Public disclosure obligations under TURKISH LAW

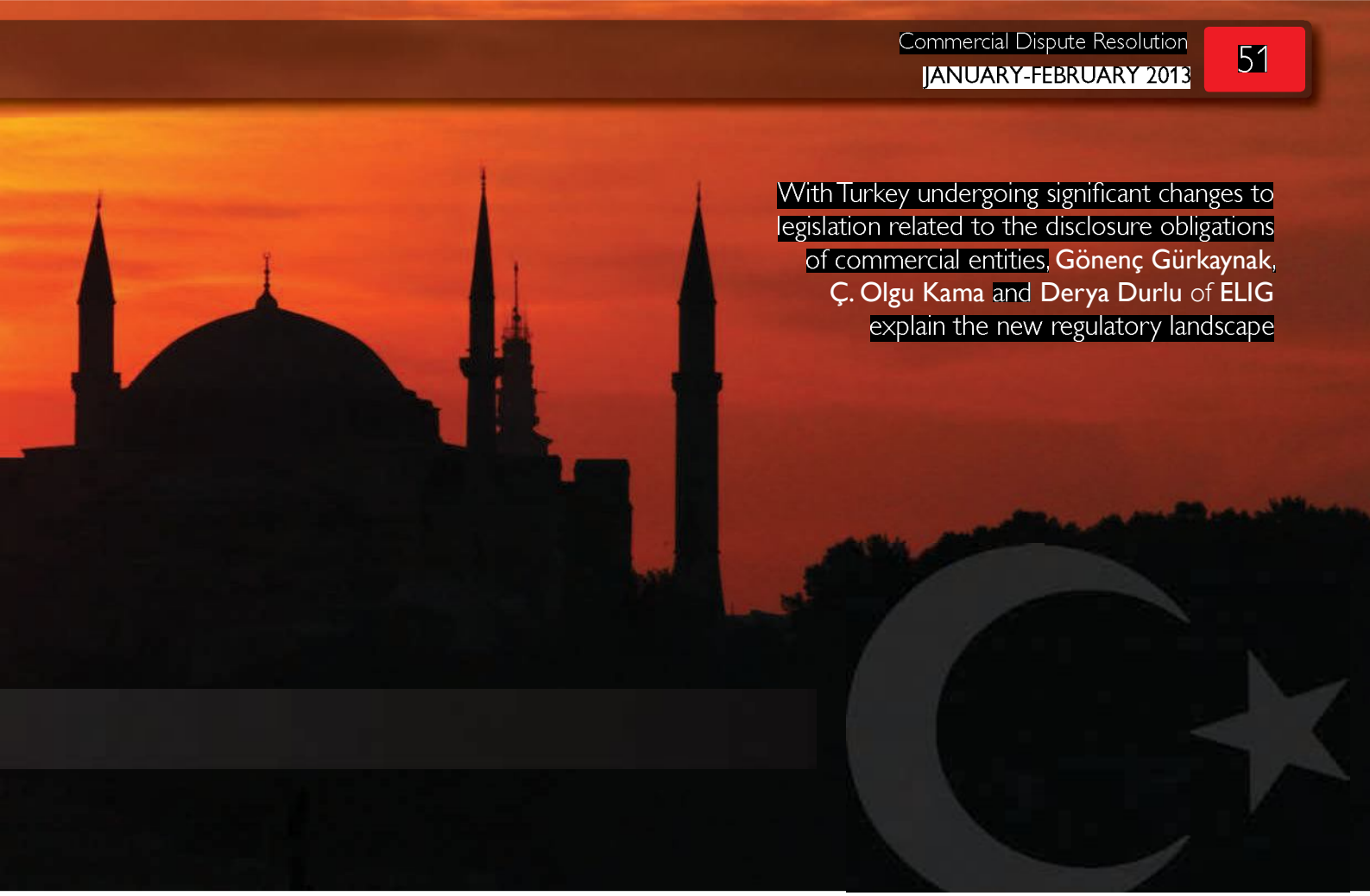
Public disclosure and transparency are two key components to providing shareholders and investors with accurate, complete and understandable information. Companies may be required under local laws to disclose certain information which brings with it certain legal ramifications (such as recourse to litigation) if it is not complied with by companies, be they publicly-held or non-public. A pertinent cross-over therefore arises between public disclosure obligations and securities litigation in the context of white-collar investigations.

