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LEGAL INSIGHTS QUARTERLY

December 2014 - February 2015

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Preface to the December 2014 Issue

The last quarter of 2014 brought with it significant changes to the Turkish legal landscape. With recent amendments realized on the Turkish Commercial Code, joint-stock and limited liability companies, depending on how they wish to appoint their authorized signatories, might have to re-issue their signature circulars and by-laws. With the enactment of a new consumer protection law and its corresponding secondary legislation such as the Regulation on Distant Agreements, merchants have to watch closely the changing rules applicable to their transactions. In addition, those merchants who are practicing electronic commerce should be more wary of the rules applicable to their practices as of May 1st, 2015, the enforcement date of the Law on the Regulation of Electronic Commerce.

On the competition law front this issue examines the European Court of Justice's confirmation decision on the European Union Commission's wide dawn raid powers. Labor law section analyzes the amendments realized on the Labor Law regarding the subcontracting relationships. This issue also attempts to answer the question of the monitoring of an employee's computers by an employer.

Finally, the white collar irregularities section analyzes the OECD Working Group on Bribery's Phase 3 Report on Turkey's compliance with the OECD Anti-Bribery Convention.

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.

December 2014

Corporate Law

Company's Acquisition of or Placing Pledge Over its Own Shares and Prohibition of Financial Assistance

Joint stock and limited liability companies were prohibited from acquiring their own shares (also known as "share buybacks") or placing pledges thereon, and transactions in violation of this prohibition were considered null and void pursuant to Articles 329 and 526 of the Turkish Commercial Code numbered 6762 ("Former TCC"). Main aims of the prohibition under the Former TCC were to preserve the company's share capital, to protect the interests of the creditors, and to prevent unequal treatment among the company's shareholders. Certain exceptions to this prohibition have been introduced by the Turkish Commercial Code No. 6102 ("TCC"). Albeit the provision of Article 379 allowing joint stock companies to acquire their own shares or accept pledges on their shares, companies are not allowed to provide advance funding, loan or security to third persons who contemplate purchasing their shares (the term "prohibition of financial assistance" is also used interchangeably) as per Article 380. This article provides the conditions and exceptions of a joint stock company acquiring or placing pledge over its own shares as well as the prohibition of financial assistance, and sets forth the consequences of violation of the rule.

Exceptions for companies to acquire or place pledge over their own shares

A joint stock company is permitted to acquire or place pledge over its own shares in exchange for a consideration provided that the total amount of the shares offered for acquisition or as security does not exceed one tenth of the company's share capital or its issued capital. The same rule also applies for third parties who contemplate acquisition of or placing pledge over the shares on its behalf but on the account of the joint stock company. The board of directors of the joint stock company should be authorized by the general assembly of shareholders to acquire or place pledge over joint stock company's own shares. The term of the authorization granted to the board of directors cannot exceed five years. As per the said general assembly resolution authorizing the board of directors, the general assembly of shareholders shall determine the nominal value of the shares that can be acquired or accepted as pledge, together with the lower and upper limits of the value of those shares. Percentage of the shares to be acquired or accepted as pledge by the joint stock company shall also be determined by the said general assembly resolution. The percentage to be determined cannot exceed one tenth of the company's share capital or its issued capital.

In addition to the conditions explained above, the remaining net assets of the company following the deduction of the price paid for the acquired shares' should at least be equal to the sum of the company's share capital and the reserve funds, which have to be preserved in accordance with the TCC. Only shares which are fully paid-in can be acquired or accepted as pledge by the company. The main reason of this provision is that a company may not subscribe for its own shares pursuant to Article 388 of the TCC. It is further noted that in case the shares of a holding company are acquired or pledged by one of its subsidiaries, the above-mentioned conditions are also have to be fulfilled. This provision ensures that the shares of a holding company shall not be acquired or accepted as pledge by its subsidiary, in violation of the said conditions.

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

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

In accordance with Article 612 of the TCC limited liability companies can acquire their own shares only if they have the necessary equity that can be freely used to purchase their shares, and the nominal value of shares to be purchased does not exceed 10 per cent of the total share capital. The shares acquired in excess of 10 per cent of the share capital of the limited liability company shall be disposed of or redeemed through a capital decrease within two years.

Prohibition of Financial Assistance, Exceptions and Consequences of Breach

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

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

Additionally, arrangements between the company and a third party, which grants the third party the right to acquire the company's own shares on account of the company, (or company's affiliate, or another company that

the majority of whose shares are held by the company), as if those shares were acquired by the company itself, shall be null and void if the transaction constitutes a breach of Article 379 of the TCC.

Conclusion

Contrary to the rules set forth by the Former TCC, a company's acquisition or placing pledge over its own shares is allowed by the TCC under certain conditions, and unless certain conditions are abided, share buy-backs shall be deemed null and void. On the other hand, unlike the Former TCC, concept of prohibition of financial assistance has been newly introduced, and does not allow companies to enter into transactions resulting in advance funding, loan or provision of security to third parties for the purchase of its shares and such transactions shall be deemed null and void, with the exceptions of two specific cases.

Adapting the Concept of Commercial Agents into the Commercial Code

1. Novelties introduced by the new Turkish Commercial Code regarding representation authorities, and adaption of these by Trade Registries

The new Turkish Commercial Code No. 6102 ("nTCC") had repeated the former Turkish Commercial Code's ("fTCC") system regarding representation authority in equity capital companies (*i.e.* joint stock companies ("JSCs") and limited liability companies ("LCCs")) with one major exception: the revocation of the *ultra vires* principle.

Expansion of legal capacity, as a result of revocation of the *ultra vires* principle, has also triggered the expansion of the authorized signatories' capacity to represent their companies. Accordingly, pursuant to the newly introduced provisions of Article 371/2 of the nTCC, transactions executed by the authorized signatories of an equity capital company ("company" or "companies") will be binding for the company regardless of whether the transaction falls within the scope of the field of activities of such company.

On the other hand, as mentioned above, the statutory limitation as to '*representation*' capacity has been expanded with the nTCC, the limitation that a company itself can impose on its '*representatives*' has been kept the same as in the fTCC, as follows: The 'representation' authority can only be limited (i) with regards to transactions pertaining to the headquarter or branches of a company, or (ii) by a joint/sole signature requirement. Albeit the fact that the notion of the 'limitation of limitations' was almost identical in both TCCs, during the fTCC era Trade Registries were nevertheless registering board of directors resolutions regarding issuance of signature circulars limiting the representation authority by means of monetary thresholds or by the subject matter. Now, Trade Registries no longer register board of directors resolutions regarding signature circulars which grant more limited authorization than what the nTCC allows. This, in first instance, strikes as a more compliant practice with the wording of the current – and even former – regulation. However, this is a false perception.

