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Preface to the March 2016 Issue

This quarter has been a vibrant one in terms of domestic legal developments, especially in the field of internet law. To that end, the internet law section in this issue focuses on the decision of European Court of Human Rights regarding the ban on a video sharing website which emphasizes that the access ban decision of Turkish courts does not only violate the rights of the applicants, but also all of the citizens. On the data privacy front, the mobilization of the legislative process suggests that Turkey is on the verge of finally enacting its own data protection law.

This issue, the corporate law front evaluates the prohibitions on company loans and transactions between the company and the board members, where violation of these prohibitions may lead to judicial fines.

The competition law front explores the decision of the Competition Board, where the Board put out a great example about the definition of distinctive market, analysis and the virtue of involving a directly-rejected acquisition transaction. In addition, this issue analyzes a case where the Competition Board found behavioral remedies acceptable for eliminating competitive concerns.

Finally, on the white collar irregularities front, this issue delves into the Turkish anti-money laundering regime, a subject that is especially of concern to financial institutions.

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

March 2016

Corporate Law

Prohibitions on Related Party Transactions and Financing in Joint-Stock and Limited Liability Companies

Prohibition on Transactions between Board Members and the Company

Article 395/1 of the Turkish Commercial Code, numbered 6102, ("TCC") prohibits board members of joint-stock companies to enter into any type of transactions with the company whether on their own behalf or on behalf of a third party, without obtaining the permission of the general assembly. Otherwise, the company may claim such transaction to be declared null and void, whereas the other party may not make such a claim.

The board members may enter into transactions with the company upon permission of the general assembly, which can be granted either for a particular transaction or in general manner. On the other hand, it is the common practice to include an article in the agenda of the general assembly meeting for the purpose of granting such blanket permission to board members. Since there is no provision seeking a special quorum regarding the meeting and decision quorum for such permission, the ordinary quorum shall be applied. However, the board members who are also shareholders of the company cannot cast vote on this agenda item in the general assembly meeting (TCC 436/1).

In case the board member is also the sole shareholder of the company, the foregoing prohibition on transactions will not apply.

In other words, shareholders, are allowed to enter into any transactions with the company without needing the permission of the general assembly.

Furthermore, the above is not applicable also to the managers in limited liability companies.

1. **Prohibition on Companies to Grant Loans to Board Members and Shareholders**

   a. **Prohibition on Company Loans Granted to Board Members Who are not Shareholders**

Another limitation applicable to board members of a joint-stock company concerns loans to be granted to them by the company. As per Article 395/2 of TCC, joint-stock companies are not allowed to grant loans in cash to non-shareholding board members and their non-shareholding relatives. Furthermore, the company cannot provide suretyship, guarantee and security to them, or assume or take over their obligations. Otherwise, creditors of the company may directly claim such amounts from the non-shareholding board member or their relatives.

As per Article 644/1(b) of TCC, the above mentioned prohibition shall also apply to limited liability companies, except for the right of the creditors to pursue the directors or their relatives.

Without prejudice to Article 202 of TCC, group companies may stand sureties or provide guarantees for each other. Please note that Article 562/5(c) of TCC provides for a judicial monetary fine not less than three hundred days for each person breaching the above mentioned prohibition.

   b. **Prohibition on Company Loans Granted to Shareholders**

Pursuant to Article 358 of TCC, shareholders of a company may not be indebted to the company if (i) there are outstanding obligations concerning capital contributions, and (ii) the sum of the company's profit and its free reserves is not sufficient to recoup the losses from the previous years. The loan mentioned herein is also a cash loan as in Article 395 above. In case there is only one shareholder in the company, the loan agreement between such shareholder and the company should be in writing.

However, shareholders assuming debt in violation of this prohibition will not face any sanctions, where the persons extending such loans will face a judiciary monetary fine of at least three hundred days.

All these prohibitions are also applicable to limited liability companies.

Banking and Finance

The New Regulation and the Communiqué on Repo Transactions

A new regulation and a new communiqué on repo transactions have been published on the Official Gazette, dated December 6th, 2015 and numbered 29554. Both pieces have entered into force on the same date, as per their enforcement provisions. Our aim is to provide the reader with brief information as to the content of both pieces.

1. **Regulation on the Repo and Reverse Repo Transactions to Be Carried out by the Banks**

The Banking Regulation and Supervision Agency ("Agency") has recently published the Regulation on Repo and Reverse Repo Transactions to Be Carried out by Banks ("Regulation") on the Official Gazette, dated December 6th, 2015 and numbered 29554.

(i) Scope

The Regulation shall apply to repo and reverse repo transactions, which take place between banks, themselves, or between banks and real or legal persons as per Article 2 of the Regulation. Same article explicitly leaves (i) the repo and reverse repo transactions, which take place between banks and the Central Bank of the Republic of Turkey ("Central Bank"), within scope of open market operations, and (ii) the repo and reverse repo transactions, which are to take place in foreign over-the-counter markets between banks and other banks and financial instutions, under certain agreements (except for Article 10 of the Regulation), out of scope of the Regulation. The Central Bank shall also be exempt from any obligations arising under this Regulation.

(ii) What Constitutes Repo Collateral

Article 5 of the Regulation stipulates the financial instruments that could be used as repo collateral. Accordingly,

- debt instruments issued by the Turkish state instutions, either abroad or in Turkey,

- debt instruments issued by issuers resident in Turkey, either abroad or in Turkey,

- shares determined by Borsa İstanbul A.Ş. ("Borsa Istanbul") to be subject to repo and reverse repo transactions in Borsa Istanbul markets,

- liquidity bills issued by the Central Bank, and

- other debt instruments to be determined by the Agency

are among the instruments, which could be used as repo collateral.

(iii) General Principles Applicable to Repo and Reverse Repo Transactions

Article 8 of the Regulation sets forth certain principles, with which banks should comply when engaging in repo and reverse repo transactions. Accordingly, the Agency seeks that there exists a written framework agreement between the parties, which shall stipulate the general framework of the transactions to take place; that the transactions and related payments take place in accordance with the said agreement; that the repo collateral should be received in accordance with the said agreement and deposited by the relevant bank in accordance with Article 9 of the Regulation; that the collateral is returned upon receipt of payment by the relevant party, again in accordance with Article 9 of the Regulation. The Agency does not seek the existence of a framework agreement with respect to the repo transactions to take place in Borsa Istanbul between its members.

The aforementioned Article 9 requires that the banks deposit repo collaterals with İstanbul Takas ve Saklama Bankası A.Ş. (as known as Takasbank) ("Settlement and Custody Bank") or its correspondents, as per the rules set out by Settlement and Custody Bank. That said, this requirement shall not apply to foreign repo and reverse repo transactions, subject of which are repo collaterals traded in foreign exchanges or other organized marketplaces.

The Regulation also sets forth certain limits regarding the transaction amount, and brings a disclosure obligation to banks, with respect to the transactions they are going to engage in, in markets outside Borsa Istanbul.

2. **Communiqué on the Principles Regarding Repo and Reverse Repo Transactions to Be Carried out by Intermediary Institutions**

On the same issue of the Official Gazette, on which the Regulation was published, the Capital Markets Board ("Board") has published the Communiqué on the Principles Regarding Repo and Reverse Repo Transactions to Be Carried out by Intermediary Institutions (III-45.2) ("Communiqué"). The Communiqué, as the Regulation, came into force, with its publishing on the Official Gazette. Doing so, the Communiqué abolished the Communiqué on the Purchase and Sale of Securities with the Undertaking of Repurchase or Sale (Series: 5, Number: 7). The Communiqué shall apply to the repo and reverse repo transactions, which are to take place between intermediaries, themselves, or between intermediaries and real or legal persons as per Article 2 of the Communiqué. Same article explicitly leaves the repo and reverse repo transactions, which are to take place with the Central Bank, within scope of open market operations, out of scope of the Communiqué. Furthermore, the Communiqué stipulates that the intermediaries cannot engage in repo and reverse repo transactions, which fall out of scope of the Communiqué.

The Regulation and the Communiqué are very similar in content. These, together with the simultaneous publishing of both pieces on the Official Gazette, suggest an intentional and explicit cooperation on the regulation of repo and reverse repo transactions, on part of the Agency and the Board.

Capital Markets Law

Companies Required to Implement the "Corporate Governance Principles" and "Mandatory Principles"

The latest Communiqué by the Capital Markets Board on corporate governance issues (II-17.1) (the "Communiqué") was published in the Official Gazette dated January 3rd, 2014 and numbered 28871. The Communiqué entered into force on the date of its publication.

In general, it is clear that the number of mandatory provisions has increased compared to the previous regulation on the subject, which was set forth by the Communiqué on Determination and Application of the Corporate Governance Principles (IV-56).

1. **Companies which are required to Implement the "Corporate Governance Principles"**

Under the Communiqué, companies whose

shares are traded on either of the National Market, Secondary National Market and Collective Products Market of the exchange are divided into three groups ("Companies") in accordance with their systemic importance considering their market values and the market values of the shares in active circulation. There is no definition of "systemic importance" within the relevant regulations.

