal reserves set out in Article 519 of the TCC are violated, or (iii) rules ordering the company to set aside a reserve fund to cover the costs of repurchasing of its own shares under Article 520 of the TCC are violated, such transactions shall again be deemed null and void.

Additionally, an arrangement between the company and a third party, which grants the third party the right to acquire the company's own shares in the account of the company, company's affiliates, or another company the majority of whose shares are held by the company, shall be null and void, if the transaction constitutes a breach of Article 379 of the TCC.

Therefore, in an M&A transaction structured as a share transfer, the foregoing regulations under the TCC should be observed, especially while structuring the financing of the transaction.

As explained in detail above, pre-closing and post-closing actions of an M&A transaction should be determined considering that corporate governance issues may interrupt both the completion and business continuity. Limitations on share transfers should be taken into account while regulating the contractual undertakings of sellers, conditions precedent, completion actions whereas restrictions on financing should be taken into account while structuring the funding of the acquisition.

Shareholder consent requirement regarding the sale of assets (e.g. subsidiary shares) by joint stock companies

When enacted in July 2012, Article 408/II of the new Turkish Commercial Code has attracted much attention, mostly due to the novelty it introduced, that is the non-transferable rights and duties of the general assembly.

1. Legislative background

Article 408/II lists certain non-transferable rights and duties of the general assemblyand thus designates the general assembly (*i.e.* the shareholder/s) as the sole decision maker with respect to such matters.

According to the said article *'mass sale of significant assets'* requires the shareholders' consent and cannot be realized only by the board of directors.

Given the mandatory nature of the said article, sale of significant assets will be deemed null and void unless the prior consent of the shareholders is obtained through the general assembly. Therefore, while entering into transactions (either for the assets of the company or its shares in subsidiaries) with joint stock companies, it is of utmost importance to assess whether such shareholder consent is required.

2. What is the materiality threshold within the meaning of Article 408/II?

The short answer to the question above is that, for the time being, in the absence of any detailed or case-specific court precedents there is no such threshold available. Neither are there conditions/qualifications set to assess such materiality/significance.

Furthermore, the limited available precedents[1] fall short on providing much needed guidance on the subject except for expressing that the sale of the only asset of a joint company requires the shareholders' consent.

The lack of such threshold is identified also by some scholars[2] and a materiality threshold of "60% of the entire assets of the company" has been suggested[3].

3. What shall be the minimum threshold?

The new Capital Market Law ("CML") also introduced a similar concept[4]. However, similarity between these two concepts goes only as far as the requirement of the shareholder consent. On the other hand, the relevant provisions of the CML and Communiqué Regarding Joint Principles on Significant Transactions and Exit Right ("ST Communiqué") specify the transactions which shall be deemed significant. Furthermore, there is also a threshold set for the 'transfer of or lease out the whole or an important part of the assets or establishing a right-in-rem thereon', which is deemed as a type of significant transactions. According to the ST Communiqué, a transfer or lease out of an asset by the company will be deemed significant (i) if the value of the transferred / leased asset exceeds 50% of the value of the total assets, or the enterprise value of the listed company, or (ii) the revenue generated by such asset is more than 50% of the annual revenues.

While assessing the materiality/significance threshold, the courts could take into account the above mentioned 50% threshold and thus shall apply a higher threshold. This could perhaps be 60% of the total assets of the company as mentioned above, since the law aims at setting a higher protection level for the shareholders of public companies than the non-public companies.

4. Final remark:

As the shares of a subsidiary is also an asset, transfer of such under a share transfer agreement may require a general assembly resolution, based on whether such shares constitute a material/significant asset for the selling entity, as discussed above.

And, as mentioned, if such consent of the shareholders is not obtained where required, the consequence will be the nullity of such transaction. Therefore, the relevant – and fundamental – representations in a contract as to the capacity of the seller under the related

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[1] The precedents studied are only those publicly available. Please also note that, such precedents have been issued prior to the enactment of the TCC regarding the now defunct Article 443 (2).

[2] PASLI, Ali: Anonim Ortaklık Kurumsal Yönetimi (Corporate Governance), İstanbul 2004, p. 97

[3] HAMAMCIOĞLU, Esra, BİÇER, Levent: Anonim Ortaklıklarda Genel Kurulun Devredilemez Yetkileri Kapsamında Önemli Miktarda Şirket Malvarlığının Toptan Satışı ve Uygulama Alanı TTK m. 408/2-f (Within the Scope of General Assembly Nontransferable Authority Mass Sale of Substantial Amount of Company's Assers in Joint Stock Company and Field of Application)

[4] ELİG, Attorneys-at-Law: Legal Insights Quarterly, March 2014 - May 2014.

transaction documents, if any, will be misrepresentations.