1.1. Delegation of duties

As it was under the fTCC, the board of directors[1] may delegate, with the exception of those that are exclusive to itself, its duties and authorization powers to one or more

[1] Board of Directors definition represents the board of directors both in joint stock companies and also limited liability companies

directors or to third parties. The novelty the nTCC introduced in this manner is the instrument to do so: the "by-law" (*iç yönerge* in Turkish).
The board of directors shall issue a by-law to determine, which director has been assigned and granted with which duty/authorization. This by-law, was not subject to registration thus was not a public document until the below mentioned amendment was made. This stemmed from the fact that, such document was exclusively concerning the internal delegation and *had* no effect on third parties.

1.2. Commercial agents

The above mentioned representation structure has been reshuffled with the latest amendment made to the nTCC, with the Law No. 6551 ("Amendment"), which has been enacted on September 10th, 2014.

According to the Amendment, the board of directors can also appoint from among its non-representative board of directors members and/or its employees, "commercial agents" and other "merchant commercial assistants" with limited authority, by issuing and, as opposed to the delegation of authorities, registering and publishing a by-law[2].

Following the amendment, Istanbul Trade Registry issued guidelines as to how to appoint a commercial agent within the meaning of Article 371/5. According to such guidance, the 'limited authority' of commercial agents is not the same with the permitted 'limitation on limitations' as described above, and the commercial agents' authority can be limited by means of monetary thresholds and/or by subject matter.

[2] Please note that the by-law cannot indicate the identities of the commercial agents but lay out the scheme and scope of authority. Commercial agents shall also be named in the signature circular, which shall refer to the by-law.

2. Commercial agents vs. commercial representatives

2.1. Definition and the scope of the authorization of a "commercial agent"

The above mentioned amendment calls for remembering what the differences between a 'representative' and 'agent' are, and what falls within the capacity of a commercial agent.

The answer to this question determines what transactions can be undertaken by a commercial agent, or in other words and more importantly, what type of authorities can be limited with monetary thresholds and/or subject matter.

The definition of commercial agents can be found in the Code of Obligations, and the Amendment can be read as the synchronization of the Commercial Code and the Code of Obligations.

A commercial agent is, as per Article 551 of the Code of Obligations, a 'person authorized to manage or undertake certain transactions of a commercial enterprise, without having the commercial representation authority thereto'. Said article also states that such authority refers to 'any ordinary transaction of the enterprise'. The wording suggests that a commercial agent is authorized to carry out mundane, ordinary transactions regarding day-to-day operations of the company/business, but not commercial activities. On the other hand, Poroy/Yasaman[3] refers to Article 165 of fTCC for the definition of ordinary transactions, which concerns the scope of the management in collective companies. Article 223 of nTCC, which is the slightly amended version of Article 165 of fTCC reads as follows:

[3] Poroy/Yasaman, Ticari İşletme Hukuku, 11th Edition, İstanbul, 2006, p.215.

"Transactions regarding the management of the company is limited with the ordinary transactions and activities necessary to achieve the purpose of the company[4]. The executives, shall also be authorized to settle, waive or accept an arbitration procedure regarding ordinary transactions and activities. However non-ordinary transactions and activities such as; donation, providing surety, providing guarantee on behalf of a third party, appointing commercial representatives, selling, acquiring or encumbering real property not concerning the purpose of the company, disposing of, establishing of (commercial enterprise) pledge on production facilities concerning the essence of the company, shall require an unanimous resolution of the partners."

Furthermore, concluding employment agreements, ordering of raw materials and making the payments thereto and selling the products have also been stipulated[5] as examples of ordinary transactions a commercial agent can undertake.

As can be seen from the above references, the scope of the authority of a commercial agent is rather wide, however, lacks the 'commercial representation'.

2.2. Definition of the scope of the authorization of a "commercial representative"

A commercial representative, as per Article 547/1 of the Code of Obligations, has the commercial representation power. Such provision reads as follows:

'Commercial representative is the person who has been, implicitly or explicitly, authorized by the business owner to manage the business and represent the business owner with commercial representation authority while using the commercial title, regarding the transactions concerning such business.'

Furthermore, the following articles state that (i) commercial representatives have the ultimate representation authority towards *bona fide* third parties, save for transactions regarding immovable properties[6] unless explicitly stated, and (ii) such authority can only be limited with regards to transactions pertaining to the headquarter or branches, or by a joint/sole signature requirement.

Sounds familiar? Well it should be, because "commercial representative" definition is, with a slight theoretical difference, the same definition with the "representative" introduced by the nTCC (also used in the fTCC).

2.3. Other "Merchant Assistants"

The Amendment has also referred to "merchant assistants", which is defined in Article 552 of the Code of Obligations. However, such concept, more or less, is only applicable to clerks or similar positions within the retail sector.

Conclusion

The Amendment has reminded the multilayer authority structure applicable to merchants as well as companies. Following the enactment of the nTCC, Trade Registries had been refusing to register board of directors'

[4] Ülgen/Teoman/Helvacı/Kendigelen/Kaya/Nomer Ertan also refers to the first sentence of the above Article, while defining the commercial agent's scope of authority - Ülgen/Teoman/Helvacı/Kendigelen/Kaya/Nomer Ertan, Ticari İşletme Hukuku, 1st Edition, İstanbul 2006, p.582.

[5] Arkan, Sabih, Ticari İşletme Hukuku, 7th Edition, Ankara, 2004, p.170.

[6] This restriction cannot be seen within the TCC, however, in practice, this has not changed anything since Land Registries are requesting from the 'representatives' a notarized proxy for such transactions.

resolutions regarding issuance of signature circulars imposing limitations other than (i) headquarters / branch related transactions, and (ii) joint / sole signature restrictions.

With the Amendment and the clear link to commercial agents within nTCC's 'authority provisions', companies will now able to grant 'limited authority' (*e.g*. monetary thresholds) to commercial agents, however, they will still be bound by the 'limited limitations' regarding 'representatives'.

Competition Law / Antitrust Law

Recent Developments on the AFM/Mars Transaction in Turkey

A Phase II review has been launched in the AFM and Mars cinema groups transaction (two major movie theater managers in Turkey), following the 13th Chamber of the High State Court's ("Court") decision that repealed the Competition Board's conditional approval (17.06.2014, 2014/2507).

