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LEGAL INSIGHTS QUARTERLY

December 2015 - February 2016

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White Collar Irregularities

2015 FCPA Enforcement Actions and Highlights

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Preface to the December 2015 Issue

On this issue, on the corporate law front, the Regulation on Conducting Notarial Acts by means of Electronic Media was promulgated, paving the way for ease of practice in many daily transactions with public notaries in Turkey.

The competition law front explores the decision of an administrative court, underlining the Competition Board's positive and negative duty to continuously monitor the markets in the context of an individual exemption or negative clearance analysis.

The internet law section focuses on the Regulation Regarding Service Providers and Intermediary Service Providers in Electronic Commerce, which imposes new obligations for service providers and intermediary service providers with respect to their electronic commerce activities. In the field of data protection, European Court of Justice decision about the repealing of the safe haven between the EU and US is analyzed.

Finally, on the white collar irregularities front, this issue provides the analysis of FCPA cases throughout 2015.

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 2015

Corporate Law

Regulation Allowing Notarial Acts to be Conducted Electronically

The Regulation on Conducting Notarial Acts by means of Electronic Media published on the Official Gazette on July 11th, 2015 ("Regulation"), sets forth rules and procedures for conducting, storing and sending notarial acts by electronic means. The Regulation introduces a system called "Information System of Union of Turkish Notaries" ("ISUTN").

Transactions mentioned under the Notary Law can be conducted by electronic means by using a secure electronic signature. However, neither the transactions which are required to be executed in a "statutory form" (*i.e.* through a deed drafted by the notary's office, as opposed to the notary approving a pre-drafted, "outside" text) or via a special procedure, nor conclusion of guarantee agreements can be conducted by using secure electronic signature. Any transaction conducted with secure electronic signatures must bear a "time stamp". Transactions which are required to be conducted in a statutory form and transactions which require declaration of the parties' intention should be conducted physically in the presence of the notary public. However, parties may log in ISUTN and start up the preparatory works. In any case, the transaction should be finalized in the presence of the notary public.

Transactions other than the ones which are required to be executed in a statutory form or via a special procedure as well as conclusion of guarantee agreements can be finalized through ISUTN by using secure electronic signature.

Notarial acts, which are allowed to be conducted by electronic means, will be made by logging in ISUTN by using secure electronic signature. In accordance with Article 6 of the Regulation, transactions listed below can be conducted without the need to be present before a notary public, and through ISUTN.

(i) Registration transactions,
(ii) Translation transactions,
(iii) Determination transactions,
(iv) Certification of commercial books,
(v) Issuing warning letters and notifications without signature authentication.

Applicants will be able to choose a notary public when making an application through ISUTN. If no choice is made, the application will be referred to the closest notary public.

Unless a physical document is requested by parties, no physical document will be created or stored for an electronic transaction where all parties use secure signatures. In case a physical copy of a document signed by electronic signatures is requested by the parties, the notary must affix his/her signature and seal the document in order to indicate that it is a true copy of the original, then deliver the document to the relevant party.

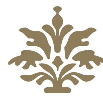
Information and documents relating to transactions performed via secure electronic signatures can be sent to notaries, persons and entities by means of electronic media. Transactions which are performed with wet signatures and recorded in ISUTN with secure electronic signatures can also be sent to notaries, or other persons and entities in the same way, if necessary.

The Regulation will become effective as of March 1st, 2016.

Differentiated Joint Liability of Board Members in Joint-Stock and Limited Liability Companies

One of the novelties introduced by the new Turkish Commercial Code No. 6102 ("TCC") is the principle of "differentiated joint liability" regarding the board of directors' liability. This new principle derives considerably[1] from the

[1] POROY, TEKİNALP, ÇAMOĞLU: Ortaklıklar Hukuku I, İstanbul 2014, p. 390



system of former Turkish Commercial Code No. 6762 (“fTCC"). We hereby provide information on both principles:

The former liability system (“absolute joint liability”)

The fTCC had regulated the principle of “absolute joint liability”, which has been abandoned by the TCC due to its unfair consequences.

Absolute joint liability may be translated such that each director is fully liable for compensation of the total loss caused collectively by the board and incurred by the company, shareholders and/or creditors, regardless of their degree of fault. This principle did not allow for the director to present defensive arguments on the grounds of his/her limited personal role regarding the subject matter.

As a result of this principle, in certain cases, a director would be forced to compensate the loss regardless of the degree of his fault in the matter which caused the loss in the first place. In other words, a director with a much lesser degree of fault would be held equally liable for the same loss with other directors who were rather the major actors in such matter.

The director who ended up compensating for more than his share of fault would be able to have recourse to other liable directors, but this would require a separate legal action which can only be initiated once the above mentioned lawsuit has been finalized. A fair compensation liability would require not one but two or more law suits in a row.

The new liability system (“differentiated joint liability”)

Under the TCC, the directors, same as the previous system, are also jointly and severally liable, for the “same loss” incurred by the company, shareholders and/or creditors provided that there is:

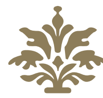
(i) a breach by the directors of their duties as directors or a fault committed by the directors, either intentionally or by negligence;
(ii) a damage suffered by the company, shareholders and/or creditors; and
(iii) a causal link between the breach and the damage.

However, as per the differentiated joint liability principle, each director will be liable as per his/her degree of fault for the damages caused collectively by the board due to misconduct. The defendant director/s may directly present arguments in connection with his/her personal part in the matter, thus have his/her amount of liability reduced.

Such principle is regulated under Article 557 of the TCC. According to such article, in case two or more persons are liable for a loss, each shall jointly and severally be liable with others to the extent that the damage incurred is personally attributable to him/her on the account of his/her own fault and the circumstances.

The party incurred the loss may request compensation from all of the directors for the total loss incurred and in such case the court will determine the liability of each individual defendant as per their roles as to the damage incurred. As opposed to the “absolute joint liability” principle, this principle would save a director with a lesser (or none) degree of fault from another costly and lengthy legal action to reach the same consequence.

On the other hand, in case the lawsuit is not brought against all the persons held liable for the damage, the judge is authorized by the same article to determine the right of recourse among the defendants and such third parties.



However, it is hard to predict how the courts would implement this aspect of the new principle, which introduces a very new liability scheme.

To sum up, the principle of "differentiated joint liability" is a favorable statutory amendment regarding the directors who are not responsible for a loss, or whose responsibility is on a lesser degree than others.

Banking and Finance

Legal Standing of Intercompany Loans

Although the Law of Financial Leasing, Factoring and Financing Companies, No. 6361 ("Law"), has entered into force on December 13th, 2012, questions regarding the legal standing of intercompany loans, especially in light of criminal laws, remain to be raised.

1. Definitions

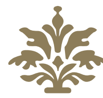
As a novelty of the Turkish Commercial Code, No. 6102 ("Code"), the definition of a group of companies was provided under Article 195 of the Code. Accordingly, companies, which are directly or indirectly bound to a parent company, form a group of companies along with the parent company. As for an intercompany loan, for the purposes of this article, it shall mean a type of financing provided by one of the companies to another, both of which are in the same group of companies.