Only below stated joint stock companies, shares of which are offered to public are obliged to implement the mandatory Corporate Governance Principles ("Principles"):

a) First group: Any Company whose (i) average market value is above TRL 3 billion, and (ii) average market value in actual circulation is above TRL 750 million.

b) Second group: A Company that is excluded from the first group, and whose (i) average market value is above TRL 1 billion, and (ii) average market value in actual circulation is above TRL 250 million.

c) Third group: A Company that is excluded from the first and second groups, and whose shares are traded on either of the National Market, Second National Market and Collective Products Market.

The average of the closing prices in the second session of the last trading days of March, June, September and December and the percentages of the shares in active circulation are the basis of the calculation of the market price and the price of the shares in active circulation. In cases where different share groups of the same Company are traded on the exchange, all of such groups are taken into consideration. This calculation is made by the Capital Markets Board ("Board") each year in January, in order to re-determine the groups which the Companies belong to, and the list is published in the Board Bulletin.

A Company which is announced by the Board that has promoted to an upper group as a result of the change in its market value and/or percentage of shares in actual circulation becomes subject to the principles governing that new group as of the first day of the year following the year to which the calculation is relevant. Demotion to a lower group shall not require amendment in the corporate governance principles that the Company is subject to.

Compliance with the principles relevant to the new group shall be ensured as of the date of the earliest meeting of general assembly following the announcement in the Board Bulletin of the Board decision on promotion into the new group.

2. Definition and List of "Mandatory Principles"

Principles relevant to Companies are divided into 4 (four) sections as set forth in the annex of the Communiqué, namely; (1) "Shareholders", (2) "Public Disclosure and Transparency", (3) "Stakeholders", and (4) "Board of Directors".

Principles applying to the shareholders of the Companies are as follows: (i) obligation of making announcement of the general assembly meeting together with relevant documentation, and giving information in the corporate website of the Company, as well as at the Public Disclosure Platform, (ii) obligation to respond to shareholders' questions, which do not jepordize commercial secrets, (iii) obligation to include certain transactions with shareholders, who have a management control, are members of board of directors, act as managers with administrative liability and their relatives, in the agenda as a separate item for providing detailed information at the general assembly meeting, and (iv) obligation to obtain the approval of the majority of independent board members for asset and service purchase and transfer transactions, and asset and service sale transactions in case the percentage of the transaction exceeds 10% of the total worth of assets.

Principles applying to the board of directors of the Companies are as follows:

1. In case it has been resolved that the chairman of the board of directors and the chief executive officer/general manager would be the same person, this situation shall be disclosed at the Public Disclosure Platform with its grounds.

2. The number of members of the board of directors shall not be less than five in any case.

3. Majority of the members of the board of directors shall consist of members who do not have an executive duty.

4. There shall be independent members among the non-executive board members, who have the ability to fulfil their duties impartially.

5. The number of independent board members cannot be less than one third of the total number of members of the board of directors. In any case, the number of independent board members shall not be less than two. This criteria shall not apply to certain third group Companies and "joint ventures" as defined under the Communiqué. Two independent board members shall be sufficient in these Companies.

6. Term of office of the independent members of the board of directors shall be up to three years and it is possible for such individuals to be nominated and elected again.

7. Independent members of the board of directors shall meet the criteria listed under the Principles. In cases where there are reasonable grounds, persons who do not comply with one or more independence criteria, may still be elected by the general assembly as independent members of board of directors, limited to a maximum term of one year subject to the opinion of the Board.

8. Nomination Committee shall evaluate proposed candidates for independent membership, report its evaluations and submit its report to the approval of the board of directors. The board of directors shall compile a list of candidate independent members within the framework of the report of the Nomination Committee, and send this list to the Board together with the report of the Nomination Committee and the resolution of the board of directors. A person who has been subject to the adverse opinion of the Board cannot be submitted as a candidate independent member in the general assembly meeting. The Company shall disclose at the Public Disclosure Platform the list of candidate independent members.

9. In case a situation jepordizing the independency of an independent board member arises, this situation shall be immediately notified to the board of directors by the independent board member, in order to be disclosed at the Public Disclosure Platform. In principle, the member who lost his/her independence shall resign.

10. Board of directors shall form the following committees: "Audit Committee" (except for banks), "Committee for Early Detection of Risks" (except for banks), "Corporate Governance Committee", "Nomination Committee", and "Compensation Committee" (except for banks). However, in case a separate nomination committee and/or compensation committee cannot be established due to the structure of the board of directors, corporate governance committee shall fulfil the duties of such committees.

11. Duties, working principles and the members of the committees shall be determined by the board of directors and disclosed at Public Disclosure Platform.

12. Committees shall be composed of at least two members. In case there are two members, both of them, and in case there are more than two members, the majority of them shall be comprised of non-executive members of the board of directors. The chairman of each committee shall be elected from among the independent members of the board of directors.

13. Chief executive officer / general manager can not have a duty in the committees.

There are other secondary principles, which set out the duties and working principles of the committees, as well as remuneration of members of the board of directors and executives.

3. Measures to be taken upon non-compliance with the Principles of Corporate Governance

In cases where compliance is not ensured as set forth in the Communiqué, or within the term granted by the Board, the Board shall be authorized to ensure compliance *ex officio*.

Even a specific time period may not be granted for fulfillment of the obligations, the Board is authorized to request interim injunction, without being required to deposit any security, to file a lawsuit for determination of the activities breaching the compliance obligation, or for cancellation of these activities, to request for a court decision that will reinstitute compliance. A roadmap describing the steps required for reinsituting compliance with principles of corporate governance shall be added to the request to be submitted to the court.

Energy Law

Amendments to the Electricity Market Licensing Regulation

1. Introduction

Electricity Market Licensing Regulation ("Regulation"), introduced by Energy Market Regulatory Authority ("EMRA"), regulates (i) pre-licensing and licensing procedures and (ii) rights and liabilities of pre-license and license holders in the Turkish electricity market.

The Regulation has been recently amended by EMRA with the Regulation Amending the Electricity Market Licensing Regulation ("Amendment Regulation"). The Amendment Regulation has been published in the Turkish Official Gazette on December 23rd, 2015 and entered into force on its publication date.

2. Significant Amendments

The significant amendments made to the Regulation are as follows:

- Legal notifications can be served through registered electronic mail to legal entities in accordance with the Notification Law. In this respect, (i) pre-license or license holder legal entities and (ii) legal entities which applied for pre-license or license are required to inform EMRA of their registered electronic mail addresses until February 23rd, 2016 unless they have already done so.

- Previously, only letters of guarantee was acceptable by EMRA during pre-license and license applications, now alternatively it is possible to submit "cash in TRL currency" instead of a letter of guarantee.

- If EMRA deems appropriate the transfer of an electricity generation license holder's rights and liabilities to another legal entity (provided that the transferee has the same shareholding structure with the transferor), EMRA will determine certain liabilities of the new legal entity and will grant a certain time period. In case such requirements are not fulfilled by the new legal entity within the granted time period, the transfer application will be rejected by EMRA.

Furthermore, following the pre-license and/or license application, in case any of the applicant legal entity's (i) shareholders, (ii) board members (for joint stock companies) and (iii) directors (for limited liability companies) become prohibited from respectively being shareholders, board members and directors in the legal entities applying for licenses within the 3 (three) years following the license cancellation date, EMRA shall grant 90 (ninety) days for such circumstance to be remedied. Otherwise, the legal entity's pre-license and/or license application will be rejected.

- For pre-license applications as to establishment of "national coal" based generation plants, the share capital of the applicant company shall be increased to (i) 1% of the total investment amount provided by EMRA for pre-license application, and (ii) 5% of the total investment amount provided by EMRA for license application.

- The outcome of the environmental impact assessment ("EIA decision") shall have been obtained and submitted to EMRA while making the pre-license applications. Pre-license applications based on wind, solar, hydraulic or geothermal energy are exempt from such requirement.

  The EIA decision as to applications based on wind, solar, hydraulic or geothermal energy should be obtained within the pre-license period. Within 90 (ninety) days following EMRA's decision as to issuance of a pre-license, the pre-license holder shall apply to the relevant authority for the EIA decision.

  Legal entities, whose pre-license applications are at the assessment by EMRA as of the date of the Amendment Regulation, shall be obliged to obtain the EIA decision and submit it to EMRA until December 23rd, 2017.

- EMRA will complete its review on the pre-license application documents within 20 (twenty) days upon submission of the documents. Before the amendment, EMRA had 10 (ten) days for reviewing the pre-license application documents.

- In case there is a missing document and/or information among the pre-license application documents based on "wind and solar energy", such applications will be returned to the applicant without any further evaluation. For other pre-license applications, in case of a missing document and/or information, an additional 15 (fifteen) days will be granted to the applicant to complete the missing document and/or information.

- After obtaining an electricity generation license on a land, also landowners may apply for establishing a generation plant on this land without a license and such application can be accepted provided that (i) the General Directorate of Renewable Energy approves the technical assessment and (ii) such generation plant does not affect the electricity generation license and any other licensed generating plant.

- Requirement for obtaining relevant opinions from relevant authorities during the pre-license period in accordance with the Regulation on Prohibited Military Zones and Safety Zones has been removed from the Regulation.

- A wind energy based license holder shall be obliged to take the relevant measures requested by Turkish Armed Forces and/or Turkish National Security Organization as to wind turbines which have impact on the relevant systems of these institutions.