The Court's decision of June 17th, 2014 repealed the Competition Board's ("Board") decision (17.11.2011, 11-57/1473-539) that conditionally cleared the acquisition of majority shares of AFM Uluslararası Film Prodüksiyon Ticaret ve Sanayi A.Ş. by Mars Sinema Turizm ve Sportif Tesisler İşletmeciliği A.Ş. and the acquisition of 50% shares of Spark Entertainment Ltd. Şti., which holds joint control over Mars by Esas Holding A.Ş. that holds sole control over AFM ("Transaction"). Following the repealed decision, the Board took the Transaction into Phase II review.

The Board has been granted with the authority to investigate transactions that need to be further assessed for their effect on the competition in the market (Article 10 of Law No. 4054). Before the Court's decision, the Transaction was under Phase II review after it was notified to the Board and was eventually cleared based on the commitment package, which required nine movie theaters to be divested and three movie theaters to be shut down. In addition, the Board had required the parties to the Transaction to regularly supply location-based information on annual average ticket prices and changes thereto for the next 5 years to follow the price changes in the market. Following this, the parties to the Transaction fulfilled all the commitments. Therefore, the Transaction was cleared by the Board and the divestment process of the movie theaters was completed on November 22nd, 2012.

This time around, as a result of the Court's decision, a new Phase II review has been launched into the Transaction. The Court mainly found that the current commitment package was insufficient to overcome the potential competition law concerns in the market.

The administration is required to issue a decision or act within 30 days in view of the Court's decision on the merits or on the stay of execution (Article 28/1 of Administrative Procedure Law No. 2577).
While the Transaction has been taken into a Phase II review, this does not mean that the transaction is not clearable. As stated in the relevant decision of the Court, the Transaction could be approved in view of up-to-date market data and analysis, using different commitment packages.

Compliance Warning; Commission's Wide Dawn Raid Powers Confirmed

On June 25th, 2014, the European Court of Justice ("ECJ") has affirmed the EU Commission's ("Commission") wide competition law dawn raid powers in its Nexans v. European Commission judgment (Case C-37/13 P).

Nexans and its wholly-owned subsidiary Nexans France ("Appellants"), companies that operate in electric cable sector, sought to set aside the judgment of the General Court, relating to unannounced inspections in the electrical cables sector under Article 20 of Regulation 1/2003, in the course of which the Appellants argued that the geographical scope of the Commission's decision on dawn raid ("Decision") was overly broad and vague.

As to the claim that the geographical scope of the Decision was overly broad, the Appellants argued that the Commission was not entitled to detect documents which had an effect beyond the EU internal market. In its Decision, the Commission asserted that the suspected cartel agreement had "probably a global reach". The ECJ conceded that the Commission's authorization is confined to protecting the EU internal market from competition distortions. However, this does not mean that in the course of dawn raid the Commission is entitled to detect documents relating solely to activities affecting the EU internal market. Thus, the ECJ rejected Appellants' foregoing claim and confirmed the Commission's wide competition law dawn raid powers by putting forward that "even documents linked to projects located outside the common market were likely to provide relevant information on the suspected infringement."

In relation to the second claim that the geographical scope of the Decision was vague, the Appellants argued that the General Court failed to describe precisely the geographical scope of the suspected cartel. Even though the Decision must include information on the evidence sought and matters relating to it, it does not have to indicate the relevant market precisely. To that end, the ECJ held that the Commission sufficiently described the geographical scope of the suspected cartel by indicating that "the suspected agreements and/or concerted practices "probably [had] a global reach". As per the ECJ judgment, since unannounced inspections conducted at early stages of the investigation process, the Commission is not obliged to define the relevant market precisely.

The aforementioned ECJ judgment confirmed that the Commission has wide dawn raid powers, but it also emphasized that the decisions of the Commission has to indicate the subject and objective of the inspection, in order to ensure that the intervention is proportional and the rights of defense are preserved.

Second Patent Settlement Fine in the EU

On July 9th, 2014 the European Commission (the "Commission") imposed fines in total of € 427.7 million on Les Laboratoires Servier ("Servier") and five other producers of generic pharmaceutical products for various anti-competitive practices, all targeting to protect Servier's blockbuster blood pressure medicine, perindopril, from generic competition.

The decision is the third within the Commission's jurisprudence sanctioning reverse payment patent settlement agreements (so called pay-for-delay agreements), following the Lundbeck decision (Case COMP/AT.39226 – Lundbeck, June 19th, 2013) and the Fentanyl decision (Case COMP/AT. 39685 – Fentanyl, December 10th, 2013) that are currently on appeal.

Servier's principal patent for perindopril expired in 2003 while certain secondary patents remained in force. The generic producers then sought access to patent-free products or challenged Servier's secondary patents. In 2004, Servier acquired the most

advanced technology among the non-patented sources that could be utilized to compete with its own patent. Although the technology was acquired merely as a defense mechanism and it was never used by Servier, Servier's acquisition caused various generic projects to cease.

Each time a generic producer decided to challenge Servier's secondary patents before the courts, the generic producer and Servier would reach an out of court settlement. However, these settlements were going beyond the scope of regular out of court settlements: the "reverse" patent settlements prevented the generic producers from competing against Servier using their generic products, in exchange for significant payments by Servier.

In return of cash payments, Servier ensured that the generic producers did not enter certain geographic markets and refrained from initiating legal claims for the duration of the settlements.

Although it is legitimate to enforce patent rights, transfer technologies and settle in litigation, the Commission concluded that Servier abused these legitimate rights to shut out competing technologies and to buy out various generic producers to stop them from competing on their merits.

The Commission thus resolved that the settlements constituted an abuse of Servier's dominant position (under Article 102 of Treaty on the Functioning of the European Union ("TFEU")). Further, the Commission concluded that such patent settlements were restrictive agreements prohibited by Article 101 of TFEU.

It is beyond doubt that companies are entitled to apply for patents, enforce them, transfer technologies and settle in litigation especially when we consider that the majority of patent settlement agreements are in fact entirely legitimate. However, as highlighted by the Commission, competition law concerns will arise if and to the extent that the rights and legal means related to patents are misused with intentions of restricting competition such as to delay the entry of a generic product to the market.