2. The Reason Why the Questions Arise

Article 52 of the Law repeals the Statutory Decree on Making Monetary Loans, No. 90, published on the Official Gazette of October 6th, 1983 ("Decree"). The purpose of the Decree, as stated in its Article 1, was to *"regulate and supervise the activities of natural persons and factoring and financing companies, who regularly engage in acts of making monetary loans in return for a certain consideration…"*. The importance of the Decree for the purposes of this article is that the Decree had explicitly left *"legal persons making monetary loans to other legal persons, with whom they are directly, or indirectly through their partner company or subsidiary company, in a partnership relationship"* out of scope of the Decree. Accordingly, intercompany loans were not subject to the Decree, thus, (along with the other articles of the Decree) Article 9 which stipulated that making a monetary loan in return for a certain consideration without holding a license to be obtained as per the Decree, would be pawnbroking, thus against the law. As the Law does not stipulate any such explicit reference to intercompany loans, questions arise as to whether providing an intercompany loan would expose the providing group company to committing a violation of law, especially with respect to the pawnbroking provision of the Turkish Criminal Code, numbered 5237 ("TCC").

3. Relevant Legislation

The lawmaker's aim has been to secure that the act of providing loans is carried under supervision. Among the other legislation relevant to intercompany loans would be the Code (Article 202 provides protection for the subsidiaries against abuse of control by the parent companies and Article 358 stipulates that shareholders can borrow from the company under certain circumstances), the Law (as it is the legislative piece which has repealed the Decree) and the TCC (as Article 241 regulates pawnbroking). Additionally, there is the Undersecretariat of Treasury's Communiqué, numbered 2008-32/34 published on the Official Gazette of February 28th, 2008 ("Communiqué"), which explicitly states that persons resident in Turkey can provide Turkish Lira or foreign currency credits to foreign companies, of which they are shareholders, and to the foreign parent company and the group companies. Lastly, the Capital Movements Circular Letter of the



Central Bank of the Republic of Turkey, numbered 2002/YB-1 and dated January 2nd, 2002 ("Circular Letter"), also contains an explicit reference to the act of *"opening of a Turkish Lira or foreign currency credit to foreign companies, of which they* [persons resident in Turkey] *are shareholders, and to the foreign parent company and the group companies, by the persons resident in Turkey*" under its Article 2.5. Although a law is superior in effect than a communiqué and a circular letter, and a communiqué and a circular letter should be compliant with a law, the existence of the aforementioned articles of the Communiqué and the Circular Letter bear importance, since they affirm that intercompany loans are recognized by the administrative organs and the regulatory acts issued by them. This being said, TCC's relevant provision should be cited at this point to assess in full the legal risk exposure of the companies engaging in the act of providing intercompany loans.

Article 241 of the TCC defines pawnbroking as the act of lending money to another person with the intention of obtaining consideration. The relevant provision does not define any further what constitutes "consideration", nor does it stipulate whether it seeks regularity for the violation to have occurred. As for the question of whether the regularity of the act is sought for the occurrence of the violation, it should be noted that while the Court of Appeals had previously sought regularity for the occurrence of the violation[2], in its more recent decisions it had found it sufficient for the occurrence of the violation that the act was committed only once[3].

Lastly, in case an intercompany loan is to be provided without accruing an interest and/or without receiving any other type of consideration, Article 241 of the TCC shall very likely not be deemed applicable, since the provision explicitly seeks the existence of "consideration". How this article shall be applicable with respect to intercompany loans to be provided in return for consideration shall be discussed below.

4. Intercompany Loans Provided in Return for Consideration

The relevant article of the TCC contains as a definition merely the act of lending money to another person with the intention of obtaining consideration, and no further detail. As mentioned above, the precedents of the Court of Appeals shall be resorted to, in order to shed a light on whether intercompany loans provided in return for consideration would constitute a violation of the law.

The first matter to be derived from the precedents when assessed is that the Court of Appeals, in its decisions[4], rules that the 6 courts of first instance should have looked into whether there was a commercial relationship between the parties, which could have required the providing of a loan. Accordingly, the existence of a commercial relationship between the parties, which can lead one to provide loans to the other (as could be deemed to be the case between group companies), can be deemed to render the pawnbroking provision of the TCC non-applicable to the relevant act of providing loans.

Secondly, the Court of Appeals has sought the existence of an extortionate consideration[5]

[2] Decision of the Court of Appeals for the 7th Criminal Circuit, dated April 11th, 2007, numbered E. 2004/17311 and K. 2007/2525; decision of the Court of Appeals Assembly of Criminal Chambers, dated July 7th, 1995, numbered E. 1995/7-207 and K. 1995/236.

[3] Decision of the Court of Appeals for the 5th Criminal Circuit, dated June 19th, 2014, numbered E. 2014/5743 and K. 2014/6848; decision of the Court of Appeals for the 5th Criminal Circuit, dated May 5th, 2014, numbered E. 2014/2642 and K. 2014/4990.

[4] Decision of the Court of Appeals for the 5th Criminal Circuit, dated September 25th, 2013, numbered E. 2012/10162 and K. 2013/9307; decision of the Court of Appeals for the 5th Criminal Circuit, dated May 8th, 2013, numbered E. 2012/6673 and K. 2013/4730.

[5] Decision of the Court of Appeals for the 13th Civil Circuit, dated May 31st, 2012, numbered E. 2012/8652 and K. 2012/14150.

to rule upon the occurrence of pawnbroking. Accordingly, if, for example, the interest rates to be accrued upon a loan are in the amount to only cover up the expenses of the providing party or, if, the interest rates are the same as/close to the interest rates to be charged by third-party banks, it would highly likely not be possible to rule upon the existence of an extortionate consideration, and thus occurrence of pawnbroking.

5. Final Remarks

Although the omission of an explicit reference to intercompany loans by the repealing Law arises questions as to whether providing an intercompany loan would expose the providing group company to committing a violation of law, as long as the providing of an intercompany loan is done so as per the following, the act of providing intercompany loans would highly likely not be deemed to be against the law:

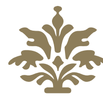
(i) in good faith of the parent company as per the Code (with respect to the intercompany loans provided by subsidiaries to a parent company),
(ii) within scope of a commercial relationship between the parties, which could require the providing of such loan, and
(iii) for consideration, which would not be deemed extortionate.