In the light of the above, while entering into transactions with joint stock companies, the parties shall liaise with their financial advisors while assessing the value of the target assets in question, and obtain the seller's shareholders' consent when in doubt, and in particular, where the transaction value is more than the half of the value of the total assets of the selling company.

Competition Law / Antitrust Law

The Turkish Competition Board Granted Full Immunity to a Leniency Application Submitted After the Preliminary Investigation Decision and Dawn Raids

The Turkish Competition Board ("Board") concluded the cartel investigation against four fresh yeast producers (October 22, 2014, 14-42/738-346). The investigated companies were Dosu Maya, Mauri Maya, Öz Maya and Pak Gıda. The reasoned decision was published on March 30, 2015. The Board found that Dosu Maya, Mauri Maya, Öz Maya and Pak Gıda violated Article 4 of Law No. 4054 on the Protection of Competition ("Law No. 4054") by jointly setting the sales prices of fresh bread yeast. It imposed a total administrative monetary fine of approximately 14 million TL (€5 million). Dosu Maya received a 1.8% turnover-based fine, which corresponds to approx. 2.7 million TL (€0.9 million), whereas Öz Maya received 5.8 million TL (€2 million - 2.7% of its annual turnover) and Pak Gıda received approx. 5.6 million TL, (€1.9 million - 1.8% of its annual turnover).

The Board also held that Mauri Maya was to be fined at a rate of 4.5% of its turnover, which would have been one of the highest fine rates in the Board's history. However, Mauri Maya, represented by ELIG, had submitted a leniency application, based on which the Board eventually granted full immunity to Mauri Maya even though the case handlers had recommended a fine reduction of 1/3 to 1/2 instead of full immunity. In doing so, the Board considered the quality, effectiveness and timeliness of Mauri Maya's active cooperation throughout the investigation, during which it provided substantive evidence on the existence of the cartel. The Turkish Competition Authority ("Authority") had obtained documents which at best vaguely hinted at the appearance of a vertical violation during the dawn raids, but no evidence of a cartel.

This fresh yeast decision marks the beginning of a new era in the implementation of leniency programmes in Turkish competition law: It is the first decision of the Board where it granted full immunity, based on Article 4/2[5] of the Regulation on Active Cooperation for Detecting Cartels, to a leniency applicant who submitted the leniency application after the initiation of the preliminary investigation and after dawn raids took place. For the first time an applicant was given full immunity after the dawn raids, on the basis of the added value and substantive evidence brought in by the applicant. The fresh yeast decision encourages cartelists to apply for leniency even in cases where a preliminary investigation has already been initiated and even where the Authority has already conducted dawn raids to search for evidence. The case is therefore expected to result in an increase in the number of leniency applications in Turkey in the near future.

[5] The first applicant following the Board's preliminary investigation decision can be granted full immunity if the Authority does not have sufficient evidence to find a violation of Article 4 of Law No. 4054.

Turkish Competition Board cleared Coca-Cola from Exclusivity Allegations

Since the beginning of 2014, the Board has been conducting an investigation against Coca-Cola Satış ve Dağıtım A.Ş. ("CCSD"). The investigation was launched into allegations that CCSD violated Articles 4 and 6 of Law No. 4054. Article 4 prohibits anti-competitive agreements, concerted practices and decisions whereas Article 6 prohibits the abuse of a dominant position. The investigation was aimed at determining whether CCSD engaged in exclusive arrangements (*i.e.* agreements and/or practices) that could *de facto* result in exclusivity towards sale points in Turkey.

During the investigation process, the Turkish Competition Authority (the "Authority") conducted several dawn raids and collected detailed information from sale points and CCSD's competitors. The Authority looked into whether CCSD's sales policies and vertical agreements were in line with the Board decision of September 10, 2007, no. 07-70/864-327 (the "2007 Decision"). The 2007 Decision implicitly obliged CCSD to amend its agreements with sales points to eliminate all *de jure* and *de facto* exclusivity arrangements. The alleged non-compliance with the 2007 Decision constituted the basis of the 2014 investigation. The 2007 Decision concluded that;

- CCSD is not allowed to provide any advantage to sales points in the market for Carbonated Soft Drinks (both in on-premise and off-premise sale channels) and condition the advantage upon the relevant sales points not selling CCSD's competitors' products;
- Subject to certain exceptions (*i.e.* tenders and sponsorship agreements), CCSD is not allowed to offer any rebates that reward sales points for equalling or exceeding the purchase amounts in previous years;
- For off-premise sales points below 100 m^2 with no non-CCSD coolers, CCSD should state in the loan agreement that the sales point is free to place competing products in 20% of the cooler;
- For on-premise sale points with no suitable cooler other than those of CCSD, the loan agreement should allow the sales point to place competing products in 20% of the CCSD cooler.