Gun-Jumping - European Commission Fines Marine Harvest ASA with € 20 Million For Failure To Notify Merger

Gun-jumping became a topical theme again after the European Commission ("Commission") fined Marine Harvest ASA ("Marine Harvest") with around 1% of its 2013 turnover on July 23rd, 2014 for failing to notify its acquisition of Morpol ASA ("Morpol") and closing the transaction before getting the European Commission's approval. Marine Harvest and Morpol are both active in the farming and primary processing of Scottish salmon. Marine Harvest had acquired *de facto* sole control over Morpol by acquiring 48.5% of Morpol's shares in December 2012. The Commission's investigation revealed that the transaction bestowed Marine Harvest with a stable majority at the shareholders' meetings due to the wide range of the remaining shares and prior attendance percentages at shareholders' meetings.

The decision relates to the breach of the "standstill obligation", which constitutes a serious breach of the merger control rules. Article 4(1) of the EU Merger Regulation ("EUMR") requires transactions between parties meeting the revenue thresholds set out in Article 1 of the EUMR to be notified to the Commission prior to completion of the transaction. According to the Commission: "Marine Harvest implemented the acquisition eight months before the formal notification

to the EU Commission took place, and over nine months before the EU Commission authorized it, in breach of Articles 4(1) and 7(1) of the EUMR."

Similar to the EUMR, the Turkish competition law regime features a suspension requirement (*i.e.* a standstill obligation) whereby implementation of a notifiable concentration is prohibited until approval by the Turkish Competition Board ("Board") (Articles 7, 10, 11 and 16 of Law No. 4054). Failure to comply with the suspension requirement might trigger monetary fines and legal status risks.

The judicial practice and case law of the Turkish Competition Board recognizes the fact that certain actions and practices may give rise to allegations of "gun-jumping", thereby violate the suspension requirement (see *e.g. Ersoy/Sesli,* 14-22/422-186, 25.06.2014; *Boyner/YKM,* 12-44/1359-M, 20.09.2012; *Cegedim*, 26.08.2010, 10-56/1089-411; *Ajans Press,* 21.10.2010, 10-66/1402-523; *Tekno Ray* 12-08/224-55, 23.02.2012). The Board analyzed specific acts and practices which were realized before the Board's clearance decision in gun-jumping cases such as the acquirer's cancelling the target's orders, decisions to integrate the acquirer's own organizational structure into the target's operations, the acquirer's actions regarding the target's employees and executives such as reviewing their employment contracts and résumés and printing new business cards, preventing the target from taking a commercial action (such as renting a store), the acquirer's actions to modify the target's commercial spaces (such as store signboards), the acquirer's interfering with the target's invoicing procedures, the target's moving its offices to the acquirer's business location, the acquirer's interfering with the target's subscription agreements, meetings between the employees/managers of the target and the acquirer, creating joint customer lists, and carrying out joint studies.

Failing to file or closing a notifiable transaction before the Board's approval can result in a turnover-based administrative fine. The fine is calculated according to the annual local Turkish turnover of the acquirer (or both parties in the case of a merger) generated in the financial year preceding the fining decision at a rate of 0.1 per cent.

Labor Law

The Recent Changes in Subcontractor Relationships

Due to the increasing competitiveness of the Turkish market, more and more companies are chosing to engage in subcontractor relationships for the purpose of reducing their operational costs. Inevitably, this leads to the limitation of employees' entitlements.

On September 11th, 2014, the Law on Amendment of the Labor Law, Certain Laws and Decrees and The Restructuring of Certain Receivables No. 6552 ("Law") was published in the official gazette. The Law amended Articles 36 and 56 of the Labor Law No. 4857 ("Labor Law") which are now imposing certain crucial obligations on primary employers.

Prior to the amendments, Article 36 of the Labor Law regulated that administrations with general or supplementary budget, local administrations, public economic enterprises or institutions and banks established based on special legislation shall upon application of an employee whose remuneration is not paid; (i) control whether or not contractors and subcontractors duly pay employees' remunerations; and (ii) pay the unpaid remuneration based on payrolls to be obtained from contractor/subcontractor by deducting

it from contractor/subcontractor's fees. Article 36(6) of the Labor Law also regulated that employers that are subject to joint responsibility under Article 2(6) of the Labor Law are vested with the authorization to control granted to certain administrations and establishments.

Subsequent to the said amendments, Article 36 now mandates primary employers; to control periodically, on a monthly basis or upon employees' request whether or not subcontractors duly pay remunerations of subcontractor employees; and to deduct unpaid remunerations from subcontractors' fees and pay them to employees' bank accounts.

Furthermore, the new clause added to Article 56 by the Law regulates that annual paid leave entitlements of employees shall be calculated based on the duration they worked in the same workplace in case subcontractors of primary employers change during this duration but same employees continue working for same subcontracted works of primary employers. Additionally, the same article provides that primary employers are now obliged to control whether subcontractors let employees use their annual paid leave entitlements. Subcontractors are also obliged to provide primary employers with a copy of their mandatory books that include records of annual paid leave entitlements, to ensure that employees are using their annual leave entitlements within the respective year.

Consequently, while primary employers have not been obliged to protect subcontractor employees prior to the Law, the amended Articles 36 and 56 of the Labor Law imposed the above obligations on primary employers, in order to prevent both primary employers and subcontractors from limiting employees' entitlements.

The Employer's Right to Monitor an Employee's Computer

Monitoring employee's computer and other devices became a preventive measure for many employers in order to protect companies' interests, as a response to the increasing potential compliance issues. Under the Turkish law, no legislation stipulates the right of an employer to monitor an employee's computers. Thus, High Court of Appeals and doctrine are taken into consideration in dealing with this subject.

The High Court of Appeals' 9th Circuit's decision dated December 13th, 2010, numbered 2009/447 E. and 2010/37516 K. points out that the employer has the right to review its employees' business computers and e-mail correspondences. The facts of the relevant decision were that the employment agreement of the employee was terminated since the employer detected certain e-mail correspondence which involves insulting remarks about the employer. In the reinstitution lawsuit initiated by the employee the court decided that as long as the reviewed documents camse from a business computer and a business e-mail account, any document or file obtained during monitoring process should be deemed legitimate. In another decision of the High Court of Appeals' 9th Circuit decision dated March 17th, 2008, numbered 2007/27583 E. and 2008/5294 K., stipulates that in case the employer gives a notice to the employee that the computers and internet should not be used for personal purposes and in case the employer, by monitoring the employees' computers, determines that the employee uses them for personal purposes, the employer then has a right to terminate the employee's employment agreement for cause.