In view of this background, this article delves into the public disclosure obligations as regulated under Turkish law. The topic is assessed first with respect to its regulation under the Turkish capital markets regime, and second with respect to the changes introduced into the new Turkish commercial law regime, with the enactment of the new Turkish Commercial Code. The division between publicly-held and non-public companies is addressed to clarify the differences in the disclosure obligations sought by local laws.

1. Disclosure obligations under Turkish Commercial Law and Turkish Capital Markets Law

Turkish Commercial Law

The New Turkish Commercial Law No. 6102 ("Law No. 6102") has introduced several new provisions with respect to disclosure



With Turkey undergoing significant changes to legislation related to the disclosure obligations of commercial entities, **Gönenç Gürkaynak**, **Ç. Olgu Kama** and **Derya Durlu** of **ELIG** explain the new regulatory landscape

obligations for companies. These changes have been propagated by the principles of accountability, transparency and responsibility.

Turkish corporate law underwent important changes in early 2011. Law No. 6102 was passed on 13 January, 2011 to take effect on 1 July, 2012, except for some provisions which relate to the audit of companies and requirements to establish a website. These will come into force on 1 July, 2013. The new code was expected for a long time as it is widely accepted in the Turkish legal community that the current code, more than half a century old, failed, in many respects, to satisfy the needs and demands of today's commercial life. A transition period until 1 July 2013 seemed necessary for the legal and business communities to adapt to the crucial changes and novelties that the code brings in many different areas. Moreover, it was also announced that certain provisions of this code will still be subject to amendments.

Turkish Commercial Law, which is described by the legislature as a code that "will make Turkish markets speak the language of international markets", improves transparency in all companies (both private and public) by requiring them to open a website which openly publishes their corporate and financial information and by establishing a more reliable and efficient trade registry system.

As a requirement of the principles of transparency and public disclosure, Article 574/2 of Law No. 6102 provides that in the event where the number of shareholders in a company drops to one, the company is required to disclose this and the pertinent information stipulated under the provision. Should a company fail to make this introductory and explanatory announcement, directors and the single shareholder/partner can be held responsible.

What is perhaps one of the most striking changes brought about with Law No. 6102 is the new regime on the auditing of equity capital companies (particularly joint stock companies, limited liability companies and groups of companies). This is a welcome change that in essence mirrors the regulations already observed in the US and EU. An audit of the separate or consolidated financial statements of the company is based on the company's accounting records (e.g. its books, records and documents). Because the auditor must receive information from the relevant individuals regarding this data, Law No. 6102 grants the auditor the right to have access to comprehensive information in order to be able to understand ▶

completely and correctly the data to be audited.

The board of directors' obligation of corporate governance disclosure is in essence one of the non-delegable duties and powers stipulated under Article 375 of Law No. 6102. If such information is not disclosed, the board of directors may be held responsible, which is limited to the company, the respective company employees and the company's business and operations. The right to request the disclosure of such material and information goes hand in hand with "disclaimer of opinion" stated under Article 403/4 of Law No. 6102. If the board of directors is to refuse to disclose such information and material, this can lead to a "disclaimer of opinion," which is to be assessed on a case by case basis.

Turkish Capital Markets Law

Another instrument that provides legal basis for the obligation of disclosure for publicly held companies is the Capital Markets Law No. 2499 and secondary legislation complementing this law, which aims to regulate and control the secure, transparent and stable functioning of the capital market and to protect the rights and benefits of investors with the purpose of ensuring an efficient and widespread participation by the public in the development of the economy through investing savings in the securities market.