- Quality standard certificates which will be submitted to EMRA have been determined based on the license types as follows:

  - Transmission license holders shall be obliged to submit quality standard certificates, to be issued by a certification authority accredited by the Turkish Accreditation Agency, for TS EN ISO 9001, TS ISO 10002, TS 18001 and TS EN ISO 14001 standards.

  - Market operation license holders shall be obliged to submit quality standard certificates, to be issued by a certification authority accredited by the Turkish Accreditation Agency, for TS EN ISO 9001, TS ISO 10002 and TS 18001 standards within 24 (twenty four) months after obtaining the license.

  - Distribution license holders shall be obliged to submit quality standard certificates, to be issued by a certification authority accredited by the Turkish Accreditation Agency, for TS EN ISO 9001, TS ISO 10002, TS 18001 and TS EN ISO 14001 standards within 24 (twenty four) months after obtaining the license.

  - Supply license holders shall be obliged to submit quality standard certificates, to be issued by a certification authority accredited by the Turkish Accreditation Agency, for TS EN ISO 9001, TS ISO 10002, TS ISO/IEC 27001 standards within 24 (twenty four) months after obtaining the license.

- Parties already holding licenses as of the date of the Amendment Regulation shall be obliged to submit the applicable quality standard certificates to EMRA until December 23rd, 2017.

- License holder legal entities shall make relevant notifications to EMRA as to their activities in accordance with provisions of the Regulation on Notifications in the Energy Market.

- The exceptions as to circumstances which are not deemed as changes in pre-license holder's shareholding structure have been extended. In this respect, change of direct or indirect shareholding structures in the pre-license holder company due to (i) public offering of the license holder or its direct or indirect legal entity shareholders and (ii) exercise of a right of first refusal are no longer deemed as change of shareholding structure.

- In case EMRA approves a license holder legal entity's merger or spin off transaction and determines any liability, it will also provide certain time period for fulfillment of such requirements. In case such requirement is not fulfilled within the granted time period, EMRA will cancel such approval as to the merger or spin off transaction.

- For the year 2017, the procedure for pre-license applications as to establishment of wind energy based generation plant will be as follows:

- Turkish Electricity Transmission Corporation ("TEIAS") will inform the wind energy based generating plant capacity for the year 2017, for the following 5 (five) years and 10 (ten) years to EMRA within 3 (three) months as of December 23rd, 2015.

- As of TEIAS's notification, within first 5 (five) days in the following sixteenth month, EMRA will accept the pre-license applications as to establishment of generation plant wind energy based.

3. Other Amendments

Other than the amendments summarized above, some other provisions of the Regulation as to amendment procedures of pre-licenses and licenses, license fees, recording guarantees as revenue have also been revised. Some provisions of the Regulation have been clarified and simplified in terms of wording.

Also, Appendix - 1 (Petition for License Application) and Appendix - 2 (Petition for Pre-license Application) have been updated. Appendix - 3 (Petition for Pre-license/License Amendment Application) has been added to the Regulation.

Competition Law / Antitrust Law

Competition Authority Once Again Recognizes Attorney-Client Privilege Principles (02.12.2015, 15-42/690-259)

It is understood from the published reasoned decision that the Competition Board ("Board") conducted an on-site inspection at Dow Türkiye Kimya San. ve Tic. Ltd. Şti. ("Dow") as part of a preliminary investigation. Attorneys for Dow filed a request with the Competition Authority for the return of some of the documents collected at the dawn raid, claiming that some of such documents benefited from the attorney-client privilege. They requested these documents to be returned without being used as evidence. The request prompted a decision, which includes the broadest clarifications on attorney-client privilege up to day in Turkish competition law enforcement (02.12.2015, 15-42/690-259).

This is not the first time the Turkish competition law circles witnessed a hot talking point on attorney-client privilege. In Sanofi (20.4.2009, 09-16/374-88) and CNR (13.10.2009, 09-46/1154-290), the Board clearly recognized the attorney-client privilege for independent attorneys' work products. Those decisions discussed the matter in several ways – yet the scope of these discussions had not gone so far from mentioning some well-known basic principles and EU practices. Thanks to the new Dow decision, the Board has now clarified several practical uncertainties and recognising once again the attorney-client privilege principles, shedding useful light on similar cases in the future.

The Board defined the "legal professional privilege" not just for the purposes of the immediate case but also in order to reflect Board's view on the subject in general. The Board's comprehensive explanations regarding the legal professional privilege's definition, scope and boundaries connote that the decision will be referred as a Board precedent in future matters related to attorney-client privilege.

The bottom line of the decision is that correspondences with independent attorneys will very well continue to benefit from the privilege. What the decision does is to clarify certain practical formalities that need to be followed to effectively invoke the privilege.

The decision notes the following items and lays down the following principles, which are, according to the Board, necessary to be able to effectively rely on the privilege: (i) correspondences with an independent attorney (*i.e.* without an employment relationship with her/his client) fall into the scope of attorney-client privilege and shall be protected, to the extent it aims at the client's right of defence, (ii) this protection covers the correspondences made in relation to the client's right of defence and documents prepared in the scope of independent attorney's legal service, (iii) correspondences that are not directly related to use of the client's right of defence or that aim to facilitate/conceal a violation are not protected, even when they are related to a pre-investigation, investigation or inspection process, (iv) the owner of these documents must invoke and justify their request/objection for privilege with solid reasons, including the source and addressee of the document, purpose of the document and obligations and liabilities of the parties. More importantly, the decision suggests that the privilege must be invoked during the on-site inspection and put into writing in the dawn-raid affidavit. To that end, entities targeted with a dawn raid should make sure that their objection is well documented in the affidavit in instances where they are represented by an independent attorney qualified to practice in Turkey, concerning the legal advice of such attorney, if it were to be taken.

Ever since Sanofi and CNR, correspondences with independent attorneys fall under the protective cloak of the privilege and this case is no exception. Throughout the history of the debate, ELIG's firm position has always been in favour of a similar treatment for correspondences with in-house lawyers as well. Indeed, in an ideal world, the privilege must not stop at correspondences with independent attorneys – it must extend beyond it to cover correspondences with in-house lawyers. The very fact of an in-house lawyer being an employee must not affect her/his position to defend the client in legal matters. However, since Akzo Nobel (EU Commission Case T-125/03 ve Case T-253/03), in-house attorneys have not been protected under attorney-client privilege, also in Turkey.

The decision is a good candidate of being a benchmark and a source of citation in future privilege cases in that it lays down a useful base on which to successfully defend a privilege case. It does nothing to limit the boundaries of the privilege but rather recognises the principles of the attorney-client privilege and poses the principles of effectively using it.

As with the 3M case of ELIG, which was the very first decision to secure the return and exclusion of privileged documents, the Turkish Competition Board also recognized the privilege and ordered for the return and exclusion of some of the documents in the recently published Dow case.

The Turkish Competition Board Refuses to Clear Setur's Acquisition of Sole Control over Beta Turizm and Pendik Turizm as the Phase II Review is Concluded

The Turkish Competition Board ("Board") published the reasoned refusal decision on the transaction concerning the acquisition of sole control over Beta Turizm and Pendik Turizm by Setur, a wholly-owned subsidiary of the Koç Group, ("Transaction") on the grounds that the Transaction will lead to the creation of dominant position and thereby restricting competition in the relevant markets (09.07.2015, 15-29/421-118). Even though Setur offered to exclude the acquisition of the operating rights of Kalamış Marina, the Board decided that such commitment is not sufficient to remove competition law concerns raised by the Transaction. According to the Board, the acquisition would grant Koç Holding the right to operate Istanbul City Port Marine, Göcek Village Port Marine and Göcek Exclusive Marine, allowing Koç Holding to strengthen its position in the marine management sector. The decision stood out among the Board's former decisional practice through its relevant product and geographical market definitions and analysis, as notably criticized in the dissenting opinion of the three Board members. The Board defined one of the relevant product market as the "mooring services rendered in marinas and boat parks market" and its geographical market as "Aegean and Mediterranean Sea coastal line" and for the Istanbul City Port, as the "districts of Adalar, Ataşehir, Beşiktaş, Beyoğlu, Çekmeköy, Kadıköy, Kağıthane, Kartal, Maltepe, Pendik, Sancaktepe, Sultanbeyli, Şişli, Tuzla, Ümraniye and Üsküdar". For the relevant market of "dry dock area services" which comprises boatyard services and land park services, the Board defined the geographic market as "the cities bordering the Marmara Sea". Finally for the market of "area leasing services" it defined the market as "Turkey".

Three of the Board members dissented. The dissenting opinion remarks the problematic aspects of the market definition of the Board in the sense that it deviated from the Board's decisional practice and that the arguments lacked sufficient substantive research of the dynamics of the case. Namely, the relevant geographic market is defined based on the districts located in the 40-square-kilometer area from Istanbul City Port considering the addresses of its yacht owners. Nevertheless, the dissenting opinion criticizes this approach by underlining that the data set of 5,585 contracts (41%) was taken into account out of 13,487 in defining the scope of the geographic market as opposed to its precedents where the geographic market is defined as "Istanbul".