Competition Law / Antitrust Law

The Extent of the Duty to Oversee the Markets: the Alpet Saga

Ankara 9th Administrative Court (the "Court") has recently handed down its judgment on the Turkish Competition Board's (the "Board") decision (i) not to grant an individual exemption to the acquisition of Altınbaş Petrol ve Ticaret A.Ş. ("Alpet") and Atak Madeni Yağ Pazarlama San. ve Tic. A.Ş's ("Atak") 33% shares in Akdeniz Akaryakıt Depolama Nakliyat ve Ticaret A.Ş ("Akdeniz") by Türkiye Petrol Rafinerileri A.Ş ("Tüpraş") (the "Transaction") (July 04, 2012, 12-36/1041-329) and (ii) to reject the revision request on the abovementioned decision which did not grant an individual exemption to the Transaction (January 29, 2014, 14-05/84-M). The Court decided that the Board's decision on the rejection of the revision request is against the law and the Board should have accepted the revision request since it fulfills the conditions based on its obligation to continuously monitor the relevant markets set out under Article 27 of Law No. 4054 on the Protection of Competition ("Law No. 4054") (Ankara 9th Administrative Court, October 02, 2015, 2014/812 E., 2015/492 K.). The Board's initial decision concerns Akdeniz, a joint venture between Opet, Akpet and Alpet and operating in the storage of petroleum products market with its oil terminal (No. 12-36/1041-329). Akdeniz was established in 2008 to facilitate the storage of imported and domestically supplied oil. In 2012, Alpet intended to sell its shares to Tüpraş. Therefore, Tüpraş made an individual exemption application pursuant to Article 5 of Law No. 4054 instead of notifying the Transaction under Article 7 of Law No. 4054. The Board confirmed the approach taken by Tüpraş and provided that since the joint venture did not qualify as a full-function joint venture; the Transaction should be reviewed under the individual exemption analysis. Upon its assessment, the Board decided that the agreement did not fulfill the conditions for individual exemption. In its *ratio decidendi,* the Board relied on the early findings of a preliminary investigation on the possible market allocation agreement between Opet and Tüpraş.

Following the investigation on Opet and Tüpraş, the Board found that there was no collusion between the parties. Subsequent to this finding, parties to the Transaction



requested the revision of the initial decision, whereas the Board rejected this request (No. 14-05/84-M). Following the Board's rejection to revise its initial decision, Alpet appealed to the Court for the annulment of the decision. The Court decided, with one dissenting vote, to (i) uphold the Board's decision not to grant individual exemption to the acquisition of Alpet and Atak's 33% shares in Akdeniz by Tüpraş; and, (ii) quash the Board's rejection of the revision request upon of the conclusion of the investigation on Tüpraş and Opet. The Court found that the Board failed to take into account the findings of the investigation.

The Court also indicated that the Board did not fulfill its duty to closely monitor the markets and act *ex officio*, if necessary, on applications for exemption. Article 27/c of Law No. 4054 ordains that, it is the duty of the Board *"to closely monitor the relevant markets subject to the exemption and negative clearance decisions; and to revise the relevant applications in case there are changes on the circumstances of the parties."* Therefore, while the Court upheld the initial decision not to grant an exemption to the acquisition, it recognized that status quo had shifted in the aftermath of the investigation. Therefore, the Court accepted the plaintiff's appeal request on the Board's second decision (No. 14-05/84-M). Furthermore, the dissenting opinion provides that the Board's initial decision (No. 12-36/1041-329) declining to grant an individual exemption to the Transaction is itself based on assumptions and probabilities instead of concrete and objective analysis (Ankara 9th Administrative Court, October 02, 2015, 2014/812 E., 2015/492 K.).

The Court's decision is interesting as it is one of the few cases where it underlines the Board's positive duty to continuously monitor the markets in the context of an individual exemption or negative clearance analysis.

The Board Evaluated the Age Restrictions for Footballers Set by the Turkish Football Federation (July 9, 2015, 15-29/430-125)

The Board re-evaluated a case against the Turkish Football Federation (the "TFF") upon the Ankara 7th Administrative Court's decision (October 31, 2014, 2013/1626 E., 2014/1494 K.) repealing the previous decision of the Board (September 27, 2013, 13-55/774-M) on the grounds that the TFF was in fact an association of undertakings and that the TFF decisions were within the scope of Law No. 4054. In its repealed decision, the Board had decided that the TFF could not be considered as an undertaking within the meaning of Article 3 of Law No. 4054. Following the decision of the Administrative Court, the Board initiated a pre-investigation to examine the allegation that the TFF's decisions imposing age restriction and age quota on footballers in their contracts with football clubs are anti-competitive and prevent players and clubs from freely conducting their economic activities.

The TFF has imposed age restriction and quota on the football clubs in the Third League and Regional Amateur League under the principle of "player conformity" since 2008, in order to regulate the conditions for the professional and semi-professional footballers' access to the labor market. The regulation sets the age limit to play in the Third League as 25. However, each club could employ up to six footballers aged between 25-30 and the footballers older than 25 under existing contracts were not affected by the regulation until the termination of their contracts. It was asserted that the TFF's decision restricts the transfers and contracts of the footballers as well as the football clubs' freedom to purchase service, and, therefore, impedes competition without any objective justification.

In its assessment, the Board firstly indicated that the TFF was an autonomous private legal person established by law. Furthermore, the Board continued on assessing the legal status of the TFF (*i.e.,* whether it is an undertaking or an association of undertaking) must be determined. The Board noted that an entity's status as being an undertaking does not depend on the possibility of whether the entity's activities in various areas constitute an economic activity, but depends on whether its particular conduct subject to the pre-investigation is linked to an economic activity. Accordingly, although in its previous decision (April 30, 2012, 12-23/659-181), the TFF was assessed to be an undertaking due to its case-specific economic activity involving the right to launch tender for TV broadcasting rights, the Board concluded in the present case that the TFF merely exercises its regulatory function and power. Therefore, the TFF was not an undertaking on the grounds that the regulation at hand cannot be deemed as a provision of goods or services or any other activity that generates income for the TFF. Although the Board hinted that it would not consider the TFF as an association of undertakings for the case at hand after reviewing the interest protected by the TFF and their members, the Board based its competitive analysis on the decision of the Administrative Court which concluded that the TFF was indeed an association of undertakings.

In its assessment, the Board emphasized that the regulations subject to the pre-investigation were effective for the clubs in the Third League and Regional Amateur League in order to transform these leagues into a "bridge" between amateur leagues and professional leagues. The Board noted the arguments of the TFF that the objective of such restrictions was to encourage footballers who would compete in the Premier League and the First League.

The Board stated that footballers can be regarded as undertakings particularly when they become parties to sponsorship agreements, during the transfer windows, and, for instance, in the circumstances where they act independent from football clubs. The Board further indicated that the TFF restriction does not impede the footballers' freedom to work and the activities of the football clubs since its scope is limited, and there are exceptions to the restriction. Moreover, the Board expressly stated that the age restrictions were found legal by the final decisions of Arbitral Tribunal. Accordingly, in the Board's view, such regulations fell under the scope of the TFF's authority and duties under the law, and that the restriction was in proportion with the goal of the regulation. As a result, the Board concluded that the regulation did not restrict competition in any of the relevant product markets and that a full-fledged investigation was not called for.

The Council of State Upholds the Lawfulness of the Regulation on Fines

The Council of State recently published its decision, (May 27, 2015, 2014/5110 E., 2015/1998 K.), repealing Ankara 6th Administrative Court's decision (dated May 27, 2014, 2013/1557 E., 2014/636 K.) which had annulled of the Board's "steel ring" decision (October 30, 2012, 12-52/1479-508), fining two undertakings operating in the Turkish steel ring packaging market who were found to have violated Article 4 of the Law No. 4054 through cartel activity. The Ankara 6th Administrative Court had annulled the Board's decision based on the ground that the resulting fines should not have been based on the Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance" *("Regulation on Fines").* The Administrative Court had stated that even though it is certain

that the concerned undertakings were in violation of Article 4 of Law No. 4054, the Board should have calculated the administrative fine on the basis of Article 16 of Law No. 4054 by considering the aggravating and mitigating factors included in the relevant Article. Particularly, the Administrative Court had reasoned that the Regulation on Fines is inconsistent with Law No. 4054 because it set forth a base limit for the administrative monetary fines under the Law No. 4054. Upon an appeal by the Turkish Competition Authority, the case was brought before the Council of State for review.