After thorough examination, the Board evaluated whether (i) the promotions, supports or other types of advantages provided to the sales points by CCSD and (ii) other practices of CCSD might be deemed to create *de facto* exclusivity in the market. In this regard, the Board considered the market share fluctuations of CCSD and CCSD's competitors, together with the availability rate of the market players since a potential application of exclusivity by a market player would affect the market share and availability rates of the market players.

At the end of the long in-depth investigation, the Board concluded that CCSD does not conduct any practices towards sales points that could systematically lead to the prevention of competitors from penetrating into the market and/or hinder their activities in the market. As a result, the Board did not find a violation on the part of CCSD.

The Authority published the annual Mergers and Acquisitions Overview Report for 2014 on February 23, 2015

The Authority published the annual Mergers and Acquisitions Overview Report for 2014 ("2014 Report") provides information and statistical demonstration on the merger and acquisition ("M&A") transactions and privatizations (together "Transactions") filed with the Turkish Competition Authority

("TCA") in terms of (i) monetary value, (ii) sector, (iii) transaction type, (iv) origin of parties (*i.e.* foreign-to-foreign, *etc.*) and (v) the gravity of these transactions with respect to the total transactions of the relevant year. The 2014 Report provides that a total of 215 Transactions were notified to the Authority in 2014. The annual Mergers and Acquisitions Overview Report for 2013 ("2013 Report") indicates that the number was 213 for the year 2013.

Out of 215 Transactions, 4 were found to be out-of-scope and 18 were privatizations. Under the classification in terms of origin of parties, 53 M&A transactions out of 193 were carried out between Turkish parties whereas 76 were foreign-to-foreign transactions. The 2013 Report indicates that out of 182 M&A transactions reviewed by the Board in 2013, 68 were foreign-to-foreign. In 2014, 122 M&A transactions out of 215 were Turkey specific, amounting in total to 22.09 billion TL (approximately €7.591 billion and US$10.086 billion). The total value of foreign-to-foreign M&A transactions reviewed by the Board in 2014 is 454.51 billion TL (approx. €156.19 billion or US$ 207.54).

The total value of the Transactions reviewed by the Board in 2014 amounts to 482.38 billion TL (approximately €165.77 billion and US$ 220.26 billion) according to the 2014 Report. On the other hand, the Board reviewed 18 privatization transactions with a total value of 9.193 billion TL (approximately €3.159 billion and US$ 4.198 billion). As is evident from the statistical data provided in the 2014 Report, the greater part of the total value of the Transactions notified in 2014 is heavily based on foreign-to-foreign transactions.

On a final note, the Transactions notified to the Authority in 2014 were concluded on average within 16 days of final submission.

Labor Law

Recent important changes in Labor Law numbered 4857 relating to private sectors

Omnibus Bill No. 6645 (the "Bill") was published in the Official Gazette on April 23, 2015 and entered into force on the same day.

The Bill has amended certain regulations in Labor Law No. 4857 (the "Labor Law"). Accordingly:

- Article 46 of the Labor Law which regulates the durations to be considered as working days has been amended by the Bill. Article 46/3/(b) is now referring to Additional Article 2 which is also added to the Labor Law by the Bill. Per Additional Article 2, employee is entitled to three days of paid leave in case of marriage or adoption; and five days of paid leave in case of death of his/her mother, father, wife/husband, sister/brother or child(ren). Additionally, employee is now entitled to up to ten days paid leave within one year period if s/he has a child who is disabled at the rate of 75% or has a chronic disease.

  Above-mentioned paid leaves shall now be considered as working days.

- Before the entry into force of the Bill, Article 69 of the Labor Law provided that night works cannot be longer than 7.5 hours per day. However, now with the Bill, night works of employees that are working in the sectors relating to tourism, private security and healthcare services may be longer than 7.5 hours provided that the respective employees give their written consent in this regard.

- The Bill has amended Articles 41 (regulating overtime works) and 63 (working durations) of the Labor Law.