As for the relevant product market, the dissent criticizes that the case handlers excluded fishing ports in defining the scope of the relevant product market on the grounds that the services provided by fishing ports are not substitutable to marines in terms of location, price, customer profile, and infrastructural insufficiencies. On the other hand, the dissenting opinion noted that the case handlers failed in conducting effective research -in relation to fishing ports and whether they were within the scope of the relevant product market. More precisely, it is revealed that the berthing capacity of fishing ports in Istanbul is 1,674; 869 of which are allocated to yachts whereas the rest (*i.e.*, 756 out of 1,674) is used by fishing boats. To that end, the dissenting opinion argues that the relevant product market should have included fishing ports as more than half of their capacity served for the yacht owners.

In the analysis of the case, the main argument of the case handlers is that (i) the market has a few players, and (ii) the Transaction would limit the consumer choice based on the fact that the combined entity would have a significant market power (*i.e.*, approximately 60-65%) and be able to easily increase the prices. Contrary to this argument, the dissenting opinion posits that the relevant customers are not price sensitive by exemplifying that the demand is higher for the more expensive Kalamış Marine Port although the marine port in the Princess Island is cheaper and it works at a lower capacity in the same geographic market. Moreover, the dissenting Board members implied that Kalamış Marine Port is already capable of increasing its prices without needing the consummation of the Transaction. On the other hand, it is strongly emphasized that since the Turkish Competition Authority ("Authority") is compelled by duty to intervene in cases involving excessive pricing by dominant undertakings, it should not base its arguments on weak possibilities and assumptions.

Overall, Beta Marina decision is of great importance in terms of its distinctive market definition, analysis as well as for the virtue of involving a directly-rejected acquisition transaction.

The Board Grants Conditional Approval to the Anadolu Endüstri Holding / Migros Transaction Following the Phase II Review

The Board issued one of its notable decisions after a Phase II review regarding the acquisition of sole control over Migros Ticaret A.Ş. ("Migros") by Anadolu Endüstri Holding A.Ş. ("AEH"), which controls the major food and beverages companies including Coca-Cola Turkey and Anadolu Efes Biracılık ve Malt Sanayi A.Ş. ("Anadolu Efes"), through the acquisition of the majority shares in MH Perakendecilik ve Ticaret A.Ş. ("MH Perakendecilik"), which is controlled by Moonlight Capital S.A. and is one of the major retailer companies in Turkey (the "Transaction") (09.07.2015, 15-29/420-117). The Board granted conditional approval to the Transaction based on the commitments submitted by AEH with respect to the beer market.

The Board defined several relevant product markets in its decision including the markets for beer, cola drinks, orange (aromatized) soft drinks, soft drinks, bottled water, fruit juices, nectar, iced tea, sports drink, energy drink, olive oil, fast moving customer goods organized retail, wholesale retail, stationery equipment and raw vegetable and fruits. The Board conducted an in-depth analysis on whether the Transaction will result in any input and/or customer foreclosure in each of the aforementioned relevant product markets. Consequently, the Board concluded that the Transaction will not result in the creation or strengthening of a dominant position and thus, not impede competition in the relevant product markets, except the market for beer.

The Board determined that Anadolu Efes, a joint venture created by AEH and SabMiller OLC, holds a dominant position in the market for beer in Turkey. Additionally, the Board determined that Migros is the largest retailer in the beer market regarding the direct sales to consumers. Even though the Board concluded that the Transaction would not result in input restriction in the beer market, the Board came to conclusion that the Transaction would likely lead to customer foreclosure in the downstream beer market and could strengthen the dominant position of AEH. As regards to the coordinated effects of the Transaction, the Board emphasized that Migros Club Card system would allow AEH to access competitively sensitive information and thus, increase the level of market transparency between AEH and its competitors and might strengthen the dominant position of AEH in the downstream beer market. Based on the foregoing considerations, the Board took the Transaction into Phase II review in the first quarter of 2015 due to the competitive concerns that might arise in the beer market.

In an effort to eliminate competition law concerns arising from the Transaction, AEH submitted the following commitments for a period of at most three years: (i) upon the consummation of the Transaction, Migros will maintain its current commercial relations with Anadolu Efes' competitors active in the beer market, engage in commercial relations with potential entrants, not hinder the sales of competing Anadolu Efes products and AEH will not interfere with the commercial relations between Migros and its competitors; (ii) a supervision and report system will be established by AEH for monitoring the implementation of the foregoing commitments; (iii) in order to eliminate the competitive concerns arising from the coordination risks, the operational management, staff and organizational structure of AEH and Migros will be separated and will not share competitively sensitive information of each other's competitors, obtained due to their commercial relations, and (iv) the foregoing remedies will be applicable even if Migros is acquired within the scope of an intra-group transaction that does not lead to a change of control.

The decision in question is the importance of containing detailed analyses on the competitive concerns that could occur in non-horizontal concentrations. In addition, the Board once again found behavioral remedies acceptable for eliminating competitive concerns in line with its recent decisions, such as Bekaert/Pirelli (22.01.2015, 15-04/52-25) and Lesaffre/Dosu (15.12.2014, 14-52/903-411).

The Authority Releases the Draft Block Exemption Communiqué on Research and Development Agreements

The Authority recently released the Draft Block Exemption Communiqué on Research and Development Agreements ("Draft Communiqué") which overhauls the current Block Exemption Communiqué No. 2003/2 on Research and Development Agreements ("Communiqué No. 2003/2") and sets out revised rules for the block exemption regime applicable to research and development ("R&D") agreements in Turkey.

The release of the Draft Communiqué is in keeping with the past practice of the Authority of paying close attention to the developments in EU competition law and seeking to retain the harmony between EU and Turkish competition law instruments. As such, the Draft Communiqué largely resembles the Commission Regulation No 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements ("EU Regulation on R&D Agreements"). Some of the most significant amendments included in the Draft Communiqué are set out in the sections below.

The Draft Communiqué includes a broader section of definitions compared to Communiqué No. 2003/2, and thereby provides further clarification regarding terminology for the concerned undertakings. For instance, the definitions for the terms such as "potential competitor", and "competing undertaking" which were not provided in the current legistlation have been included in the Draft Communiqué.

In regard to the restrictions falling outside the scope of the exemption, the Draft Communiqué has also adopted the approach of the EU Regulation on R&D Agreements and divided such restrictions into two different sections, namely "hardcore restrictions" (which result in the agreement as a whole not being able to benefit from the block exemption) and "excluded restrictions". The current legislation does not include a separate "excluded restrictions" section. Unlike hardcore restrictions, if an R&D agreement includes excluded restrictions, the block exemption may still be applied to the rest of the agreement. In parallel with the EU Regulation on R&D Agreements, excluded restrictions under the Draft Communique include (i) restricting the right to challenge the validity of related intellectual property rights after completion of the R&D, and (ii) restricting the right to grant licenses to third parties to manufacture the contract products or to apply to contract technologies, where the agreement does not provide for the joint exploitation of R&D results or such exploitation does not in fact take place. Under Communique No. 2003/2, both of the above restrictions are considered hardcore restrictions under Article 6(b) and 6(g) respectively.

The Authority has also revised the scope of the hardcore restrictions in the Draft Communiqué in line with the EU Regulation on R&D Agreements. For instance, under Article 8(1)(d) of the Draft Communique, allocation of customer groups or territories, which is regarded as a hardcore restriction without qualification under Article 6(f) of the Communiqué No. 2003/2, no longer constitutes a hardcore restriction where the R&D Agreement includes specialization in the context of exploitation. In parallel with Article 5 (d) of the EU Regulation on R&D Agreements, the relevant article also provides that where the agreement includes exclusive licensing, passive sales to certain customers and territories may also be prohibited.

As in the case of Communique No. 2003/2, compared to the EU Regulation on R&D Agreements, the Draft Communique still includes a higher general market share threshold for the block exemption, permitting R&D Agreements including joint exploitation of results between competing undertakings to qualify for the block exemption where the parties' combined market share in the relevant market does not exceed 40%. In the case of paid-for R&D, where the same party is the financing party in multiple R&D agreements regarding the same contract products or contract technologies, the above market share threshold of 40% is sought for the combined market share of the financing party and all the relevant parties. R&D agreements including exclusive distribution of the contract products still remain the exception to the above market share thresholds, with the market share threshold for such agreements remaining at 20%.

In the light of the above, the Draft Communiqué sets forth explicit and comprehensible provisions that define the conditions of the block exemption applicable to R&D agreements in Turkey. The Authority's taking the EU Regulation on R&D Agreements as a point of reference also furthers the goal of creating harmony between EU and Turkish competition law instruments.

Labor Law

The Precedent in Determination of Number of Workers Showed a Drastic Change

The High Court of Appeals changed its formerly well-established precedent, during a lawsuit about the pre-requisite for filing a reinstitution lawsuit. For the pre-requisite the employer must employe at least thirty employees for his workplace.

In this lawsuit, an employee, requested for reinstitution along with the receivable arising from the unjust termination of labor contract.

On the other side, the defendant argued that in order for employee to be entitled to request for a reinstitution before the court, as a paramount circumstance, at least 30 workers should be employed at the workplace subject to the lawsuit.