The Council of State's decision emphasized that Article 16 of the Law No. 4054 authorizes the Board to issue the regulations regarding the elements to be taken into consideration for determining the level of fines, and that Article 27 of Law No. 4054 further provides the authority to issue communiques regarding the application of Law No. 4054.

The Council of State went on to note that the administrative monetary fines that are imposed under Article 16 of the Law No. 4054, are subject to the general provisions of the Misdemeanor Law numbered 5326 *("Law No. 5326")*, and that the secondary regulative authority of the Board is limited with the framework of the Law No. 4054 and with the general principles set forth in the Law No. 5326. Particularly, Article 4 of Law No. 5326, titled the principle of lawfulness, sets forth that the magnitude, type and duration of penalties imposed for misdemeanors can only be set by statute. However, the Council of State reasoned that the Regulation on Fines does not foresee any sanctions other than the administrative monetary fines or any rates above the 10% limit set up by Law No. 4054. Therefore, it does not conflict with the hierarchy of norms or the principle of lawfulness.

The Council of State's decision further provided that Article 16 of the Law No. 4054 has enumerated certain elements that should be taken into account while determining the rate of the administrative fines, but left the effect of the relevant elements on the rates of fines to be specified in the regulation to be issued by the Board. To that end, the Council of State ruled that the Regulation of Fines merely exercised the discretion already possessed by the Board in individual cases through regulatory action affecting all similar situations. This in turn led to the adoption of more objective criteria, and promoted the principle of equality before the law, as well as more effective judicial review.

Moreover, the Council of State reasoned that the adoption of the definitions, "cartels" and "other violations" does not conflict with Law No. 4054 since prohibited conduct falling under the relevant definitions is already determined as violations of competition law under Article 4 of the Law No. 4054. Therefore, the Regulation on Fines does not introduce a new or different regulation, but merely classifies the already existing violations under the relevant definitions. Similarly, a classification regarding the level of fines between cartels and other violations, remaining within the scope of the 10% limit, was found not to determine the definitive level of the resulting fine. As such, the Regulation on Fines was found not to set forth a floor for the determination of administrative fines.

Due to the abovementioned reasons, the Council of State upheld the legality of the Regulation on Fines and therefore repealed the annulment decision of the Administrative Court.

Labor Law

Are Employees Working Under a Fixed-Term Employment Agreement Entitled to Severance Payment at the End of the Fixed-Term?

Article 14 of abrogated Labor Law No. 1475 (the "Law No. 1475") regulates the conditions that shall be met in order for an employee to be entitled to severance payment. Pursuant to Article 14 of the Law No. 1475, these conditions are as follows:

(i) If an employee terminates his/her employment agreement that is in effect for at least one year with a rightful reason stipulated under Article 24 of Labor Law No. 4857 (the "Labor Law"),
(ii) If an employer terminates an employment agreement that is in effect for at least one year with a reason other than the ones stipulated under Article 25/II of the Labor Law,
(iii) If an employment agreement is terminated due to military service, upon marriage or for the purpose of collecting retirement related benefits.

These conditions for being entitled to severance payment are, in a nutshell, seniority equal to or longer than one year and a "termination" realized by an employee or an employer. Whether expiration of a fixed-term employment agreement gives rise to severance payment depends on whether such expiration shall be considered as a termination.

The rule is that fixed-term employment agreements expire (are automatically terminated) at the end of their term. In lieu of a fixed-term, parties can also determine a specific work. In this case, the agreement will expire once the determined work is completed. In other words, if parties' intention when executing the employment agreement for a fixed-term or for a specific work is to let the agreement expire ipso facto (automatically) after expiration of the fixed-term or completion of the determined work, there should not be a unilateral termination by the employer or employee. Therefore, in the absence of "termination will", when a fixed-term employment agreement expires, there is no termination that would give rise to severance payment.

There are differences of opinion in the doctrinal writings in this regard. Certain authors explain that if employers notify employees that their employment agreements will not be renewed upon their expiration, such notification shall be deemed as a declaration of unilateral termination intention. On the other hand, the prevailing opinion is that employees would not be entitled to severance payment unless their employment agreements are terminated in accordance with Article 14 of the Law No. 1475. Court of Appeals acknowledges the latter.

The decision of High Court of Appeals Assembly of Civil Chambers dated May 30, 2014 and numbered 2014/22-391 E., 2014/710 K. indicates that expiration of a fixed-term employment agreement does not mean that the agreement is terminated unilaterally, thus does not meet the conditions set forth under Article 14 of the Law no. 1475.

In light of the foregoing, employees working under a fixed-term employment agreement are not entitled to severance payment upon expiration of the term or upon completion of the determined work. That said; this is not the case when the employment agreement is terminated by the employer before expiration of its term or completion of the determined work without a reason stipulated under Article 25/II of the Labor Law. In such a case, the severance payment must be paid to the employee since there is indeed a "unilateral termination".

Litigation

The Constitutional Court Limits the Content of Hate Speech

The Constitutional Court ("the Court") was presented with an individual application by a well-known citizen, due to an interview with the chairman of Civilization Foundation who politically criticized and implied the applicant liable for rising political tension in Turkey.

The applicant, before applying the Court, filed a criminal complaint, however the prosecutor decided for non-prosecution on the grounds that the speech in interview lies in the scope of freedom of speech. Following this, the applicant directly applied to the Court for seeking a legal protection of constitutional rights.

The applicant specified in the petition that the interview breaches the right of protection of honor and reputation and includes hate speech as well and thereby remarked that the state is under the obligation of protecting such rights and take measures against hate speech by virtue of Article 36 of the Constitution. However, as the prosecutor decided for non-prosecution, the state failed to fulfill its obligations, the applicant pointed out.

The Court decided that honor and reputation of the citizens are immaterial property and the state should protect such property of its citizens via two viable alternatives; criminal procedures and civil procedures. In criminal procedure the citizens may file a criminal complaint whereas in civil procedure citizens may seek for compensation against tortious acts.

In this context, the Court emphasized on the precedent that, for enjoying right of individual application as to protection of honor and reputation, the applicant shall exhaust both civil and criminal law procedures unless the violation of right of protection of honor and reputation can also be regarded as hate speech. In other words, should there be hate speech; the applicant may exhaust either civil or criminal law procedure for applying the Court. If not, the applicant should exhaust both.

At this point, the Court first limited the content of hate speech by referring to European Court of Human Rights' decisions by way of exemplifying. Racism, religious discrimination, aggressive nationalism, ethnocentrism, skin color, ethnic background, gender mainstreaming, gender identity, sexual orientation, disability, political belonging, age categories, being a refugee or an immigrant and hateful speeches against foreign or disadvantageous group are regarded as hate speech by the Court. Therefore, even if any speech may violate the right of protection of honor and reputation, it might not be regarded as hate speech should it not refer the foregoing topics.