The Annex of the Communiqué Series: IV, No. 56 on the Determination and Application of Corporate Governance Principles, whose legal basis is essentially Article 22 of the Capital Markets Law, provides the legal foundations for the obligation of informing the public and transparency, among other corporate governance principles. Article 2 of the Communiqué's Annex explains that the policy to inform includes the following: the scope of which information will be disclosed to the public other than those set by the law, in what format, frequency and via what means this information is to be disclosed to the public, the frequency with which the board of directors or managers will have contact with the media, and the frequency with which meetings are to be held in order to inform the public. The same provision, under the second paragraph provides a clear explanation as to how the company is to disclose its information. Article 2.1 stipulates that information that will be disclosed to the public is to be disclosed both from the Platform to Inform the Public (via www.kap.gov.tr) as well as from the company's own website, in a timely, accurate, complete, interpretable and cost-efficient manner. Article 2.2.2 of the Communiqué's Annex sets out the ground rules for the company to disclose its ethical rules within the scope of its public information policy and to use its website actively as a means of public disclosure.

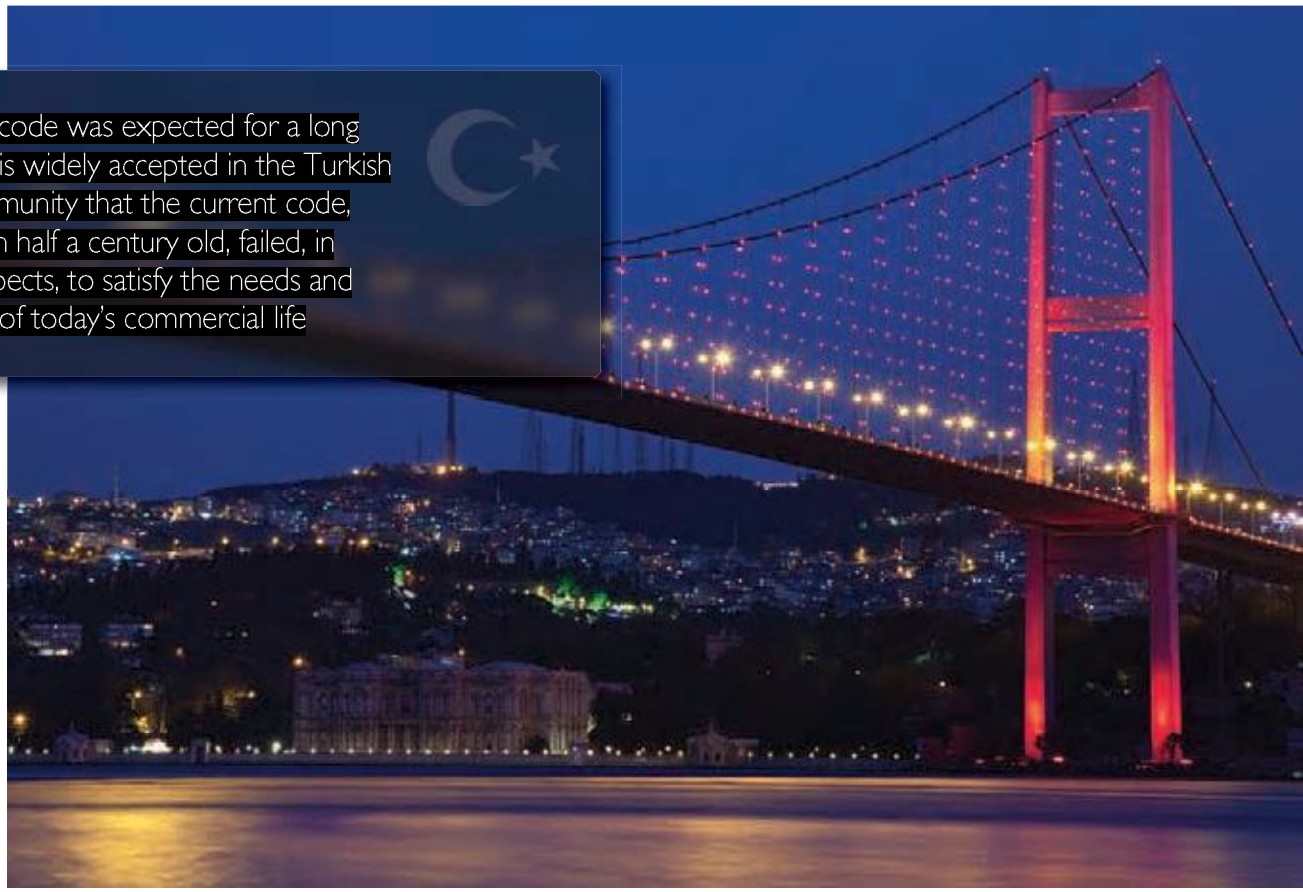
Furthermore, Article 6 of the Communiqué provides that the annual report should include information about whether or not the principles laid out in the Corporate Governance Principles are being properly applied. If not, the reasons for such non-application, and all possible conflicts of interest due to the improper adoption of the principles should be disclosed to the public, together with the pertinent harmonisation report, if any.