As per article 18 of Labor Law numbered 4857 there is no clarification in determination of number of employees. It is not certain, whether to look into only the office in which the plaintiff works, or all other connected (branch) offices affiliated with the employer.

Until this case, the High Court of Appeals maintained its practice that workers, which are employed at all other connected (branch) offices, are to be counted to determine the total number of workers.

Thereupon, one may say that, to a large extent, in this lawsuit too, the High Court of Appeals would call for a decision of reversal since the local court did not regard the workers at the branch offices of the defendant in determination of total number of the employees.

However, unexpectedly, the High Court of Appeals approved the local court's decision of which pointedly concluded that in determination of number of employees, merely looking into the office in which the plaintiff works but not all other connected (branch) offices is esteemed as sufficient.

In a nutshell, since the defendant has 23 workers including the plaintiff, the local court dismissed the lawsuit due to absence of pre-requisite through disregarding the workers of affiliated offices of the defendant. One may argue that, by approving the local court's conspicuous decision, the High Court of Appeal may be in its way to change the long standing precedent.

Litigation

Recognition and Enforcement Procedures of Foreign Arbitral Awards in Turkey

Law on International Private and Civil Procedure numbered 5718 ("Law on International Private and Civil Procedure") stipulates the recognition and enforcement of foreign arbitral awards in Turkey. In order for an arbitral award obtained in a foreign country to gain effect in Turkey, this award must be recognized and approved by Turkish courts. This can be achieved through filing a lawsuit for recognition ("Recognition Lawsuit"), or enforcement ("Enforcement Lawsuit") of the foreign arbitral award.

Recognition Lawsuit and Enforcement Lawsuit differ from each other in terms of their effects. The nature of the foreign arbitral award is the key in determining which of these lawsuits shall be filed. If the arbitral award has an enforceable nature, this award must be made subject to an Enforcement Lawsuit, whereas if there is no executable aspect of the award, a Recognition Lawsuit must be filed. For example, if a foreign arbitral award orders payment of a certain sum in dispute, this decision shall be made subject to an Enforcement Lawsuit. On the other hand, if a foreign arbitral award declares the existence of a certain right, or even receivables, but not payment of the latter, it shall be made subject to a Recognition Lawsuit.

Articles 60 and 63 of the Law on International Private and Civil Procedure stipulate the recognition and enforcement of foreign arbitral awards. Besides, Turkey has been a signatory to New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"). Thus, recognition and enforcement process of a foreign arbitral award in Turkey is also subject to the aforementioned convention. Provisions of the Law on International Private and Civil Procedure apply for enforcement of foreign arbitral awards rendered only in countries those are not parties to the New York Convention.

Article 5 of the New York Convention stipulates that existence of the following circumstances hinders recognition and enforcement of a foreign arbitral award in Turkey:

i. If the subject matter of the dispute submitted to foreign arbitration cannot be resolved by arbitration, due to a restriction in the Turkish legislation.

ii. If the foreign arbitral award is contrary to public order in Turkey.

iii. If at least one of the parties to the arbitration agreement lacks the authority to enter into such agreement, or if the arbitration agreement is invalid for whatsoever reason.

iv. If the party, against whom enforcement of the foreign arbitral award is requested, is not made duly aware of the arbitrator selection or arbitration proceedings or is deprived of having the opportunity to present evidence during the proceedings.

v. If the foreign arbitral award pertains to an issue outside the scope of the arbitration agreement, or exceeds this scope.

vi. If selection of arbitrators or the procedures to be followed by them is contrary to the mutual agreement of the parties, or if there is no agreement on selection of arbitrators, the laws of the country where the foreign arbitral award is rendered.

vii. If the foreign arbitral award has not become final or enforceable as per the laws of the country where the award is given, or annulled by the competent court in the venue where the award is given.

Internet Law

The European Court of Human Rights Decides on the Access Ban of an Entire Video Sharing Website Between May 5, 2008 and October 30, 2010 in Turkey

European Court of Human Rights ("ECHR") announced its decision on the applications regarding access ban of an entire well-known video sharing website ("Website") back in 2008 which lasted for more than two years.

The relevant Website was access banned on May 20th, 2008 as a result of Ankara 1st Criminal Court of Peace's decision 2008/402 Misc. which stated that contents of ten videos broadcasted on Website, were in violation of the Law numbered 5816 on Crimes Committed against Ataturk, which stipulates that those who publicly defame Ataturk's memory will be imprisoned for a period of one to three years. Consequently, the entire Website was access banned in Turkey between May 5th, 2008 and October 30th, 2010. Even though the applicants filed an objection against this decision by stating that the measure had an impact on their professional academic activities and that there was a public interest in having access to the Website, Ankara Criminal Court of First Instance rejected their objection on the grounds that the decision was in compliance with the law and there is lack of standing in terms of the applicants.

In addition to this, a supplementary ban decision was rendered by Ankara 1st Criminal Court of Peace and two of the applicants filed objection against the supplementary decision as well. However, their objection was also rejected by the higher court.

Applicants filed an application before the ECHR on July 20th, 2010 and December 27th, 2010, based on that the decision of Ankara 1st Criminal Court of First Instance's decision was in violation of Article 10 (freedom of expression), Article 6 (right to a fair hearing) and Article 46 (binding force and execution of judgement) of the Convention and requested the ECHR to indicate to the Turkish Government which general measures should be taken to cease the alleged infringements.

ECHR evaluated the applications and decided that the applicants have actively used the relevant video sharing Website for professional purposes; particularly downloading or accessing videos used in their academic work and observed that the Website is a platform which enables information of specific interest, particularly on political and social matters, to be broadcasted, and thus an important source of communication.

ECHR also acknowledged that the Website permits the emergence of citizen journalism which can put across political information not conveyed by traditional media and also states that the Law numbered 5651 does not authorize the blocking of access to an entire Internet site on account of certain specific contents therein.

ECHR quoted Article 8 of the Law numbered 5651 which stipulates that access to a broadcast on the internet may be blocked if there is sufficient suspicion that the content constitutes one of the crimes listed in the law and states that in the case at hand, there is no legislative provision allowing Ankara 1st Criminal Court of First Instance to impose a blanket access ban on entire Website. ECHR also accepted that the applicants can claim to have been affected by the access ban decision even though they are not directly targeted by the decision and that therefore they have victim status as required by the Convention.

As a result, ECHR decided that Ankara 1st Criminal Court of First Instance's decision does not have a legal ground as required by the Convention and that the applicants had not been sufficiently protected.

ECHR's decision is very important as it emphasizes that the access ban decision of Turkish court does not only violate the rights of the applicants, but also all of the citizens. Especially by stating that the Website permits the emergence of citizen journalism, ECHR showed its point of view regarding internet broadcasting and the relationship of freedom of expression with it.

The decision of ECHR is only available in French now. However, the press release of the decision can be found on the ECHR's website.

The Constitutional Court Decides on the Annulment of Certain Provisions of the Internet Law in Turkey

The Constitutional Court granted its decision on the annulment of certain provisions of the Law numbered 5651, the main Internet law in Turkey and it is published at the Official Gazette on January 28th, 2016.

CHP ("Republican People's Party"), main opposition party, applied to the Constitutional Court for partial annulment of Articles 2, 3, 4, 5, 6, 7, 9, 9/A and Additional Article 1 of the Law numbered 5651, and annulment of Article 6/A (the provision which establishes the Access Providers Union) and Provisional Article 3 of the Law numbered 5651.

The Constitutional Court partially accepted the request and annulled certain provisions of the Law numbered 5651.

I. The Constitutional Court decided on the annulment of Article 4/3 of the Law numbered 5651 which reads as follows: *"Content provider delivers the information requested by TIB which falls under the scope of TIB's performance of duties assigned by this Law and other Laws, to TIB as requested and takes the measures notified by TIB"*.

The Constitutional Court stated that the relevant provision is not clear and foreseeable and stated that this section is in violation of Article 20 of the Constitution as it violates the constitutional rights of individuals through data processing, without obtaining the explicit consent of the relevant persons.

II. Article 5/5 of Law numbered 5651, which reads as follows: *"Hosting Provider is obliged to deliver the information requested by TIB in the requested form and take the measures notified by TIB"* is annulled by the Constitutional Court by the reason of this provision grants an uncertain authority to TIB in terms of (i) the conditions of conveying the information requested by TIB, (ii) the nature of the information to be requested by TIB and (iii) for how long the relevant information will be held by TIB.

III. Article 6/1(d), which reads as follows: *"Access Provider is responsible to deliver the information requested by TIB, in the requested form and take measures notified by TIB"* is also annulled by the Constitutional Court with the same reasons of the annulment of Article 5/5.

IV. The Constitutional Court decided on the annulment of the "subsection (d)" indication under Article 6/3 which states that Access Provider that fails to comply with the responsibilities set forth under subsections (b), (c), (ç) and (d) of paragraph 1 shall be imposed an administrative fine of TRL 10,000 up to TRL 50,000.

The Constitutional Court stated that the "subsection (d)" indication will be removed as well, as the decision cancels Article 6/1(d) of the Law numbered 5651.

The annulment decisions on the provisions above will be effective within a year following the publication of the decision at the Official Gazette (*i.e.* January 28th, 2017).