Following the limitations, the court evaluated the disputed interview whether it includes hate speech or not and decided that allegations and assertions appearing within the interview are not directly against the immaterial property of the applicant, but for the much debated political issue in which the applicant, allegedly played a tremendous role. Therefore the Court decided that although there is a breach of right of protection of honor and reputation, there is no hate speech.

Accordingly, the Court stated that the applicant should have applied for civil law procedure (*i.e.* compensation request against tortious act) before enjoying right of individual application, and decided that the applicant did not meet the admissibility criteria (exhaustion of remedies requirement, *i.e.* following civil law procedures in the first place before applying the Court).

In conclusion, the Court sets the limit of hate speech, existence of which is necessary for individual application after exhausting either civil or criminal law procedure, but not both. Therefore, although there is violation of right of honor and protection, should there not be hate speech, the applicants need to exhaust all internal legal procedures before applying the Court.

Internet Law

New Regulation on E-Commerce Websites

The Regulation Regarding Service Providers and Intermediary Service Providers in Electronic Commerce is published in Official Gazette on August 26th, 2015 ("Regulation"). The Regulation is secondary legislation enacted as per Law No. 6563 on Regulation of Electronic Commerce. The Regulation sets forth the obligations for service providers and intermediary service providers with respect to their electronic commerce activities. Intermediary service providers are defined as the entities which provide electronic environment to service providers for their economic and commercial activities.

The Regulations came into force on the date it is published on the Official Gazette. However, for the service providers and intermediary service providers which were already providing e-commerce services, certain provisions of the Regulation will be applicable starting from November 26th, 2015.

Below are certain obligations of service providers and intermediary service providers with respect to their electronic commerce activities:

- Service providers and intermediary service providers should indicate their corporate identity and contact information in their electronic environment.
- Intermediary service providers should provide the technical capabilities to service providers to allow service providers to fulfill their obligations under the Regulation.
- Intermediary service providers are not responsible with all the content, published in the electronic means they provide to service providers.
- Service providers and intermediary service providers should include a transaction guide for customers on their homepage. The transaction guide should include: (i) technical steps to conduct the e-commerce activity, (ii) principles for accessing the agreement between the parties, (iii) technical tools for the customer to revise their information, (iv) privacy and data protection policies and (v) alternative dispute resolution options.
- If the goods subject to the e-commerce activity are second hand, they should be presented under different category.
- Total amount, including the applicable taxes and delivery fees should be visible to the customer.
- Service providers and intermediary service providers are responsible for maintaining and taking necessary measures to prevent access and processing of personal data acquired during their business.
- Burden proof regarding the obligations set under the Regulation belongs to the service providers and intermediary service providers. The electronic records should be kept for three years starting from the transaction date.
- The Ministry of Customs and Commerce is responsible for monitoring compliance and enforcing the Regulation and it authorizes to punish the service providers and

intermediary service providers which do not fulfill the obligations set under the Regulation.

The newly introduced Regulation brings obligations to e-commerce website with respect to technical specifications and this Regulation will have positive effects on Turkish e-commerce market. These obligations would enable clearer and safer e-commerce facilities for the consumers. Moreover, as the technical obligations are also legible for e-commerce service providers and intermediary service providers, this would introduce a safer e-commerce environment in Turkey.

Telecommunications Law

4.5G Auction is Finalized

Turkish Ministry of Transportation, Maritime Affairs and Communications announced that the auction for 4G spectrum would be held on May 26, 2015 and that 4G technologies would be put into service towards the end of 2015. However, 5G auction was delayed, and on August 26th, 2015 "4.5G" auction is conducted in Ankara.

Avea, Vodafone, Turkcell, Netgsm and Huawei submitted documents for the 4,5G auction. The Information and Communication Technologies Authority ("ICTA"), as the regulatory supervisory authority conducted the auction.

Here are the outcomes of the 4,5G auction:

- Vice Chairman of ICTA declared that the minimum auction fee for all the frequencies is more than Euro 2 billion and 298 million (excluding VAT).
- ICTA set a minimum price of Euro 2.3 billion for the 20 separate frequency packages of 800, 900, 1800, 2100 and 2600 MHz spectrum.
- Huawei did not join the auction and Netgsm decided not to make any bids.
- The biggest winner of the auction was Turkcell, winning 8 of the 18 packages sold and 172 MHz of spectrum for 1.62 billion across all five available bands.
- Vodafone acquired 5 of the 18 packages and 82.8 MHz of spectrum for Euro 778 million across all bands except 2100 MHz.
- Avea took 5 of the 18 packages and 110 MHz of spectrum for Euro 955 million.
- A1, A2 and A3 packages were presented in the 800 MHz spectrum. Vodafone took A1 package of 800 MHz spectrum.
- B1, B2 and B3 packages were presented in the 900 MHz spectrum and the winners are Avea, Vodafone and Turkcell respectively for each package.
- The winners of 1800 MHz are Turkcell for C1, Avea for C2 and Vodafone for C3 package.
- The licenses of the operators will be valid until April 30th, 2029.
- 4,5G services are expected to be provided starting from April 1st, 2016.

Considering the legal obligations set under the auction specifications, mobile operators will need to use IMT-Advanced technologies (International Mobile Telecommunications-Advanced requirements which are issued by the ITU-R of the International Telecommunication Union) and the operators would need to extend coverage range to 95 percent of Turkey's population in the next eight years. Moreover, as stated by the

representatives of ICTA, mobile operators would need to have at least 30 percent domestic product utilization in the first year, 40 percent in the second year and 45 percent in the third year. Moreover, again as stated by the representatives of ICTA, R&D employees are expected to increase by 50 percent in the telecommunications sector. These legal obligations set forth for the mobile operators will be opening a new era in the telecom sector of Turkey.

Data Protection

New Era for Transatlantic Data Transfers – ECJ Decision on Safe Harbor

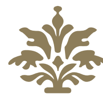
European Court of Justice ("ECJ") rendered a decision on October 6th, 2015 and declared the European Commission's decision allowing the U.S. companies complying with the Safe Harbor Privacy Principles to transfer data from Europe to the U.S. (Safe Harbor Decision) invalid, by determining that the U.S. does not provide an adequate level of protection for personal data.

By way of background, the European Union has a rigorous data protection and privacy legislation in place, compared to many other countries and areas around the world. Companies operating in the EU are not allowed to transfer personal data to countries outside the European Economic Area unless they provide adequate level of protection for personal data. EU privacy law forbids the movement of its citizens' data outside of the EU, unless it is transferred to a location which is deemed to have "adequate" privacy protections in line with those of the EU. Turkey also adopted a similar approach in the Draft Law on Protection of Personal Data (Draft Law), which is based on the EU's Directive of 1995 on data protection. The Draft Law states that personal data cannot be transferred abroad without the explicit consent of the data subject and may only be transferred abroad on the condition that the recipient country ensures an adequate level of protection. There are certain exceptions to this requirement in the Draft Law as well.

The Safe Harbor Privacy Principles, which were developed between the years 1998 – 2000 allowed U.S. companies to register their certification if they meet the European Union requirements. The Safe Harbor agreement essentially promised to protect EU citizens' data, if transferred by American companies to the U.S.. It allowed companies such as Apple, Facebook, Microsoft or Google to self-certify that they would protect EU citizens' data when transferred and stored within U.S. data centers.