Accordingly, working durations of employees who work in underground mines cannot be longer than 7.5 hours per day and 37.5 hours per week. These durations were 6 hours and 36 hours before the Bill.

Litigation

The Applicable Law Arising out of Contractual Relations Including Foreign Element

The contracting parties are entitled to determine the law that will be applicable to their contractual relationship including foreign element(s) (*e.g.* one party being a non-Turkish citizen, the place of performance being outside of Turkey *etc.*). The law that shall apply to any dispute arising from this contractual relation shall be the law that the parties chose.

In case the parties do not specifically determine an applicable law for their contractual relation to the contract, the applicable law shall be determined in accordance with International Private Law and Procedural Law No. 5718 ("IPLPL").

Pursuant to Article 24 of IPLPL, in case parties do not determine the applicable law, the contract shall be governed by the law with which the contract has the closest relation.

The most closely connected law may be determined by virtue of Article 24 of IPLPL. This article stipulates that the most closely connected law is (i) the law of the habitual domicile of the party responsible for the characteristic performance, (ii) the law of the workplace or the domicile (if there is no workplace) of the party responsible for the characteristic performance if the contract in question pertains to a commercial or vocational activity, and (iii) the law that is most closely connected to the contract if the party responsible for the characteristic performance has more than one workplace.

Consequently, Article 24 of the IPLPL introduces that characteristic performance is the essential criteria as a rule of thumb, to determine the most closely connected law. For instance, the characteristic performance in an international sale contract executed between a Turkish seller and an American buyer is the obligation to deliver the goods subject to the contract. Should there be a dispute with regard to this contract in a scenario where the contract does not bear any stipulation on applicable law, the law of the workplace or the domicile (if there is no workplace) of the party responsible for the characteristic performance (*i.e.* delivery) shall be applicable.

Accordingly, Article 24 of IPLPL serves to determine the law that is most closely connected with a particular contract through presumptions. However, paragraph 4 of Article 24 introduces an exception to those presumptions, stipulating, if the contract is connected more closely given the specific circumstances of the case, then this more closely connected law shall be applicable, instead of the aforementioned presumptins of Article 24. Thus, specific circumstances of each case are crucial in determining the applicable law. For instance, the place of performance is accepted to be the primary element for determining the "more closely connected law that shall apply". With reference to our previous example, if the American buyer and Turkish seller agree onUS to be the place of performance, then the applicable law will be the law of the relevant state.

In cases where parties do not specifically determine the applicable law the rule of thumb is that the applicable law is the workplace or domicile of the party undertaking the characteristic performance, unless the circumstances of the case bring a more closely connected law to the equation.

Internet Law

The Draft Law on Data Protection and Exceptions in Prospect

The long-awaited Draft Law on Data Protection ("Draft Law"), which is submitted to the Turkish Grand National Assembly ("TGNA") on December 26, 2014, is based on the European Union ("EU") Directive currently in effect (Directive 95/46/EC – "Directive"). However, EU has already proposed a reform package with respect to the Directive, as the Directive does not meet requirements of the new technological developments. The Draft Law submitted to the TGNA does not encompass the issues discussed in the EU and it appears that the legislators merely took the Directive of 1995 as reference, although it has been 20 years since the Directive was issued.

The Draft Law is in compliance with the Directive overall. However, there is an anomalous provision in the Draft Law which provides broad exceptions for state institutions and organizations (Article 24 of the Draft Law). The provision is against the Turkish law and the purposes of the Draft Law itself, apart from being contrary to the Directive.

According to the article, the provisions of the Draft Law will not be applicable under certain circumstances, including cases where (i) personal data are processed within the framework of the provisions related to intelligence activities under the Law on the Duties and Powers of the Police, the Law on the Organization, Duties and Powers of the Gendarmerie; and Law on the State Intelligence Services and National Intelligence Agency and (ii) personal data are processed for the purposes of making financial research, collecting data, receiving, analyzing, evaluating, studying and sharing with related institutions notifications relating to suspicious transactions and other notifications within the framework of the Law on the Prevention of the Laundering of Crime Revenues, and the Law on the Prevention of the Financing of Terrorism.

The main concern regarding this article is the exception provided to the police, gendarmerie, national intelligence agency and other administrative authorities without indicating any limits or specifying certain circumstances for the application of this exception. If the article enters into force, as is, this might inevitably pave the way for arbitrary implementations of the police, gendarmerie and the state intelligence organization in terms of protection of the individuals' personal data.