V. One of the important decisions of the Constitutional Court is the annulment of the phrase "contents with similar nature" under Article 9/9 of the Law numbered 5651, which was as follows:

"In case the broadcasts subject to the court's access ban decision, which are in violation of personal rights in the scope of this article, "or contents with similar nature" are also broadcasted at other internet sites, then the relevant decision shall also apply to these addresses upon the relevant person's application to Access Providers Union ("APU")".

The Constitutional Court decided on the deletion of the phrase "contents with similar nature" from this article by stating that as per principle of legitimacy, a law should be clear and concrete, however, the scope of authority granted to APU on access ban of "contents with similar nature" is ambiguous and therefore, does not satisfy the said principle.

Having said that, the Constitutional Court rejected the request for annulment on the remaining provision, which grants an access ban authority to APU on the same contents subject to court orders.

Constitutional Court's annulment decision on this provision is effective as of publication of the Decision at the Official Gazette (*i.e.* January 28th, 2016). Therefore, APU would not be authorized to grant access ban decisions for the "contents with similar nature".

Consequently, the most important two changes that the Constitutional Court may bring in practice with its decision are as follows:

(i) The complainants will not be entitled to request access ban to "contents with similar nature" from APU, without obtaining a new decision. However, in case certain content subject to an access ban decision including violation of personal rights is also broadcasted at other websites, then the relevant order will be also applicable to these contents as well, upon application of complainants to APU.

(ii) TIB will not be entitled to collect data from the operators. Data collection will only be possible, if it is duly requested by the courts based on a criminal investigation and/or prosecution or through the consent of the relevant data subjects.

Data Protection

Turkey is on the Verge of Adopting a Law on Data Protection

Turkey is one of the countries where protection of personal data is expressly protected under the Constitution, as a fundamental right. However Turkey has not managed to accomplish adopting a law dedicated to protection of personal data, despite many attempts and endeavors since 2003. These endeavors have accelerated right after the 64th government was formed at the end of 2015, and eventually, the Turkish Prime Ministry submitted a Draft Law on Protection of Personal Data ("Draft Law") to the Turkish Grand National Assembly ("TGNA") on January 18th, 2016.

Draft Law was also included within the National Program prepared by the 64th government. On December 15th, 2015, a meeting on the Draft Law was held in Brussels, Belgium, with the representatives of the Ministry of European Union, Ministry of Justice, Ministry of Foreign Affairs, Ministry of Interior, European Commission, EUROPOL and EUROJUST. Right after this meeting, the Minister of Justice, Bekir Bozdag gave a speech on the latest developments pertaining to the legislative process regarding the Draft Law and declared that the Draft Law drafted by the Ministry of Justice is submitted to the Council of Ministers' approval. Following these developments the Draft Law was sent to TGNA and the text of the Draft Law of 2016 was shared with the public.

The Draft Law is based on the European Union's ("EU") Directive currently in effect (Directive 95/46/EC – "Directive"), as it was in the previous versions of the draft. Nevertheless, the Draft Law appears to be more consistent version when compared to its previous version. That being said, EU has already proposed and agreed on 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 reasoning of the Draft Law does not discuss or refer to the issues recently discussed concerning data protection.

There are two significant developments in the latest version of the Draft Law. The first one is the definition of "explicit consent", which is the main requirement as to obtaining and processing personal data under Turkish laws. If there were no definitions provided in the Draft Law, this term would have been construed per the general provisions of the Turkish law. However the definition of "explicit consent" under the general provisions of the Turkish law fails to fulfill the needs of perpetually developing nature of the technologies where personal data is required or creates an added value.

For instance, websites that use cookies or does not use cookies but obtain, retain and process your personal data otherwise, usually provide a privacy policy asking its users not to use their services, if they do not agree with the terms of their privacy policies. The consent given by the user in this example might have not been deemed "explicit consent" under the general provisions of the Turkish law. The Turkish law requires an active declaration of intent, which does not meet the demands of both users and the providers any service or good. Now that the term "explicit consent" is defined in the Draft Law in accordance with the Directive, this should fill the gaps for interpreting this requirement more accurately.

The second important point in the Draft Law is the establishment of a new regulatory and supervisory authority. The Draft Law introduces the Personal Data Protection Authority ("Authority"), a new regulatory and supervisory authority, which consists of a Board and a Presidency along with several other administrative departments. The previous version of the draft (December 26th, 2014) only included a Data Protection Board to be established as the regulatory and supervisory authority. The Draft Law vests the Authority with many powers and duties.

The Draft Law indicates that the Authority will be related to the Prime Ministry, instead of the Ministry of Justice, which was assigned as the associated ministry. This amendment appears to be arising administrative law requirements that independent administrative authorities need to be related to a ministry. The Draft Law does not include an explicit assurance of independency, which may from time to time lead to questioning the independency of the Authority, if the Draft Law is accepted by the TGNA and enters into force as is.

Despite the Draft is not in full compliance with the Directive; the Draft Law is still a step forward for the legal framework of the Turkish jurisdiction and an exciting development for all stakeholders in Turkey.

E-Money

Recent Developments in the Non-Cash Payment Regulation

The Banking Regulation and Supervision Agency ("BRSA") has brought certain changes to the Regulation on Payment Services and Electronic Money Issuance and Payment Organizations and Electronic Money Organizations ("Regulation") governing the principles and details as to the authorization and operations of payment institutions and electronic money institutions.

The amendments in the Regulation, most of which pertain to one-off payment transactions and frame contracts, have been introduced on December 26th 2015, with the publication of the Regulation Amending the Regulation on Payment Services and Electronic Money Issuance and Payment Organizations and Electronic Money Organizations ("Amendment Regulation") on the Official Gazette Some of the most substantial changes embodied under the Amendment Regulation are as follows:

***(i)* Scope and Captions**

- The definition of "invoice payment" in Article 3 of the Regulation has been amended.

- A sub clause has been inserted to Article 5 of the Regulation (titled "payment services"), specifying that sub clause 6 of Article 5 (governing the requirement for an agreement for invoice mediations) will not be applied in cases where institutions outsourcing from banks for provision of invoice payment services are clearly authorized through an agreement between the bank and the invoicing authority, for collecting payments on behalf of such invoicing authority.

- Article 8 (2) of the Regulation, listing the documents required for license application to be made by companies having banks or financial institutions established abroad as shareholders directly or indirectly holding more than 10% of the shares and as managing shareholders, has been changed.

- Board of Director's authority to determine the conditions for deputy general manager's attendance to board meetings in the absence of general manager, is removed from Article 16 (1) of the Regulation. Same as before, the board will have to be constituted of at least 3 members and the general manager is a natural member of the BoD.

- Article 5 of the Amendment Regulation amends Article 24 (2) of the Regulation, on calculation of shareholders equity for companies holding shares in banks or financial institutions.

- With the amendment made in Article 29 of the Regulation, the requirement as to the form of contracts (*e.g.* minimum font size of 12) to be executed for one-off payment transactions has been removed and a wording allowing one-off payment transactions to be conducted through a receipt or similar documents instead of contracts, has been added. Also, through the amendment, the contracts for one-off transactions will have to include the customer's consent and a copy of the text including the consent of the user is sought for one-off payment transactions made remotely.

- Article 30 of the Regulation governing the pre-information requirement of users by payment service providers, has also been amended. Accordingly, payment service providers are obliged to publish in their workplaces, in a visible manner, maximum period for the transaction to be completed, total service fees and if any, exchange rates to be implemented.

- Certain cosmetic changes have been made on Article 31 governing the information to be placed on contracts, receipts or similar documents to be issued for one-off payment transactions, in a manner to be consistent with the changes made in Article 30.

- With the amendment made in Article 57, in frame contracts between payment service users, which are consumers and the payment service providers, parties will be allowed to decide on not implementing the rule under sub clause (g) of Article 35 (9) (*i.e.* inclusion of breakdown of the service fee into the frame contract) or on implementing such rule in a different form.

- Lastly, provision excluding one-off payment transactions from the obligation to execute a contract in case the payment transaction falls under TRL 300 or limit of the payment instrument is or under TRL 500 or the fund amount of the payment instrument at any time do not exceed TRL 500, has been removed from Article 58.

***(ii)* Enforcement**

According to Article 13, the Amendment Regulation has entered into force on the publication date. Therefore all of the foregoing amendments became effective as of December 26th, 2015.

Real Estate Law

Construction Agreement in Return for Flat – What to do to Minimize Conflicts?

Urban transformation gained acceleration and became an irreplaceable part of construction sector since the Law of Transformation of the Places Under the Risk of Disaster entered into force in 2012 ("Law"). Construction agreement in return for flat or land share ("Agreement") is an integral part of this urban re-development process where the contractor re-builds the already existing buildings and obtains flat shares from the new building in return for payment. Property owners on the other hand, get newer, more valuable properties. In zones which are subject to the Law, property owners also get immovables which are compliant with the applicable legislations thanks to the Agreement.

This article will attempt to point out the practical issues regarding the Agreement which both the contractors and the land owners should make use of especially during contract drafting process to minimize the potential conflicts the Agreement might lead to.