According to the doctrine, the consent of the employee is not needed in case monitoring of the employee's computer and other devices is based on a reason related to the security and protection of the workplace or third parties' personal rights. Nevertheless, in case there is a doubt on the existence of the above-mentioned circumstances, the employer should get the employee's prior consent.

It is of crucial importance to note that, if the employment agreements (i) recognize that company infrastructure should only be used for business purposes at all times, and (ii) grant the employer the right to review/transfer business computers' data or (iii) the company bylaw or regulations enables the employer to undertake such review, the consent of the employee should not be received.

The doctrine asserts that the employer's entitlement on that regard is not boundless and the employer shall conduct narrowly-tailored and a target-driven review on an employee's business computer, considering the exact purpose of such monitoring. In other words, the employer should in any case refrain from an unnecessary invasion, especially for the personal data of the employee, and should take into consideration the privacy right of the employees. Therefore, a review or transfer of business computers' data without the employees' prior consent would be defendable, as long as the review is realized with the sole purpose of the compliance monitoring, and to the extent any personal data unwillingly surfacing during the investigation is kept strictly confidential. Therefore, since the privacy right of the employee is the limit for such monitoring, it is important for the employer balance the company interests and the employee's privacy rights.

Consumer Protection Law

Implementation of the Consumer Protection Law Along With the New Secondary Legislation

The new Consumer Protection Law ("Law") No. 6502 entered into force as of May 28th, 2014. Subsequent to the enforcement of the Law, a group of new secondary regulation was also introduced, first on June 13th, 2014 - regulations governing warranty certificates, introduction and operating manuals and post-sale services - and on June 30th, 2014 - regulation on price tags - were published on the Official Gazette (collectively as the "New Secondary Legislation").

Not surprisingly, the New Secondary Legislation adapted an approach that is keener on the protection of consumer rather than the counterparty, similar to the Law. This article will be examining the impacts of the New Secondary Legislation throughout the transition period on daily practices, rather than outlining the new aspects introduced with the said legislation.

(i) Downside of the transition period: Contradiction among legislation

Indeed the transition of an entire secondary legislation in parallel with the Law was not expected to be flawlessly realized in the blink of an eye. This being the case, this transition process seems to inevitably give rise to contradiction between the newly introduced system and soon-to-be abolished regulations.

For instance, in distant and door-to-door sales such as the sales made online or through opening stands in fairs or events, the consumers' right to renege from contract is 14 days as per the Law. However, the Regulation on Distant Agreements and the Regulation on Implementation Principles of

Door-to-Door Sales which are still in effect, grant the consumers with only 7 days for reneging from a distant sales agreement, which paves the way for contradiction among legislation and thus ambiguity for both the consumers and the sellers in practice. Given the legislator's approach which is very much to the favor of the consumer, it would be prudent for the sellers to lean on the safe side, in contradictions such as this one, which would boil down to allowing the consumer to renege within 14 days.

(ii) Font size

Not only the implementation of the New Secondary Legislation, but also the interpretation of the Law itself can trigger certain challenges as discussed below.

An amendment made in Article 4 of the Law included "briefings made to consumers as per the Law" amongst the documents which should be readable with at least 12 points font size. However, the Law lacks an explicit definition of what will be considered as "briefings".

- Shall all documents under the Law be drafted with 12 points font size?

As per the Law, during the execution of some agreements, such as residence financing agreements, consumer loan agreements and distant sales agreements, sellers are obliged to provide the consumers with a pre-briefing on the terms of the ongoing transaction.

Although there is no specific explanation pointing out that the word "briefing" means informing of the customers by the sellers in specific cases outlined by the Law, such as the foregoing agreements, considering the nature of other documents used in consumer transactions (*e.g.* warranty cards, introduction and operating manuals *etc.*) and their separate regulations which explicitly pinpoint their content, one can argue that the font size rule would be applicable to the briefings specifically listed by the Law and imposed on the sellers to be communicated to the consumers. That said, this is still considered as a gray area by the sellers and manufacturers.

(iii) Repetition of the mandatory content

According to Article 2 of the Regulation on Warranty Certificates, warranty certificates shall be issued for all products specified under the attached list. Similarly, all products except the ones listed in Article 6 of the Regulation on Introduction and Operating Manuals shall include an introduction and operating manual during sale. In this respect, the manufacturers, in most cases, would be obliged to issue both a guarantee certificate and an operating manual for a single product.

These two documents above are clearly subject to different specifications under separate regulations. That said, their mandatory content overlap in certain items, such as the obligation to explicitly state consumers' optional rights in cases of defect, which should be written on both guarantee certificates and operating manuals. Given that a remarkable number of manufacturers in Turkey are managed from abroad, with global warranty guards and operating manuals, this repetition surely imposes additional burden on the manufacturers, obliging them to re-state certain content in the packaging of a single product.

Litigation

A Litigation Act - Raising Questions on Advertising Self-Regulatory Board

The Advertising Self-Regulatory Board ("ASRB"), is an ethical service platform, established with the participation of the Advertisers Association, the Turkish Association of Advertising Agencies and media institutions. ASRB has been requesting correction of advertisements that they find to be in violation of the International Code of Advertising Practice ("Ad-Practice") and fulfills this function in a manner that is not based on legal requirements, but for the sake of its commitments to and responsibilities against the society. ASRB is not a judicial authority, thus its decisions are merely advisory, not binding.

A litigation act, filed by ELIG, Attorneys-at-Law before Administrative Courts, ultimately paved the way for questioning whether ASRB's decisions have a restrictive effect on competition. This act was triggered by ASRB's advisory request letter sent to broadcasting channels for cease of a certain commercial believed to be misleading consumers and thus, against Ad-Practice. The story behind this advanced as follows:

The ASRB, upon a complaint with regard to a certain commercial, deemed this commercial against Ad-Practice by concluding that the statements in the commercial misled the consumers. The ASRB requested for the cease of this commercial from the company running it. As the commercial was not ceased, ASRB, this time, requested cease from the broadcasting channels airing this commercial. Although ASRB's request is not binding whatsoever, those requests have a binding effect over broadcasting channels since several powerful enterprises have a governing capacity in ASRB and by virtue of this, ASRB has a hold over broadcasting channels, due to the revenue to be generated from commercials of those enterprises in question. Consequently, ASRB's request took effect and the channels stopped the commercial. Thereupon, the company airing this commercial filed a complaint before Competition Authority under ELIG's representation and the Authority ruled that there was no need for investigating the complaint, which is what challenged by the litigation act in question here.