This exception conflicts with the purpose of the Draft Law. The proportionality principle should be considered in drafting and implementing laws. Personal data are mostly used in public services and by the administration. Therefore, these wide exceptions provide data breach risks more and are contrary to the Article 20 which considers protection of personal data as a fundamental right. These exceptions lead to discrimination between the state institutions and private sector, although the Draft Law should have been at equal distance to each of them.

The Directive, which constitutes the basis of the Draft Law, excludes from the Directive's scope the processing of personal data in the course of an activity which falls outside the scope of the European Union law and, under any circumstances, processing operations concerning public security, defense, state security and the activities of the state in areas of criminal law. However, the national legislations of the member states provide protection for individuals in these areas as well.

Considering that the Draft Law will be the main regulation pertaining to protection of personal data in Turkey, it might have at least limited the scope of these exceptions at certain point and provide protection for the individuals in order to prevent possible contestable implications of the Turkish authorities (*i.e.* police, gendarmerie and the intelligence agency).

Regarding a similar issue, the Turkish Constitutional Court decided on October 2, 2014 that a provision (Article 3/4 of the Law No. 5651) which authorized the Turkish Information and Communication Technologies Authority ("TK") to obtain traffic data from the operators and in case the judge decides so, present it to the requesting authorities, is against the Turkish Constitution and cancelled the relevant article by stating that the provision is against the Turkish Constitution and "the data requested based on 'traffic data' is directly related to the fundamental principles of the Constitution such as privacy of communication, the freedom of spreading of the thoughts and opinions, the freedom of telecommunication and protection of personal data and collection of these information by TK without any legal ground and/or limitation is against fundamental rights and freedoms".

Therefore, the exemptions granting administrative bodies' excessive and very wide authority to process personal data and excluding them from the application of the Draft Law might also be deemed in violation of the Turkish Constitution as well as the Turkish Constitutional Court's precedents, if these exemptions were to be put under judicial review before the Turkish Constitutional Court.

Telecommunications Law

Recent Amendments on Data Protection to E-Communication Law

On April 22, 2015 Article 51 of the Law No. 5809 on Electronic Communication Law ("Law No. 5809"), was published in the Official Gazette. The the amendment entered into force retroactively and will be effective as of the date of the Constitutional Court's decision which cancelled the amended provision.

As per the relevant provision, personal data should be processed in compliance with the law and in good faith; should be true and current, if necessary; should be processed for certain, clear and legitimate purposes; should be proportionate, limited and restrained with the purpose that they are processed for and retained as long as it is necessary for the purpose.

Electronic communication and relevant traffic data is confidential, in principle. Apart from the cases where the relevant legislation and court decisions stipulate otherwise, listening, recording, storing, intercepting and pursuing a conversation, without the consent of all participants of a conversation, is prohibited.

Apart from the communication purpose, operators may use electronic communication networks for the purposes of storing information in the terminal devices of the subscribers/users or providing access to the stored, only if the relevant subscribers/users are clearly and comprehensively informed of the data processing and their explicit consent is obtained. Operators should take the necessary technical and administrative measures to ensure security of the networks, personal data of subscribers/users and the services they provide.

Personal data may be processed by the Information and Communication Technologies Authority ("Authority") within the scope of Article 49 of the Electronic Communication Law or for public interest, for the performance of the obligations imposed on the operators.

Without prejudice to the relevant legislation pertaining to transfer of personal data abroad, traffic and location data may only be transferred abroad, provided that the data subject explicitly consents to such transfer.

Currently applicable laws allow transfer of data abroad with the data subject's explicit consent. Processing of personal data also captures transfer of data, and Article 20/3 of Turkish Constitution states that personal data may only be processed in cases where it is regulated under the laws or with data subject's explicit consent. In this respect, companies may transfer personal data abroad by obtaining data subjects' explicit consent.

Turkish laws do not define "explicit consent". For proof purposes, explicit consent could be obtained in writing.

Traffic data may only be processed by the persons authorized by the operators for the purposes of management of traffic, interconnection, invoicing, detection of irregularity / fraud and for conducting similar transactions or for resolution of disputes, particularly consumer complaints, interconnection and invoicing disputes. The privacy and integrity of such traffic data should be provided while storing the data until the resolution process of the disputes are completed. Traffic data, which is necessary for the purposes of providing electronic communication services with added value or marketing of electronic communication services, and location data may be processed through anonymizing the data or obtaining explicit consent of the relevant subscribers/users and only by the persons authorized by the operators within the time period and extent that the indicated activities require.