The transatlantic Safe Harbor agreement was solely applicable to U.S. companies which adhere to the agreement but not to U.S. public authorities and national security, public interest and law enforcement requirements of U.S. prevailed over the safe harbor scheme, thus enables interference, by U.S. public authorities, with the fundamental rights of persons. Especially, Edward Snowden's NSA leaks displaying the level of protection pertaining to data and privacy in the U.S. might have triggered the ECJ's approach regarding the level of protection in the U.S..

Around 4,500 U.S. companies, including Alphabet Inc. (Google), Apple Inc. and Microsoft Corp., benefitted from the Safe Harbor agreement and they were allowed to use a single standard for consumer privacy and data storage in both the U.S. and Europe. From now on national authorities will be entitled to investigate data transfers to U.S. and companies must validate their transfer of data outside European Union. This would inevitably affect U.S. companies and push the U.S. government to make improvements



to protections for data, even before discussing the effects of the EU's new regulation on protection of personal data.

Now that the agreement has been considered invalid by the ECJ, U.S. companies would no longer rely on self-certification and would be obliged to agree model contract clauses in each case. These agreements would authorize the transfer of data outside of Europe. Many will already have model contract clauses already drawn up. Others may be forced to stop the transfer of data to the U.S. until they have. The companies most affected are likely to be smaller, financially and technologically less developed companies, since those companies will have to abide by the same systems as Facebook and Google and ensure compliance with data protection regulations. EU Member States also started to take the necessary steps based on this recent decision. The ECJ decision did not include a transition period and is effective as of October 6th, 2015.

Retail Trade Law

Introducing the Draft Regulation on Shopping Malls

On September 11th, 2015 the Ministry of Customs and Trade ("Ministry") has announced on its website, the Draft Regulation on Shopping Malls ("Draft Regulation"), prepared as secondary legislation to the Law on Regulation of Retail Trade ("Law").

The Draft Regulation, as per Article 1, aims to regulate the qualifications as well as the establishment, operation and monitoring principles for shopping malls, while covering certain aspects that would also concern the retailers located therein.

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

Mandatory Qualifications for Shopping Malls

Shopping malls should meet the requirements outlined in Article 4 of the Draft Regulation. In this context shopping malls shall;

(i) be built as a single construction or multiple constructions in a way to form an integral space,
(ii) include a sales area of at least 5,000 square meters,
(iii) include a business spaces available for minimum 10 retail businesses to operate,
(iv) include shared areas listed inbetween Articles 9 and 12,
(v) have a centralized management.

Shopping Malls Offering Continuous Clearance Sales

Article 6(1) of the Draft Regulation describes continuous clearance sale as *"sale of end of line products, end-season products, export leftovers, defective and similar products by the retail businesses for reduced prices or for ex-factory costs over the year"*.

Article 6(2) of the Draft Regulation specifies requirements to be fulfilled by shopping malls where the majority of retail businesses offer continuous clearance sales. In this respect, in order for shopping malls to publicly use the expressions similar to "outlet" that would display the mall as or associate the mall with continuous clearance, at least 70% of the products being offered for sale in each retail store located therein, should fall under the description of continuous clearance sale.

Shopping malls fulfilling such criteria are also obliged to use expressions displaying or referring to continuous clearance sale.

Not only the shopping malls but also the retail businesses are required to satisfy the foregoing

rule underlined in Article 6 (2). In other words, retail business located in shopping malls can use expressions displaying or referring to continuous clearance sales such as “outlet”, provided that at least 70% of the products offered for sale by that retail business are end of line products, season-end products, export leftovers, defective or similar products.

Responsibility Arisen Out Of Continuous Clearance Sales

As indicated above, requirements for usage of expressions displaying or referring to continuous clearance sale are set forth separately for shopping malls and retail businesses under Article 6.

Article 7, in this respect, splits the responsibility arisen out of such requirement and underlines that for the responsibility resulting from Article 6(1) (*i.e.* shopping malls to display themselves as continuous clearance sale centers or publicly use the expression of “outlet”) shopping mall managements will be responsible. On the other hand, for the responsibility arisen out of Article 6(2) (*i.e.* retail businesses to use expressions displaying or referring to continuous clearance sale such as “outlet”) retail businesses will be responsible along with the shopping mall management.

Article 7 further imposes on shopping malls the obligation to audit the compliance of the retail businesses with Article 6 minimum 3 times per year and inform the Ministry within 3 business days if any one of the retail businesses located in the shopping mall fails to reach the “70% limit”.

Shared Area Expenses Charged on Lessees

From severe payment conditions, penalty clauses against the retail businesses to unjust exit options granted to mall managements incompliant with the legislation; it is no secret that lease agreements for retail spaces in shopping malls fail to sustain balance for both parties.

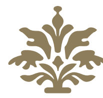
Article 13 of the Draft Regulation touch-bases the subject by restricting mall managements from charging lessees with costs other than electricity, water, heat, maintenance & repair, security and cleaning expenses for shared areas. The same article also specifies that the shared area expenses shall be calculated and paid in Turkish Lira and payments collected as shared area expense can only be used for covering those expenses.

Implementation Rules

Provisional Article 1 sets forth the principles regarding implementation. In this regard, shopping malls already open on the enactment date of the Law, *i.e.* January 29th 2015 will have to establish shared areas listed in the Draft Regulation and a centralized management as required in Article 4, within 6 months following the enactment date of the Draft Regulation.

The Draft Regulation also introduces regulations for the benefit of craftsman and artisans as well as occupations that carry traditional, cultural and artistic importance but have sunk into oblivion. For example, as per Article 14, shopping malls will be obliged to allocate at least 5% of their retail space to craftsman and artisans in return for a rental fee at the current market rate and allocate at least 0.3% of their retail space for occupations that carry traditional, cultural and artistic importance but have sunk into oblivion, in return for a rental fee maximum 1/4 of the current market rate.

The rule as to the implementation of the foregoing provision is set forth under Provisional Article 1. Thereby, retail spaces



which fell vacant as of the enactment date of the Law (i.e. January 29th 2015) will primarily have to be rented to craftsman and artisans as well as occupations that carry traditional, cultural and artistic importance but have sunk into oblivion, until the required retail space ratio is met.

Real Estate Law

Constitutional Court Decision on the Right to Request Correction of Land Shares

Turkish Constitutional Court finally put an end to the debate that has been ongoing since the amendment to Article 3 of the Property Ownership Law became effective in 2007. The provision, subject to the decision, entitled the property owners to apply to a court for correction of allocation of land shares according to their share of independent sections, if the current allocation is not proportionate. The provision did not include a statute of limitation for requesting correction of allocation, and allowed the property owners to raise this claim whenever they want to. This was perceived as a threat for other property owners who are officially more advantageous than their neighbors in terms of their land share.