One of the many arguments advanced in this litigation was ASRB's restrictive effect on competition, exerted via its decisions that turns out to be binding in practice, though not in theory. It was argued that ASRB's decisions and sanctions directly undermine chances for effective competition and such regulatory acts taken by ASRB restrict competition to the favor of certain enterprises. To put succinctly, the argument was that the ASRB may enable competition law violations while functioning. With regard to this argument, the Administrative Court ruled that the restrictive effect of ASRB's actions/decisions on competition must be investigated and whether those actions violate competition rules to the favor of certain enterprises is an issue worthy to be analyzed thoroughly. Accordingly, the court concluded that Competition Board's ruling on not investigating the complaint is unlawful, which led to the Board's investigation on the complaint in question.

This litigation is prominent in a way beyond having the Competition Board open an investigation. By the court's ruling, the possibility of ASRB affecting competition via its decisions is acknowledged and found worthy to be investigated. This decision shows promise to change the way ASRB operates henceforward, which would gradually rid the media sector from having a governing capacity in ASRB.

Internet Law

Recent Developments in Turkish Internet Law and a Significant Constitutional Court Decision

Law No. 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts ("Law No. 5651") has recently been amended. The amendments are published on the Official Gazette of September 11th, 2014 and became effective on the same day. Below are the new amendments introduced to the Law No. 5651 and what they bring:

Per Article 3, content, hosting and access providers are responsible for providing their identification information on the internet in a manner allowing the users to have access to such information, pursuant to the principles and procedures set forth in the regulation; and keep such information up-to-date. The amount of administrative fine set out in Article 3 of the Law No. 5651 is increased from "TRL 2,000 up to TRL 10,000" to "TRL 2,000 up to TRL 50,000".

Paragraph 4 of Article 3 of the Law No. 5651 which stipulates the legal process for Turkish Communications Presidency ("TCP") to obtain internet traffic data is amended as follows: "The Presidency shall obtain the traffic data from the relevant operator and in case it is decided by the judge, present it to the requesting authority". The collection of internet traffic data by TCP was possible only if the traffic information was requested by the courts based on a criminal investigation and/or prosecution in previous version of this paragraph. TCP is now granted the authority to obtain Internet traffic data from operators without any decision by the court or a judge. Only the presentation of internet traffic data to the requesting authority is tied to the existence of a decision by the judge.

The phrase "24 hours" subject to Article 8(5) of the Law No. 5651 (access ban decisions that may be given regarding the catalogue crimes) is amended as "4 hours". The amendment reads as follows: "Access ban decision shall immediately and at most within 4 hours as of the notification of the decision, be executed by the access provider".

The following paragraph is also added to Article 8 of the Law No. 5651: "Access ban shall be executed by The Presidency upon the order of The President, if failure to do so might result in delay and cause irreparable damages due to one or more matters among national security and preservation of public security, prevention of crime. Access providers shall enforce the request received from The Presidency within four hours at the latest. The access ban decision given by the President shall be presented to the approval of criminal judgeship of peace judge within twenty four hours by The Presidency. The judge shall announce its decision within forty eight hours".

The terms "national security", "public security" and "prevention of crime" are extremely vague. Therefore, the foregoing provision grants a wide authority for TCP regarding access ban decision. Even if the access ban decisions of the TCP will be sent for the evaluation of the judge, TCP may ex officio take an access ban decision if the conditions in Article 8 of the Law No. 5651 are met. This provision is illegal from many aspects of Turkish laws mainly due to (i) granting an administrative body authority to access ban without prior judiciary audit, (ii) violating right of defense (the decision will not be notified to the content or hosting providers), and (iii) disabling legal remedies that could be applied against the judge's decision (it is not clear where the judge will announce its decision, if at all).

Additionally, traffic information is considered as personal data under Turkish law, and there is no explanation in the reasoning of the amendments, explaining why the TCP has been granted the authorization to collect traffic information from the operators without a valid legal ground. The right to request protection of personal data is a constitutional right and the new amendment intervenes with it. The revised version of the article also does not meet the criteria of "being necessary in a democratic society", "not intervening to the core of a right", "proportionality" and "to be used as a last resort", which are set forth in Constitutional Court's and European Court of Human Rights' decisions. Besides, this new article does not regulate how to ensure integrity and accuracy of the traffic data to be collected.

On October 2nd, 2014, Turkish Constitutional Court decided that Article 3(4) and Article 8(16) of the Law No. 5651 are against the Constitution and these provisions should be cancelled based on the constitutional objection filed by the main opposition party. The decision will not be effective until it is published in the Official Gazette. However, as the court rendered a stay of execution decision for the application of Article 3(4) of the Law No. 5651, this article's implementation should cease.

E-Commerce Law of Turkey is Recently Enacted

Law No. 6563 on Regulation of Electronic Commerce ("E-Commerce Law") is published in the Official Gazette on November 5th, 2014. E-Commerce Law, which aims to regulate procedures and principles regarding electronic commerce, will be effective on May 1st, 2015. Therefore, there will be a transition period in e-commerce ecosystem in Turkey in the following days.

Please find below the significant provisions of E-Commerce Law:

(i) Definitions of terms particular to electronic commerce such as "service provider", "intermediary service provider", "electronic commerce", "commercial communication", "electronic commercial communication" have been introduced.

(ii) Liabilities and obligations of service providers, intermediary service providers and the sanctions in case of non-compliance with these obligations have been introduced.

(iii) The obligation on service provider and intermediary service provider on the preservation and security of the personal data they obtained through their transactions within the scope of the E-Commerce Law is regulated by allowing them to transmit or use the relevant personal data only with the consent of the data subject.

(iv) Article 50 of the Law No. 5809 on Electronic Communication is amended and the clauses below are added to the Article:

"(5) Without the prior consent of the subscribers, operators shall not convey unsolicited communication for the purposes such as direct marketing, political propaganda or transmission of sexual content messages by electronic communications means such as automatic dialing machines, fax machines, e-mail and short messages. Operators shall not convey communication to their subscribers and users involving political propaganda regarding the services they provide.

(6) In case operators obtained the communication information of their subscribers and users while providing merchandise or a service by informing them that such communication will be conveyed

and providing them the opportunity to reject, communication for the purposes of marketing, promotion, modification and maintenance services might be conveyed to the subscribers or users without their prior consent.