The Agreement combines obligations from both construction agreement and promise to sell agreement. Therefore, this is not a type of Agreement that is explicitly regulated under Turkish Law of Obligations. The obligations of the parties, the rules applicable to the

Agreement and the form requirement, all combine the rules applicable to both types of agreements. One result of this combination is the requirement to execute the Agreement in official form before the land registry officer, since this is the form requirement for promise to sell agreements concerning immovable properties. The Agreement would be deemed null and void, in case the form requirement is not met.

According to the Agreement, the main obligations of the contractor are

(i) the obligation to deliver the property timely and without any defects and

(ii) the obligation of loyalty and care whereas the main obligations of the land owner are

(i) the obligation to transfer the flat or the land share as determined by the agreement and

(ii) the obligation to discharge the requirements to finalize the building.

This is the type of agreement whose fulfillment is heavily dependent on the obtention of several administrative approvals, permits and licenses. First of all, the property subject to Agreement must have a zoning status. Then the parties need to obtain approval of the construction project according to zoning legislation, and finally, construction start license should be obtained. Accordingly, it is advisable for the parties to explicitly set out who will obtain the permits. In practice, this obligation is generally burdened on the contractor, and is discharged through a power of attorney provided by the property owner to the contractor. Where the obligation to obtain the necessary permits is the contractor's, providing the contractor with a power of attorney can also be an obligation for the land owner, beyond a mere preference. The contractor, on the other hand, should comply with the authorities granted with the power of attorney.

Defective delivery of the property is another issue that might lead to conflicts. The defect may result from the quality of the material used or the technical specifications regarding the property that is built. In one of its decisions, the High Court of Appeals held that it would not be equitable to expect the landowner to accept a property which was built without proper technical specifications. In this case, the landowner was able to rescind from the agreement.

It is advisable and most Agreements do include technical specifications annex, so that the materials and the methods to be used during the construction are defined. Such an annex would prove to be useful in proving whether the materials used or the end product is defective. In one of its decisions regarding the agreement, the High Court of Appeals held that the use of lower quality of sinks by the contractor within the building is a defect. In this case, the plaintiff was awarded a suitable discount from the amount to be paid to the contractor.

Regarding defective delivery, another method to mitigate potential conflicts would be setting out the provisional acceptance and absolute acceptance dates definitively within the Agreement. As per Article 477 of the Turkish Code of Obligations numbered 6098, the landowner is expected to inspect the property upon delivery, and give notice to the contractor of the defects within a reasonable period. Once the property has been explicitly or implicitly accepted, the land owner cannot use its rights regarding defective delivery for defects apparent at the time of delivery. However, the legislation has not set out the periods within which the defects should be determined and notified to the contractor. In practice, the parties are advised to clearly set out the inspection and notification periods to the contractor. These periods are generally stipulated as "provisional acceptance" and "absolute acceptance" periods within the Agreement.

Another point of potential conflict is with regard to the delivery dates of the Agreement. Since the Agreement process is time and money consuming for all, it is advised for parties to clearly set out construction start date and delivery dates for the building. As per the general provisions of Turkish law of obligations, in case of default by the contractor, the landowner may (i) request performance of the agreement in addition to default compensation, (ii) waive the right to request performance and claim positive damages or (iii) rescind from the agreement and claim negative damages.

Finally, in order to get leverage in the face of breach of the Agreement, the parties may use penal clauses. The penal clauses are mostly used to enforce the delivery date obligations of the parties. It is important to note that the penal clause, along with any terms, conditions or revisions on the Agreement, should be realized in official form before the land registry, in order to render all of these conditions valid.

Since construction agreement in return for flat is not one of the typical agreements specifically regulated by the Turkish Code of Obligations, it is advised that the parties set out all of the terms and conditions between themselves explicitly within a written agreement. This way, potential conflicts could be minimized and the parties' obligations would be clear.

The New Regulation on Shopping Malls and What It Means for Retailers

In our previous issue, we had reported that the Ministry of Customs and Trade ("Ministry") had published on its website a draft regulation regarding shopping malls ("Draft Regulation"). The Draft Regulation was intended to become a secondary piece of legislation to the Law on Regulation of Retail Trade numbered 6585 ("Law"), and was announced on the Ministry's official website on September 11th, 2015.

As expected, a regulation, which is based on the Draft Regulation, the Regulation on Shopping Malls ("Regulation"), has been published on the Official Gazette, numbered 29636 and dated February 26th, 2016. The Regulation has entered into force on the same date, as per its date of enforcement provision, Article 21.

Our aim is to touch upon certain differences between the Draft Regulation and the Regulation, and delve into the specifics of Article 11 of the Regulation, as the said article regulates the common expenses to be charged by mall managements, and as such, bears importance for retailers having branches at shopping malls.

Differences between the Draft Regulation and the Regulation

a. Definitions

With respect to Article 3, titled "Definitions" and Article 4, titled "Properties of a Shopping Mall", of both the Draft Regulation and Regulation; although the Draft Regulation also referred to a "large store", it did not define what it was. The Regulation defines a large store to be a business with a sales area of at least 400 square meters, within which consumer goods are sold by retail partially or in whole. This is the same definition provided under the Law. Thus, the inclusion of the definition of a "large store" within the Regulation does not introduce much novelty, as the relevant remark was already defined under the Law. That said, this creates a difference between the Draft Regulation and Regulation, as it plays a role in the definition of a "shopping mall". While the Draft Regulation sought the existence of business spaces, within which at least 10 retail businesses could operate, the Regulation stipulates two options in that regard: Accordingly, a shopping mall has to contain either a large store and at least 10 business spaces or, in lack of a large store, 30 business spaces.

On a final note with respect to retail businesses, with an area greater than 400 square meters, the Regulation additionally sets forth that emergency buttons should be placed in visible places in such businesses to facilitate communication with the emergency units within shopping malls.

b. Opinion of the Trade Body

As for Article 5 of both pieces, the Regulation stipulates in more detail what the opinion to be obtained from the relevant trade body regarding the contemplated shopping mall project shall include, and states explicitly that in case the relevant trade body does not deliver its opinion in due time, its opinion of the contemplated shopping mall project should be deemed to be positive.

c. Governance of Continuous Clearance Sales

As for the governance of continuous clearance sales realized at shopping malls, and the liability arising therefrom; Article 6 of the Draft Regulation had described what a continuous clearance sale was, and then set out the requirements to be fulfilled by shopping malls, wherein such sales were realized, and by retail businesses, which realized such sales. Accordingly, in order for a shopping mall to use expressions displaying or referring to continuous clearance sales, such as "outlet", at least 70% of the goods being offered for sale in each retail store located therein should have fallen under the description of a continuous clearance sale. Shopping malls fulfilling such criteria were also obliged to use expressions displaying or referring to continuous clearance sale. It was stipulated that the retail businesses were also required to satisfy the foregoing rules. Accordingly, retail businesses located in shopping malls could use expressions, displaying or referring to continuous clearance sales, such as "outlet", provided that at least 70% of the goods offered for sale by that retail business were compliant with the description of a continuous clearance sale, as defined under the Draft Regulation. They, too, were obliged to use expressions displaying or referring to continuous clearance sale. The foregoing, mostly, is omitted by the Regulation. That, though, does not bring much difference, as these issues, mostly, are already covered by the Law. What the Draft Regulation additionally did was to regulate also the liability arising from such sales. Article 7 thereof had split such liability into two, and stipulated that for the liability arising under Article 6(1), *i.e.*, shopping malls to use expressions displaying or referring to continuous clearance sale such as "outlet", shopping mall managements would be liable, and for the liability arisen under Article 6(2), *i.e.*, retail businesses to use expressions displaying or referring to continuous clearance sale such as "outlet", retail businesses would be liable along with shopping mall managements. Article 7 of the Draft Regulation had further imposed on shopping mall managements the obligation to audit the compliance of the retail businesses with Article 6 at least three times per year and inform the Ministry within three business days if any one of the retail businesses located in the shopping mall failed to reach the "70% limit". The Regulation stipulates this issue merely by stating that the owner and the management of the shopping mall shall be liable for the duly use of the expressions displaying or referring to continuous clearance sale by the shopping mall. The liability of a retail business, arising out of its use of the expressions displaying or referring to continuous clearance sale, has been left out of scope. That said, the Law stipulates an administrative monetary fine in case of violation of the Law in that regard by the retail businesses.

d. Common Expenses

Article 11 of the Regulation, titled "Common Expenses" is much more detailed than Article 13 of the Draft Regulation, which was on the same subject. This being the case, as for what constitutes common expenses, the two pieces of legislation do not differ much. The one difference, though, is that the Regulation stipulates that the expenses with respect to repair and maintanence, which could be charged by the shopping mall management, should not bear the characteristics of a renewal. The Draft Regulation did not stipulate any such distinction. As for the calculation with respect to the sharing of the common expenses, the Regulation refers to a table annexed to the Regulation, while the Draft Regulation referred to the ratio of the area leased by the retail businesses over the total sales area of the shopping mall. The table annexed to the Regulation takes into consideration the type of business a retail business is engaged in, in addition to the area of the relevant retail business. While the Draft Regulation ruled that no other expenses under the name common expenses could be charged on the retail businesses, the Regulation rules that the agreement between the parties could set forth inclusion of other common expenses, in addition to the ones stipulated under the Regulation. In case the agreement between the parties does not rule differently, these other common expenses shall also be shared as per the table annexed to the Regulation. Different from the Draft Regulation, the Regulation additionally stipulates that an advance payment could be requested by the shopping mall management and the Regulation rules in detail how and until latest when the shopping mall management shall request payment of common expenses. What is to be noted is that while the Draft Regulation stipulated explicitly that the burden of proof would be on the shopping mall management with respect to proving that it has duly served a duly-prepared notice regarding common expenses, the Regulation omits to stipulate such matter. Both the Draft Regulation and the Regulation have provided that the common expenses shall be calculated and paid in Turkish Liras and payments collected under the name common expenses can only be used for covering such expenses.

e. Interim Period

The Provisional Article 1 of the Draft Regulation had set forth that the shopping malls, which already opearate at the enactment date of the Law, *i.e.*, January 29th, 2015, would have to establish common spaces and a centralized management within six months following the enactment date of the Draft Regulation. The Regulation stipulates the relevant term to be a year.