This issue was highly debated especially following the urban transformation project was initiated on August 4th, 2012, when the regulation on transformation of areas having disaster risk entered into force. While the urbans are being restructured, the property owners negotiated with the construction firms and also with each other for deciding on the new structure of their property. This raised many disputes, mainly based on the foregoing provision, and there were numerous ongoing cases both before the domestic courts and the Supreme Court. The property owners, who exercised their right, requested a proportionate allocation and the counterparts, who might be in a disadvantageous position after the new allocation, claimed that this was in violation of their property rights protected under the Turkish Constitution.

In one of these cases, brought before Istanbul Anadolu 12th Civil Court of Peace, one of the parties claimed that the provision, entitling the property owners to request correction of allocation of land shares, is against the Turkish Constitution, since the regulation did not include a statute of limitation. The defendant claimed that this provision constituted a perpetual threat of litigation for the other property owners' property rights and is against the protection of property right. Istanbul Anadolu 12th Civil Court of Peace found this claim admissible and brought this constitutional objection for annulment of the relevant sentence of Article 3 of the Property Ownership Law before the Turkish Constitutional Court (Case No. 2015/25).

The Turkish Constitutional Court ("Court") put this case to its agenda on March 14, 2015 and rendered a decision on September 10, 2015. The Court evaluated the issue from the legislator's point of view and stated that the provision aims to protect the land owners who have less land shares than they should have in a proportionate allocation. This difference occurs due to the difference in the sizes of independent sections of buildings and land owners sell their properties based on the size of their independent section, which might lead to an unfair position when compared to the other property owners on the same land. The Court indicated that the fact that there is no statute of limitation for requesting correction does not constitute a disproportionate interference to the other land owners' property rights.

The Court emphasized Article 36 of the Turkish Constitution which protects right to resort legal remedies and right to a fair trial, and stated that beside being a fundamental right, this right is also an assurance of protection of other fundamental rights and freedoms. The Court decided that this provision is in accordance with the right to access to courts and initiate lawsuits. The Court eventually decided that the relevant provision is not against the Constitution and put an end to this highly debated issue. The decision was published in the Official Gazette No. 29509 of October 21st, 2015.

Although the decision brought the discussions on whether the relevant regulation is in compliance with the law, to an end, it also signaled more lawsuits to come in the future based on this provision, before the courts. The decision is a quite significant for many land owners, considering the ongoing urban transformation projects all across the cities of Turkey.

White Collar Irregularities

2015 FCPA Enforcement Actions and Highlights

This year the total number of Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC) the Foreign Corrupt Practices Act ("FCPA") enforcement actions hit the lowest numbers since 2006. More specifically, there are only 18 FCPA enforcement actions in 2015, as opposed to a total number of 26 enforcement actions in 2014 and 28 in 2013. This is due to a decrease in DOJ numbers, whereas the number of SEC enforcement actions has stayed more or less stable. This year also witnessed a drop in the ratio of FCPA enforcement actions against individuals.

This year's enforcement actions do echo the Yates Memo by the Deputy Attorney General Sally Yates, which underlines the significance of individual accountability for deterring corporate wrongdoing and provides guidelines on how to enforce such accountability. Accordingly, 8 of the enforcement actions of the sum total of 18 are enforced against individuals. 4 of these enforcement actions against individuals were also against the corporations they worked for. We expect this trend to continue in the coming years, as the DOJ is of the opinion that pursuing individual liability of corporate executives, deter future wrongdoing and incentivizes changes to corporate behavior.[6]

Out of 10 corporate cases pursued throughout the year, 4 of them relate to third party counterparts, excluding the parent-subsidiary and joint-venture liability. This enforcement trend affirms the importance of third party due diligence, as corporations are held liable for the behavior of their business partners, when they know, or they have sufficient red flags that they should have known, the illegitimate actions of their counterparts.

2 of the 10 corporate actions this year focus on gifts and hospitality payments. Both the FLIR and BHP Billiton cases bluntly demonstrate the "extravagancy" element in gifts and travel expenses payments.

This year, one of the most interesting cases, the BNY Mellon case, demonstrated the different ways companies can encounter bribery. In this case, the subject matter of bribery was not monetary benefits, but rather, valuable internships provided to the relatives of certain public officials with the expectation of retaining business advantage, *i.e.* anything of value.

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[6] http://www.justice.gov/dag/file/769036/download

Finally, as has been the case for a long time, self-reporting, cooperation and remedial efforts are among the most important factors SEC and DOJ consider when entering into plea agreements. We expect this trend to continue in the near future.

DOJ Enforcement Actions in 2015

In 2015 DOJ brought 2 enforcement actions against companies: Louis Berger International and IAP Worldwide Services Inc. and 6 against individuals. This is a mild decrease when compared with last year's 12 enforcement actions against individuals and 11 cases against companies.

The case relating to the illegitimate funding of TENEX, the Russian uranium and uranium enrichment company which is a subsidiary of a Russian state institution finalized with the guilty plea of three individuals, Vadim Mikerin, Daren Condrey and Boris Rubizhevsky. According to the scheme, the US resident and Russian official Mikerin arranged the corrupt payments of over $2 million to award TENEX contracts. Mikerin, Condrey, Rubizhevsky and others would transmit payments to further the corrupt scheme, to shell company bank accounts in Cyprus, Latvia and Switzerland. These payments were made so that Mikerin could influence the Russian authorities to favor US companies. The illegitimate payments were made through consulting agreements, and were referred to between the parties as "Luck Figure", "LF", "cake" and "remuneration". Part of his plea deal, Mikerin will pay approximately $2,126,622, as the amount of the money transferred to offshore accounts.[7]

In July 2015, Louis Berger International ("LBI"), New Jersey based construction company entered into a deferred prosecution agreement ("DPA") with DOJ, along with entering into plea agreements with two of companies senior executives (both of whom are US citizens) in the bribe-giving regions. In this case LBI accused of bribing foreign officials in in India, Indonesia, Kuwait and Vietnam to win government construction management contracts. The illegal payments were concealed through "commitment fees", "counterpart per diems" etc. to third party counterparts.

With regard with these accusations LBI entered into a DPA with DOJ and agreed to pay $17.1 million and to retain compliance monitor for at least three years. Not surprisingly, among the reasons DOJ entered into a DPA with LBI were (i) self-reporting, (ii) co-operation, (iii) remediation and (iv) the company's commitment to improving its compliance program and internal controls.[8]

In June 2015, IAP Worldwide Services Inc. ("IAP"), a defense company entered into a non-prosecution agreement ("NPA") with the DOJ, in order to resolve allegations that it conspired to violate the anti-bribery provisions of the FCPA. IAP agreed to pay $7.1 million in penalties. James Michael Rama, a former vice-president of the company also pleaded guilty and was sentenced to 120 days in prison.

According to the facts of the case, Kuwait government set up a two stage tender, where the first stage consultancy would determine the specifications of the second stage of the tender, in order to advise the setting out of the specifications of the tender, IAP set up a

[7] http://www.justice.gov/opa/pr/russian-nuclear-energy-official-pleads-guilty-money-laundering-conspiracy-involving

[8] http://www.justice.gov/opa/pr/louis-berger-international-resolves-foreign-bribery-charges

consultancy firm, Ramaco, which would advise the Kuwait government in phase one, to win a contract in phase two. Ramaco would obtain $4 million for this project, half of which would be transferred to a Kuwaiti government official through third party consultants. In order to erase the trace of the relevant amount to the foreign official's account, the company had first transferred the money to several different accounts.