Operators provide to the subscribers/users the opportunity to reject processing of their location data. Apart from the cases where the relevant legislation or the court decisions stipulate, location data and identity information of the relevant persons may be processed, without the explicit consent of the subscribers / users, by the persons who are authorized by the operator, in disaster and emergency situations defined under the Law No. 5902 on the Organization and Duties of Disaster and Emergency Management Presidency and emergency service calls.

Traffic and location data and personal data may be processed within the scope of and limited to examining subscriber / user complaints and monitoring activities.

Within the scope of the services provided under this Law:

(i) Personal data subject to an investigation, examination, monitoring or a dispute should be stored until the relevant process is completed.

(ii) Transaction records regarding accesses to personal data and relevant other systems should be kept for two years.

(iii) Records attesting the consent of the subscribers/users on processing of their personal data should be kept at least throughout the subscription period.

Data categories and the periods for storage of data, which may not be less than one year and more than two years as of the date of communication, are determined by a regulation.

For the purposes of management of risk pertaining to collection of payments and preventing abusive usage, operators may process and share the subscriber's invoice amounts and payment information regarding electronic communication services with the other operators.

Operators are liable for ensuring security, confidentiality of personal data and use of it in accordance with its purpose within the scope of the Electronic Communication Law.

Law of Obligations

A Peek Inside the New Law on Regulation of Retail Trade

The Law on Regulation of Retail Trade ("Law") governing the fundamentals on the retail market practices, is published on the Official Gazette dated January 29, 2015 and entered into force as of its publication.

As stated in the Law's preamble, the idea behind the Law appears to be preventing complex and non-standardized transactions engaged with during business establishments, in payment delays and in practices that encourage unfair competition of up and coming organized retail business.

With this article, we aim to provide an overview of the significant regulations introduced with the Law.

(i) New Descriptions in the Legislation

One of the significant advantages of the Law is the introduction of new definitions on retail practices such as "chain store", "department store" and "retail business" along with the other terms used in retail business.

Article 3 of the Law, in this respect, describes the chain store as "establishment in which variety of similar consumer products are being offered for retail sale, partially or in full, regardless of their brand, which is being operated under the ownership of the same legal entity or real person under same the headquarters, which has at least five branches, one of which is at the least qualified as a department store or has at least ten branches with less than four hundred square meters of sales area for each".

The Law also defines the term department store as "establishment with at least four hundred square meters of selling area in which variety of similar consumer products are being offered for retail sale, partially or in full, regardless of their brand".

Furthermore, shopping malls, department stores, chain stores, special authorized establishments and retail dealers and other artisans and tradesman working in retail commerce will be deemed to have engaged in retail business.

(ii) Expediting and Simplifying the Bureaucratic Procedure

The Law further introduces a new concept named "PERBIS"; an electronic data system which will be established and monitored by the Ministry of Customs and Trade for monitoring the opening, closing and operational processes of establishments in retail business.

Pursuant to Article 5, applications for a business license will be made through PERBIS and be evaluated by the authorized institution in 3 business days. Upon the evaluation, the application will be finalized and the business licenses will be granted again, through PERBIS.

This being said, as per provisional Article 1 of the Law, opening and operation procedures will be carried in accordance with the the current legislation until PERBIS is entirely installed and the business licenses issued before the enactment date of the Law will remain valid.

(iii) The Protection Granted To The Manufacturers

The Law also looks out for manufacturers and suppliers by setting forth a provision to prevent department stores, chain stores, special authorized establishments and retail dealers with high market share, from arbitrarily charging their operational expenses to manufacturers and suppliers.

Article 6 of the Law prohibits department stores, chain stores, special authorized establishments and retail dealers' requests for contribution payments from manufacturers and suppliers. However, such prohibition is limited with contribution payments that do not directly affect the product demand, such as payments for store openings and constructions, endorsement gap, participation payments for credit cards and to be made to banks.

Second paragraph of Article 6, as an exception to the foregoing rule, embodies that contribution payments affecting product demand (*e.g.* advertising, announcement and shelf assignment) can be requested by retail establishments provided that the nature and rate of such contribution payment is contractually outlined, that contribution payment is limited with the contract period and the products are offered for sale until the end of the contractual period.

For department stores, chain stores, special authorized establishments and retail dealers that breach Article 6, a penalty equivalent to the contribution amount received for each store will be imposed. Also, repetition of the breach in one calendar year will lead to reduplication of the penalty payment.