On a similar vein, Communiqué Series: VIII, No. 61 on the Principles Regarding the Submission of Information, Documents and Disclosures Signed on the Electronic Environment to the Platform to Inform the Public is another pertinent legislative tool related to the disclosure obligation. Communiqué No. 61 sets out the principles and procedures on (i) the electronic signature and submission to the Platform to Inform the Public regarding any and all information, documents and disclosures within the context of Communiqué No. 61, by partnerships traded at the stock exchange and intermediary firms and founders of funds whose shares are quoted at the stock exchange, as well as (ii) electronic signature of independent audit reports prepared by independent auditing firms and submission of these to shareholders, intermediary firms and founders of funds in an electronic environment.

2. Disclosure obligations for publicly held companies and non-public companies

The Capital Markets Board Communiqué No. 54 on Principles Regarding Public Disclosure of Special Circumstances is the principal regulation on disclosure obligations of publicly held companies. The aim of the Communiqué mirrors that of the Capital Markets Law, whereby the transparent functioning of the capital markets is sought to be guaranteed through timely, complete and correct information. The scope of the Communiqué is to set out the principles and procedures applicable to the disclosure circumstances related to companies listed on the stock exchange.

Article 4/e of the Communiqué defines "special circumstances" as circumstances that bring about insider information or sustained information. As per the Communiqué, insider information is to be understood as information that may affect the value of capital market instruments and the investment decisions of the investors as well as information that is not disclosed to the public. Sustained information, on the other hand, is to be understood as information that does not fall within the scope of insider information and that should be disclosed to the public as per the provisions of the Communiqué. As per Article 47 of the Capital Markets Law, insider trading can result in judicial monetary fines equal to



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5,000 to 10,000 days (at a daily rate fixed by a judge) and prison sentences of two to five years. As per Article 47/A, non-compliance with the Communiqué results in an administrative monetary fine of TRY 15,000-100,000.

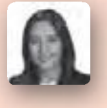
As an additional note, the structure, members of the board, their term of office and remuneration of the members are determined in general assembly meetings, and the minutes of general assembly meetings are registered with the relevant trade registry and published in the *Turkish Trade Registry Gazette*.

As per Law No. 6102, joint stock companies subject to independent auditing will be required to set up and maintain a company website within three months following the incorporation of the company, and must allocate a part of the website to the announcements legally required to be made. This obligation is also substantiated and laid out under the abovementioned Communiqué, under Article 3 of its Annex.

The companies must launch their websites by 1 July 2013. The authorised bodies of companies who do not open their website within three months following the aforementioned date will be subject to a judicial fine of between TRY 20 and TRY 100 per day, at the court's discretion, for between 100 and 300 days. Therefore the amount of the judicial fine is between TRY 2,000 and TRY 30,000 by taking into account the minimum and maximum wage. Authorised bodies of companies who do not allocate a part of their website to the information society within the same period of time will be subject to a judicial fine of up to 100 days. ■

About the authors

Gönenç Gürkaynak is a founding partner of ELIG Attorneys at Law, and has headed the Regulatory and Compliance Department of the firm since 2005. Prior to his position at ELIG, he worked in Istanbul, New York, Brussels and then in the Istanbul offices of an international law firm for more than eight years.



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