(7) The opportunity to reject such communication and revoke their permission regarding it shall be provided to the subscribers and users in a facilitated way and free of charge."

(v) Finally, the legal requirements for sending commercial communications are set out under this legislation. Commercial electronic communications (*e.g.* a spam e-mail message or a SMS message with commercial purpose) might be sent to the recipients, who are not merchants or artisans only if their prior consents are obtained. However, as per Temporary Article 1 of the E-Commerce Law, this provision will not be applied for the databases which are established by taking the data subjects' consent before the E-Commerce Law enters into force (*i.e.* May 1, 2015).

Considering the principle of territoriality, the E-Commerce Law should apply to the companies established in Turkey and not to the foreign companies.

The E-Commerce Law is significant because it is the first specific legislation under Turkish law for specifically regulating commercial communications, liabilities of service providers and intermediary service providers, contracts concluded by electronic means, liability to provide information regarding electronic commerce and sanctions to be applied.

Telecommunications Law

A Significant Board Decision of Information and Communications Technologies Authority Regarding Network and Information Security for Operators

Turkish Information and Communications Technologies Authority ("ICTA") has taken certain significant decisions on telecommunications sector. One of the decisions of ICTA is about the telecommunications operators who should maintain additional measures for network and information security. As prescribed by the Regulation on Network and Information Security for Telecommunications Sector ("Regulation"), ICTA is responsible to determine the telecommunications operators who should maintain additional measures.

ICTA, on a decision of September 2014[7] which was published on September 16, 2014, granted a board decision stating that the following types of operators are obliged to maintain additional measures for network and information security: (i) infrastructure management services, (ii) GSM operators which are providing services within the scope of a concession agreement signed with ICTA, (iii) GSM 1800 mobile phone services for aircrafts (iv) internet service provider, fixed phone services, (v) virtual mobile network services (vi) satellite communication services (vii) satellite and cable TV services; and providers should have minimum net annual

[7] Please see the Turkish version of the Regulation at the following URL address: http://btk.gov.tr/mevzuat/kurul_kararlari/dosyalar/(03)_(438)%20%C5%9Eebeke%20ve%20Bilgi%20G%C3%BCvenli%C4%9Finin%20Sa%C4%9Flanmas%C4%B1na%20%C4%B0li%C5%9Fkin%20%C4%B0lave%20Tedbirleri%20Almakla%20Y%C3%BCk%C3%BCml%C3%BC%20Olacak%20%C4%B0%C5%9Fletmecilerin%20Belirlenmesi_01_09_2014_web.pdf

sales with TRL 10 million. As per the foregoing decision, operators which are providing GMPCS mobile phone services are obliged to maintain the additional measures, regardless of their net annual sales. Additional measures for network and information security for telecommunications sector is regulated under Section 4 of the Regulation. Additional measures are mainly as follows: (i) measures against cyber-attacks, (ii) documentation requirement, (iii) obligation to prepare a security report, (iv) notification requirement after breaches and (v) maintaining a disaster recovery center.

Real Estate Law

Sale of Agricultural Estates Owned by the Treasury

The principles and procedures pertaining to the sale of agricultural estates owned by the Treasury is regulated under the National Estate Communiqué No. 355 ("Communiqué") titled "Principles and Procedures on Sale of Agricultural Estates Owned by Treasury in Accordance with the Provisions of the Law No. 6292 on Supporting Development of Forest Villagers and Utilization of Estates Excluded from Forest On Behalf of Treasury and Sale of Agricultural Estates Owned by Treasury ("Law No. 6269")", which is based on Article 12 of the Law No. 6269.

Article 12 of the Law No. 6269 regulates that a person who (i) leased an agricultural estate for at least three years as of December 31st, 2011, or (ii) is a tenant with an ongoing lease agreement, or (iii) is one of the users or stakeholders determined by the administration, and applied to purchase the agricultural estate within two years as of entrance into force of the Law No. 6269 (*i.e.* April 26th, 2012) by offering to pay the administration its price and accepting the administration's determined price without any objections, is deemed a direct right holder on that agricultural estate in the scope of the Law No. 6269.

Agricultural estates, in terms of the Communiqué, are the estates that are convenient to agricultural production due to characteristics of their soil, topography and climate, or convertible to an estate which allows agricultural production through zoning, improvement, reclamation.

According to Article 5/2 of the Communiqué, in case the agricultural is used by a tenant or a third party other than the stakeholders, the stakeholders have the priority right in purchasing the estate. However if the stakeholders do not approach to purchase the agricultural estate, the estate might be sold to the right holder tenant or the user respectively.

The Communiqué breaks down sale of agricultural estates into four sections: (a) sale to stakeholders (Article 6 of the Communiqué), (b) sale to tenants (Article 7 of the Communiqué), (c) sale to users (Article 8 of the Communiqué) and (d) sale to persons who have annotation or indication in the land registration (Article 9 of the Communiqué). The requirements as to sale to each of the foregoing differ from each other based on their status.

The authorities for conducting the direct sale of the agricultural estates owned by the Treasury are the financial offices and revenue departments. Pursuant to Article 10 of the Communiqué, the sale transactions are concluded at least within a year as of the application of the right holders.

The sale prices of the agricultural estates and the buildings established on them for agricultural production are determined according to one half of the market price of the estate. The prices for the properties

established on these estates for the purpose of residence are also determined according to this evaluation. Following the sale of the agricultural estate, the administration issues a "Direct Sale Right Holder Certificate" including the information related to the estate and the right holder's identity number, identification information, photo and signature. After this certificate is issued by the administration, the transfer and the legal pledge (in case the payment is made in installments) on the estate is registered to the land registry *ex officio*.

White Collar Irregularities

The OECD Phase 3 Report on Turkey: The State of Anti-Corruption Law and Enforcement

The OECD Working Group on Bribery ("WGB") has published its Phase 3 Report on Turkey, following the Phase 2 and Phase 2Bis Recommendations ("Follow-Up Report") of March 2010, to assess Turkey's efforts in implementing the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("Convention"). As expected, the Phase 3 Report predominantly criticizes Turkey's lack of enforcement of its foreign anti-bribery legislation, while putting the ambiguity of corporate liability laws under the spotlight.