(iv) Restriction on Duration of Sales Campaigns

Pillars of sales campaigns offered to consumers are governed under the Consumer Protection Law and its secondary legislation. The Law, while referring to the Consumer Protection Law, sets forth a new regulation which restricts the duration of sales campaigns.

As per Article 9, the duration of sales campaigns cannot exceed 3 months in case of store openings, assignments, closings as well as address and activity area changes and cannot exceed 6 months in case of liquidation under the Turkish Commercial Code. In any case, retail establishments are not allowed to organize sales campaigns with an indefinite start and expiry period.

The Law enforces a penalty amount of TL 5,000 in case of breach of the foregoing restriction. Five times of such penalty payment will be imposed to department stores, chain stores, special authorized establishments and retail dealers and ten times of the penalty payment in case of a breach of a shopping mall. Also, the repetition of the breach in one calendar year will lead to reduplication of the penalty payment.

(v) Establishment of the Retailers Council

Lastly, the Law introduces the concept of a "Retailers Council", which is to be coordinated by the Ministry of Customs and Trade.

Objective of the establishment is listed under Article 15 of the Law as (i) information and opinion exchange on conduct of retail commerce in accordance with the Law, (ii) contribution to the formation of sectorial policy, (iii) detecting problems, (iv) determination of measures to be taken and

(v) provision of collaboration between relevant establishments and institutions.

The Retailers Council will convene once a year for the maintenance of the listed standards.

Real Estate Law

Immediate Expropriation

Expropriation refers to the process of limiting the right to property for public interest and also to the act of taking private property belonging to private persons by the administration through refunding the current value of the expropriated property. In certain urgent situations and under specific circumstances, the administration has the right to carry out an expedited procedure called "immediate expropriation"

Immediate expropriation is an exceptional method of expropriation regulated under the Article 27 of the Law No. 2942 on the Expropriation Law ("Law No. 2942"). According to this article, immediate expropriation can only be carried out under very restrictive conditions, which includes: (i) an emergency under the provisions of the Law No. 3634 on National Defense Obligations; (ii) extraordinary circumstances as stipulated in special laws; or (iii) a decision of the Council of Ministers in case of an urgency.

In recent years, immediate expropriations have been carried out especially with regard to energy and urban transformation and renewal projects.

According to Article 27 of the Law No. 2942, upon request of the administration, value of a private property is appraised by the experts within seven days and the seizure is made after the appraised amount is deposited to the bank by the administration in the name of the owner.

Subsequent to this deposit, the voucher is submitted to the court, thus the property gets seized (expropriated) and the decision is served on the property owner. If the property owner accepts the payment and assigns the property on behalf of the administration at the local Title Deed Registry after being served, expropriation process is deemed finalized upon registration as Article 27of the Law No. 2942 suggests. However, if the property owner does not accept the amount of the payment; the administration must file a lawsuit for value appraisal and registration of the property in the name of the administration in the Civil Court of First Instance. Upon acceptance of the lawsuit by the court, the administration can execute the immediate expropriation process.

Following finalization of the process, the administration may request for evacuation of the expropriated property registered in the name of the administration at the Title Deed Office, by virtue of Article 20 of the Law No. 2942. The execution officer, who is responsible for this evacuation process, makes an announcement to the users of the property to evacuate the property within fifteen days. At this stage, no objection can impede the evacuation process and the court cannot by any means take any decision having the effect of a precautionary measure against the evacuation.

As per Article 20 of the Law No. 2942, the owner of the property has the right to reclaim the property back, should the administration fail to take any action or to install any facility in line with the purpose of expropriation or transfers property to a third party thus leaves the property as received. In such a case, the property owner is entitle to reclaim the property by paying back the expropriation cost together with the legal interest accrues from the date the expropriation cost is paid by the administration. However, the owner's rights related to the expropriated are subject to twenty years of lapse of time.