Final Remarks

The differences between the two pieces of legislation suggest an approach in favor of the shopping mall managements. Finally, considering the number of shopping malls, which already operate and are currently built, thus the impact shopping malls have on Turkish economy, it is a welcoming development that the lawmaker acted relatively quick to act upon the Law and publish its secondary legislation.

White Collar Irregularities

Risk, Compliance and Liability: International Reflections on the Turkish Anti-Money Laundering System

Anti-money laundering landscape is a risky arena, especially for companies active in the financial sector. It is highly possible for companies to face multiple enforcement actions, in case they are active in multiple jurisdictions. In order to prevent the risk, the requirements for companies regulated strictly. Besides the high amount of fines and criminal charges, anti-money laundering harms also the reputation of companies, whether it is proven or just an allegation. Given the devastating consequences employing a preventative approach against money laundering risks seems like the smart thing to do.

In the same vein, Financial Action Task Force ("FATF") recommends member states to enact legislation that requires financial institutions to have programs against money-laundering. This requirement is practiced in the form of compliance programs and it has a special significance in Turkey, because of the region's geographical location as a neighbor to Middle East and Asia, its role as a business hub opening up to those regions, its belated anti-money laundering legislative developments.

Turkish AML Climate – The Crimes and Offences

According to FATF Mutual Evaluation of Turkey Follow-Up Report No. 15 of October 2014, Turkey has an effective anti-money-laundering ("AML") and counter terrorist financing ("CTF") system. In October 2012, FATF had released a statement and indicated its concerns about terrorist financing at the time, Turkey did not have a thorough counter terrorist financing system. It was critical for Turkey to adopt necessary legislation before February 22nd, 2013 in order to keep its FATF membership. To that end, Turkey adopted and molded its legislation to get its AML system declared complete.

Since 1991 a lot has changed in Turkey. In order to define its money laundering crime in accordance with the international AML framework, Turkey reduced the threshold of predicate offences to a minimum penalty of 6 months of imprisonment, from a previous threshold of a minimum of 1 year. The term of imprisonment for the offence of money laundering has also been raised from a range of 2 to 5 years to a range of 3 to 7 years. Following the amendments, Article 282 of the Turkish Criminal Code now provides that laundering of proceeds of a crime occurs when (i) a person who takes out of the country the funds obtained due to a crime that is fulfilling the abovementioned threshold, (ii) subjects the funds to certain transactions to create the impression that they have been obtained legitimately or (iii) subjects the funds to transactions to conceal their illegitimate source. This crime can occur not just for the person who committed the predicate crime, but for anyone who launders the proceeds of a crime. The perpetration of this crime by a public officer or during the performance of one's professional duty (*e.g.* when a banker is performing its professional duties), is deemed as an aggravating circumstance. Leniency procedure is available for the crime provided that the relevant persons comply with the procedure set out by the law. Due to the perpetration of this crime, security measures against legal persons might be taken. These security measures are: (i) cancellation of permits provided by public authorities, and (ii) seizure of assets.

Turkish law does not recognize corporate criminal liability. However, Article 43/A Law on Misdemeanors numbered 5326 presents further liabilities on legal persons, in case the crime of laundering the proceeds of crime has been perpetrated by the representative of a legal person to the benefit of that legal person. Accordingly, the stated legal persons will be punished by an administrative fine between TRL 14,969 and TRL 2,994,337.

Turkish AML Climate – The Regulatory Requirements

As stipulated by the legislation incumbents include banks, insurance companies, other financial service companies, companies whose operations include activities related to valuable stones and minerals, luck and betting games etc. There are obligations for the incumbents such as customer due diligence and risk based compliance programs, regulated by related laws, in order to prevent the misconducts. According to the Regulation on Measures Against Laundering of Proceeds of Crime and Financing of Terrorism ("Regulation"), the incumbents are expected to engage in customer due diligence for all of their transactions. Moreover, when the incumbents determine a suspicious transaction is being conducted through their services, the incumbents should notify the Financial Crimes Investigations Board ("Board") with regard to such suspicion. Aside from these, the incumbents must inform the Board on a regulatory basis with regard to transactions that exceed the threshold amount determined by the Board. In case the incumbents do not realize their obligations, the Law prescribes certain administrative fines, in addition to criminal measures.

In matters relating to CTF, the Law No. 6415 on the Financing of Terrorism ("Law on Financing of Terrorism") was promulgated on February 2013, in order to prevent Turkey from getting its FATF membership suspended. As per the Law on Financing of Terrorism, Turkey now accepts UN Security Council resolutions no. 1267 (1999), 1988 (2011) and 1989 (2011); and the relevant institutions are obliged to abide by the asset freeze decisions published in the Official Gazette. With the enactment of Law on Financing of Terrorism, Turkey took a major step to prove its intentions regarding financing of terrorism. This law also gave the opportunity to execute the UN Security Council resolutions.

As of September 2008, the promulgation date of the Regulation on Compliance Programs Regarding Obligations on Laundering the Proceeds of Crime and Prevention of Financing of Terrorism (Regulation on Compliance Programs), banks, capital markets intermediary institutions, insurance and pension companies and Post and Telegram Organization General Directorate, are obliged to create risk-based AML and CTF compliance programs. As per the Regulation of Compliance Programs, the institutions obliged to create compliance programs should (i) develop institution policy and procedures, (ii) carry out risk management activities, (iii) carry out monitoring and controlling activities, (iv) assign a compliance officer and establishing a compliance unit, (v) carry out training activities and (vi) carrying out internal control activities. The risk management and activities regarding monitoring and control should be carried out by the compliance officer. However such activities are ultimately under the responsibility of the board of directors ("BoD"), The Regulation on Compliance Program stresses that the compliance program of each company should be constituted by considering the size of the institution, the volume and type of their transactions.

Global Examples

Importance of complying with AML and CFT regulations, having a decent compliance program shows itself through the record fines imposed against companies like HSBC and BNP Paribas. According to the allegations against HSBC, between 2006 and 2010, at least $881 million in drug trafficking proceeds were deposited into HSBC Mexico accounts. The Department of Justice stipulated that HSBC failed to exercise oversight over its AML system, failed to implement an adequate AML compliance program which monitored its subsidiary's activities in Mexico and the company's compliance department was severely understaffed, as a result of which, the company engaged in transactions with drug traffickers and sanctioned countries. In addition HSBC did not inform its US subsidiary of the deficiencies which prevented the US subsidiary to disclose the situation to the US authorities.[1] Recently in 2015, HSBC also settled with Swiss authorities for money laundering allegations against its Swiss subsidiary. As part of the settlement, HSBC agreed to pay 40 million Swiss francs, so that the Swiss authorities will not be able to publish the findings of their investigation.[2] Likewise, in 2014, BNP Paribas pleaded guilty for violation of several US CTF legislations, paying almost $9 billion for its transactions with Sudan, Iran and other sanctioned countries. As a part of the bank's settlement agreement, BNP Paribas will not be able to engage in certain transactions in US dollars for a year. Among the reasons behind the gigantic fine imposed on BNP Paribas are the facts that the bank kept its employees in the US intentionally in the dark so as to keep them from reporting the allegations to the authorities and intentionally attempted to cover up its tracks with regard to the wrongdoing.[3]

Conclusion

Institutions, more specifically financial institutions must be careful with their transactions and comply with the AML regulations. Companies have to set risk-based compliance programs proportionate to the size and volume of their operations. The consequences of AML in compliance are severe including severe fines, criminal penalties, civil actions, reputational damage and debarment from projects finances by international finance institutions. The risk of incompliance of course, depends on the territory the company is active in. In territories such as Turkey, which acts as a business hub, opening up to a multitude of jurisdiction with different legislative and political sensibilities, the companies are urged to be vigilant in terms of their compliance with applicable legislations.

[1] http://www.justice.gov/opa/pr/hsbc-holdings-plc-and-hsbc-bank-usa-na-admit-anti-money-laundering-and-sanctions-violations

[2] http://www.theguardian.com/business/2015/jun/04/hsbc-fined-278m-over-money-laundering-claims

[3] http://www.justice.gov/opa/pr/bnp-paribas-sentenced-conspiring-violate-international-emergency-economic-powers-act-and

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All members of ELİG team are fluent in English.

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