Being a signatory to the Convention has undoubtedly benefitted Turkey, legislation-wise, as Turkey has so far implemented the recommendations emphasized in the WGB reports, not wishing to face any consequences of openly breaching the Convention in the international arena. However, the main points of criticism in all five previous reports issued by the WGB on Turkey do not change. These are Turkey's lack of enforcement actions on foreign bribery and the lack of corporate criminal liability. The Phase 3 Report reiterates these criticisms, having added the new concern of whether the prosecution of foreign bribery cases would be utilized as platforms of political settlements.

Such concern could have arisen due to Turkey's handling of the high-profile corruption investigation that erupted in December 2013 which gained massive international media coverage. While not being directly linked to the fight against foreign bribery and rather being a domestic corruption issue, the WGB is not indifferent to the re-shuffling of police officers and prosecutors in the aftermath of the allegations and the issuance of a verdict of non-prosecution against 96 persons allegedly involved in the corrupt scheme. Consequently the WGB, one might say "justifiably", questions the independence and impartiality of law enforcement in Turkey and is concerned as to how the general law enforcement panorama in Turkey affects the detection and prosecution of foreign bribery. Like the representatives of civil society and private sector lawyers interviewed during the on-site visit of the examiners, the WGB does not seem to be satisfied with the explanations provided by Turkish authorities that the reassignments in the police force, as well as public prosecutors and the judiciary, were normal practice and that this occurrence has no influence over Turkey's handling of foreign bribery acts. In the context of assessing the relevant reassignments, one should consider that reassignments are known to be used as measures of "punishment" in Turkey.

The Phase 3 Report is dominated by criticism of Turkey's low level of enforcement and its inaction with respect to detecting, investigating and prosecuting acts of foreign bribery. This coincides with the outcomes of Transparency International's newly published 2014 report on Exporting Corruption where Turkey's

enforcement score of the Convention is “little or no enforcement”. As such, the Phase 3 Report is yet another reminder that Turkish law enforcement regarding foreign as well as domestic bribery has still a long way to go.

WGB further comments that Turkey should improve its efforts to proactively detect, investigate and prosecute allegations of foreign bribery as a matter of priority. Accordingly, out of 10 allegations that emerged since 2003, Turkey has investigated six cases in a limited manner, took no investigative steps in two and, most worrisome of all, the Turkish authorities claimed to be unaware of two allegations which were publicized in domestic and foreign media. The WGB expresses its disappointment with the fact that Turkey proactively detected only one foreign bribery case. Therefore, the WGB recommends Turkey to review its mechanisms for gathering information to ensure effective detection of foreign bribery allegations and to enhance investigations by engaging with other investigative authorities. The WGB expresses its serious concerns about the facts that no foreign bribery convictions have been made in the 11 years since the entry into force of the Convention in Turkey. The WGB’s concern about the low number of cases is supported by the size of Turkey’s economy (17th largest economy in the world) and its geopolitical position and trade relations with countries presenting potentially high risks of foreign bribery pursuant to the Transparency International’s 2013 Corruption Perception Index.

The other major criticism in the Phase 3 Report is with regard to corporate liability arising from foreign bribery. Historically, this has been a much debated issue in the Turkish legal landscape, with the insertion of an article on corporate criminal liability to the Turkish Criminal Code and its subsequent cancellation by the constitutional court. Following WGB’s extensive criticism in Phase 2 and Phase 2bis Reports regarding the lack of criminal liability for legal persons, an administrative fine was finally introduced in the Law on Misdemeanors, to be imposed on legal persons who perpetrate the offense of foreign bribery. To that end, the Phase 3 Report recognizes that liability may arise due to corporation’s perpetration of foreign bribery. However, it also criticizes the said legal framework on the grounds that it is not clear whether the liability covers state-owned or state-controlled enterprises (“SOE” and “SCE”, respectively), in addition to private legal persons.

In this respect, even the recommendation regarding the inclusion of SOEs and SCEs in the provision providing for corporate liability may be insufficient. This is because, due to a recent amendment in the Court of Accounts regulation, the Court of Accounts might not be able to audit the accounts of public institutions for another three years (including (i) joint stock companies established by virtue of specific laws that more than 50% of the shares are directly or indirectly held by public and (ii) all kinds of administrations, institutions, organizations, unions, enterprises and companies established by the foregoing provided that the public shares exceed 50%). As a result, while the transparency and accountability of private companies are provided through internal and external audits, even if SOEs and SCEs are to be included in the relevant provision, their accounts may not be duly audited to determine a potential act of foreign bribery.

According to the Report, it is also unclear whether a conviction of a natural person is necessary for the fine to be imposed over a legal person. Since the wording of the relevant article 43(A) in the Code of Misdemeanors and the explanations of Turkish authorities

cast doubt on the possibility of conviction of a legal person without the prosecution or conviction of a real person, Turkey may clarify the issue by introducing a provision into the Article 43(A). A final point of criticism regarding corporate liability due to foreign bribery is the lack of enforcement, leading to a lack of guidance on the legislation already deemed to be ambiguous.

Regarding the legal framework, the Report recognizes Turkey's efforts of furthering its anti-bribery laws and its engagement in two mutual legal assistance requests regarding foreign bribery. However it also stipulates that Turkey does not have any legal mechanisms for the protection of whistleblowers in neither of the public and private sectors. While Turkish authorities asserted that the whistleblower protection against retaliation exists through the general principles of the Labor Law, it is hard to argue that such provisions provide the necessary protection tailored to the particularities of whistleblowing. In order to provide a thorough whistleblower protection, Turkey should introduce a more specific provision into the Labor Law regarding the whistleblowers' protection against retaliation and their wish to keep their identity confidential.

Finally, the WGB requested Turkey to report in 2015 on (i) the progress made to proactively detect, investigate and prosecute foreign bribery, (ii) steps taken to rectify the deficiencies in corporate liability provisions and to enforce them, (iii) steps taken to ensure that foreign bribery investigations are not influenced by political considerations and (iv) the steps taken to better protect whistleblowers from retaliations. Subsequently, Turkey is invited to submit a written follow-up on the implementation of WGB recommendations in 2016. As also stressed in the WGB's Phase 3 Report, we expect Turkish anti-corruption efforts to focus on law-enforcement for the next few years to come. Considering Turkey's past legislative reactions to WGB reports, one might say that legislative requirements on corporate liability and whistleblower protection will be relatively easy to provide. Although the first item on the list only requires Turkey to enforce its anti-bribery laws in a manner just as robust and impartial as it enforces any other laws under its legal system, the part of the progress report regarding the third item promises to be quite challenging.

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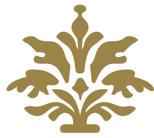

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