White Collar Irregularities

Convergent Anti-Corruption Legislation Does Not Abolish the Need for Localization of Compliance Programs

Transparency International, one of the most prominent civil society organizations, defines corruption as the abuse of entrusted power for public gain.[6] Although at first sight, this definition sounds overarching, over the years, with the help of civil society organizations and the governments legislation-wise the definition of corruption gets wider and closer to Transparency International's. The first legislation that outlawed exporting corruption was the US Foreign Corrupt Practices Act ("FCPA") of 1977, in the aftermath of the Watergate scandal. In 1997, partly to create a level-playing field for the American businesses acting abroad and in order to prevent the indisputable negative effects of foreign bribery, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Convention") was opened to signature. From then on, not just the bribery of public officials, but also the bribery of foreign public officials would be illegal in the signatory countries. However, what brought corruption to the top of the agendas of multinational corporations were not these developments, but rather the rigorous enforcement of the FCPA in the recent years. Typically, multinational companies face hundred million dollar fines for FCPA violations, possibly by their subsidiaries, or even their distributors in foreign countries. In 2012, UK also enacted the UK Bribery Act ("UKBA"), the UK counterpart of the FCPA, adding to the increased enforcement chances of foreign bribery legislations.

This legislative enforcement scheme has captured the attention and raised awareness of multinational corporations on corruption For the legal practitioner, such rising awareness translated itself into more training requests, more questions on the compliance of daily dilemmas faced by the employees and finally, into more internal investigations. As another result of this increased awareness, the private sector increasingly became active on not just the enforcement but the policy making side of efforts to combat corruption.

Pursuantly, the policy making side regarding the making of new legislation and enforcement trends, witnesses constant progression through discussions in the international arena, propelled by non-governmental organizations, private sector and governments. Participation of different actors from differing jurisdictions could result in convergent policy preferences both in the legislation and enforcement trends. However, no matter how similar is the legislation in different jurisdictions, the way one may encounter corruption always differs in accordance with cultures and corruption perceptions. Hence, the multinational companies are recommended to obtain advice from local counsels on anti-corruption matters related to their commercial activities.

A global look at the anti-corruption legislation around the world

Multinational companies face the challenge of complying with a plethora of different anti-corruption legislations in different jurisdictions. However, when dealing with compliance programs and trainings whose main aim is to communicate to the employees

[6] https://www.transparency.org/whatwedo

what to do and what not to do in anti-corruption matters, the anti-corruption legislations generally prohibit the same thing, be it the FCPA, UKBA or local legislation. To put it simply, multinational and local companies should not provide advantages to anyone, in order to secure an act from these persons. Although traditionally, the meaning of "anyone" was narrow so as to solely mean public officers, with time, this meaning came to include also the foreign public officials and private individuals, coming closer to the Transparency International's definition of corruption.

Turkish Legislation

The development of the Turkish anti-corruption legislation is no exception to the trend defined above. Previously, the bribery provision of the Turkish Criminal Code only criminalized bribery of public officials. Following Turkey's ratification of the Convention in 2000, Turkey amended its legislation to criminalize the bribery of foreign public officials. Through time, the definition of foreign public officials were widened and distilled, until it complied with the meaning ascribed to the concept in the Convention. In 2009, as a result of the pressure from the OECD Working Group on Bribery, the Law on Misdemeanors was amended to sanction legal persons in case bribery was committed within scope of their activities by persons representing them. Finally in 2012, the Turkish Criminal Code was amended to include private commercial bribery.

Different Faces of Corruption

This alliance of local legislations with international trends renders the legal landscape more compliance friendly for multinational corporations. This way, at least legislation-wise, multinational corporations do not have to significantly amend the building blocks of their compliance programs, as in a general sense, mentality of corruption and the prohibited acts do not change. However, this is not to discredit the relevance of cultural adaptations of compliance programs. Accordingly, as cultures take a different form, so does the forms of corruption.

Multinational companies' compliance programs and anti-corruption trainings should be adapted to cultural and perception sensitivities. For example, in emerging markets where a gift giving culture or philanthropic culture persists, bribes may take unaccustomed forms. In these cultures bribery examples could include hotel accommodation, plane tickets, gifts, providing vehicles and even offering a ride in the company jet. However, more subtle examples also exist. These could include provision of loans, providing business / job for a relative, providing scholarship to a person related with the targeted person, donation to a designated charity or covering the medical expenses of the relevant person.

Some of the examples above may easily be perceived to be legal deeds as opposed to corruption, and the employee may engage in them without having any intention to engage in a corrupt act. This is why it is vitally important for multinational companies to retain local counsel, within scope of their compliance programs.

Conclusion

The article above suggests that due to constant interaction between private sector, civil society organizations and governments in the international arena, the local anti-corruption legislations tend to converge, leading to a more compliance friendly environment for multinational companies. However, this is not to ignore the importance of cultural adaptation when it comes to anti-corruption systems of multinational companies. Ultimately, multinational companies are advised to retain local counsels when adapting their compliance programs to the jurisdictions they are commercially active in.

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