Not surprisingly, the DOJ cited IAP's cooperation among the factors it decided to enter into a NPA. The NPA requires IAP's (i) further cooperation, (ii) a review of its existing internal controls, policies and procedures, (iii) make any necessary modifications to ensure that the company maintains accurate record keeping and a rigorous anti-corruption compliance program and (iv) to report periodically to relevant authorities regarding remediation and implementation of the aforementioned compliance program and internal controls, policies and procedures.[9]

Security Exchange Commission Enforcement Actions in 2015

In 2015, SEC brought 10 FCPA related enforcement actions, 8 of them against corporations and 2 against individuals. This enforcement pattern is similar to 2014 where SEC brought actions against 7 companies and 2 individuals.

In January 2015, SEC entered into a DPA with the PBSJ Corporation whereby the company will pay $3.4 million. PBSJ violated FCPA by offering and authorizing bribes and employment to foreign officials to secure Qatari government contracts. The company had disguised these payments as agency fees under their books and records. In return, the relevant public official had provided access to confidential bidding information so that the company could propose the winning bid.

The PBSJ got the chance to have a DPA due to various reasons such as taking quick steps to end the misconduct after self-reporting to the SEC, making voluntarily witnesses available for interviews and providing factual chronologies, timelines, internal summaries, and full forensic images to cooperate with the SEC's investigation.[10]

Walid Hatoum, former officer of PSBJ was also charged due to his alleged role in the scheme above. Without denying or admitting charges Hatoum agreed to pay $50,000 in fines. [11]

In February 2015, Goodyear Tire and Rubber Company agreed to pay in fines more than $16 million to settle SEC charges. The company faced charges because its subsidiaries in Angola and Kenya paid bribes to employees of government owned companies and to local officers such as the police. These payments were falsely recorded as business expenses in the company books and records so there was illegitimate expenses shown as legitimate in Goodyear's books and records.[12]

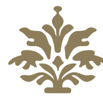
In April 2015, FLIR System Inc. agreed to pay more than $9.5 million in fines, without admitting or denying the charges that the company provided extravagant gifts and travel expenses to government officials who had the authority to award contracts to the company. In one instance, the company allegedly covered the travel expenses of foreign public officials for a 20 night travel which included stops such as Paris and New York. In another

[9] http://www.justice.gov/opa/pr/iap-worldwide-services-inc-resolves-foreign-corrupt-practices-act-investigation

[10] http://www.sec.gov/news/pressrelease/2015-13.html

[11] http://www.sec.gov/news/pressrelease/2015-13.html

[12] http://www.sec.gov/news/pressrelease/2015-38.html



instance, the company had bought two expensive watches for the public officials. SEC alleged that the nature and the expenses of the gifts and travel expenses were inaccurately reflected in the company books and records. In 2014 in relation to the same irregularities, SEC had also charged two of the company's executives, who also had settled.[13]

In May 2015, BHP Billiton agreed to settle SEC charges by paying $25 million. The company's alleged actions relate to company's sponsorship of the 2008 summer olympic games where they invited 60 public officials with the authority to award contracts to the company, along with their spouses and paid for travel packages that included event tickets as well as luxury accommodation, costing between $12,000 and $16,000. According to SEC, even though the company had recognized that inviting public officials would be risky, it had failed to implement meaningful control mechanisms through e.g. not providing sufficient training to its employees.[14]

In July 2015, Mead Johnson Nutrition agreed to pay $12 million, without denying or admitting allegations, to settle SEC charges. According to SEC's allegations, Chinese subsidiary of the company made improper payments to healthcare professionals at government-owned hospitals in order (i) for them to recommend the company's infant formula to new and expectant mothers, and (ii) to obtain the contact information of these persons to be able to market their products. The company allegedly failed to accurately reflect the slush funds used by the Chinese subsidiary's distributors. SEC stipulated that this was due to the "lax internal control environment" prevalent at the company.[15]

[13] http://www.sec.gov/news/pressrelease/2015-62.html
[14] http://www.sec.gov/news/pressrelease/2015-93.html
[15] http://www.sec.gov/news/pressrelease/2015-154.html

In August 2015, Vincente E. Garcia, a former vice president of SAP SE agreed to pay a little below $100,000 to resolve SEC charges. According to the allegations Garcia authorized sales to business partners with excessive amounts of discount, *e.g.* 80%, so that the excessive profits made by the business partners could be used to form the slush funds for illegitimate payments. The DOJ has announced parallel action.[16]

Again in August 2015, BNY Mellon agreed to pay $14.8 million to settle SEC charges, without denying or admitting the allegations. According to the allegations, the company awarded valuable internships to the family members of the government officials, who had the authority to award contracts leading to the management of a sovereign wealth fund. The company had failed to use its normally rigorous internship application procedure, upon the request by the public officials. SEC cited the company's remedial efforts and cooperation as the reasons it chose to settle the case.[17]

In September 2015, Japanese conglomerate Hitachi agreed to pay $19 million to settle SEC allegations. Accordingly, the company sold 25% of its shares in its South African subsidiary to the front company of the governing party. This way, in case the government awards contracts to the South African subsidiary of Hitachi, the profits would be shared between the governing party and the front company, in addition to Hitachi. Hitachi also paid $1 million to the front company as success fees. According to SEC, Hitachi knew that the front company was funding the ruling party and nevertheless continued with the purpose of being awarded government contracts.[18]

[16] http://www.sec.gov/news/pressrelease/2015-165.html
[17] http://www.sec.gov/news/pressrelease/2015-170.html
[18] http://www.sec.gov/news/pressrelease/2015-212.html

Bristol-Myers Squibb will face more than $14 million to settle SEC charges that its majority-owned Chinese joint-venture violated the books and records provisions of the FCPA. Accordingly, the company's Chinese joint-venture made cash payments and provided other benefits to health care providers at state-owned and state-controlled hospitals in exchange for prescription sales.[19]

According to SEC, the company (i) failed to respond to the red flags that its personnel was engaged in corrupt activities, (ii) failed to follow up on the claims made by former employees with regard to fake invoices etc. and (iii) took its time to remediate the gaps in its compliance processes.

[19] http://www.sec.gov/news/pressrelease/2015-229.html

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Our legal team consists of 60 lawyers. While we take pride in being able to assist our clients in almost all fields of law, the main focus of our practice consists of corporate law, mergers & acquisitions, competition law, EU law, banking and finance, litigation, technology, media and telecommunications law, Internet law, data protection and privacy law, energy, oil and gas law, administrative law, real estate law, white collar irregularities and intellectual property law.

As an independent Turkish law firm, ELİG collaborates with many international law firms on various projects. Furthermore, ELİG is able to serve its clients' interests also in Ankara and İzmir, through its cooperation with local law firms in these two major cities.

We are very sensitive about conflict of interest checks, and ethical professional conduct. One of our founding partners, Mr. Gönenç Gürkaynak, is a member of New York Bar and the Law Society of England and Wales (non-practising), in addition to his attorney status at the İstanbul Bar since 1998.

All members of ELİG team are fluent in English.

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