ISSN 2147 – 558X

ELİG
LOKMANHEKİM ◆ GÜRKAYNAK
Attorneys at Law

LEGAL INSIGHTS QUARTERLY

March 2014 - May 2014

Corporate Law

The Controlling Shareholders' Right to Squeeze out the Other Shareholders and Rights to Sell in Public Companies

Invalidity of Monetary Limitations in Signature Circulars

Significant Transactions, Minority Shareholders' Exit Right and Mandatory Offer

Competition Law / Antitrust Law

The Turkish Competition Board Imposed Record-Breaking Fine on Turkey's Largest Energy Company

The Turkish Competition Authority Delivered an Official Opinion for the Draft Law on the Regulation of Retail Trade

The Turkish Competition Authority Opens Public Consultation on the Draft Regulation on Administrative Fines

The Turkish Competition Law is on the Verge of Change

Labor Law

The Significance of Additional Compensation in Securing the Validity of Mutual Termination Agreement

Medical Device Law

A Look Inside The New Regulation on Opticianries

Telecommunications Law

Regulation on Quality of Service in the Electronic Communications Sector

Internet Law

Recent Amendment to the Internet Law in Turkey

Real Estate Law

Legislation on the Transformation of Areas under the Risk of Disaster

White Collar Irregularities

Third Party Liability in Light of the FCPA

© 2014 ELIG, Attorneys-at-Law. All rights reserved.

LEGAL INSIGHTS QUARTERLY

March 2014 - May 2014

This collection of essays provided by ELIG, Attorneys-at-Law is intended only for informational purposes. It should not be construed as legal advice. We would be pleased to provide additional information or advice if desired.

Mart / March, İstanbul

Yayın Türü / Type of Publication
Yerel Süreli / Local Periodical

ELİG, *Ortak Avukat Bürosu* adına Yayın Sahibi, Sorumlu Müdür / Owner and Liable Manager on behalf of ELIG, *Attorneys-at-Law*

Av. Gönenç Gürkaynak
Çitlenbik Sokak No: 12,
Yıldız Mahallesi
Beşiktaş 34349,
ISTANBUL, TURKEY

Basımcı / Publisher
Detay Mat. San. Tic. Ltd. Şti.

ISSN 2147 – 558X

Preface to the March 2014 Issue

The first quarter of 2014 brought with it massive anticipated change to the Turkish legal landscape. Competition law seems to be the field that has been affected the most by this change, as the parliament is contemplating amendments to the Competition Law and the Regulation on Administrative Fines and the introduction of the Draft Law on the Regulation of Retail Trade. Developments worthy of attention took place on the enforcement side too, as the Turkish Competition Board imposed a record high fine on TÜPRAŞ, Turkey’s largest energy company.

However, competition law is not the only field of law where enforcement trends have been noteworthy. On the corporate law front, trade registries around the country have been gradually changing their policies regarding the limitation of representation powers of signatories in signature circulars, harmonizing the practice with the principles set out in the Turkish Commercial Code.

The amendment to the Internet Law is also salient as it triggered and continues to trigger much public debate on grounds of freedom of speech. Not only does the amendment grant the Presidency of Telecommunications the authority to grant access bans on certain websites without court orders, it also introduces monetary and legal obligations on Internet service providers, which are likely to be passed on to Internet users, adding to the already high cost of Internet use in Turkey.

Finally, this issue sheds some light on the topic of third party liability resulting from the US Foreign Corrupt Practices Act, an issue that should be closely examined by foreign companies operating in Turkey.

March 2014

Corporate Law

The Controlling Shareholders' Right to Squeeze out the Other Shareholders and Rights to Sell in Public Companies

The controlling shareholders' right to squeeze out the minority shareholders[1] ("Squeeze out Right") and those minority shareholders' right to sell their shares to the controlling shareholder ("Right to Sell") in public companies are regulated under the "Communiqué on Rights to Squeeze out and to Sell" ("Communiqué") No. II-27.1 and published in the Official Gazette numbered 28870 and dated January 2nd, 2014. The Communiqué is grounded on Article 27 of the Capital Market Law No. 6362, and will come into effect on July 1st, 2014.

Certain noteworthy regulations introduced by the Communiqué, which have significance for public companies, are as follows:

The Squeeze out Right and the Right to Sell are applicable only in cases where the controlling shareholder has at least 95% of the voting rights in a public company. While determining this ratio, the number of shares and privileges on shareholders' voting rights and the persons acting in concert should be taken into account. As long as this ratio is achieved, the controlling shareholder is entitled to exercise its Squeeze out Right regardless of whether the remaining shareholders have privileged rights.

The Communiqué introduces certain exceptions to the exercise of the Squeeze out Right (and also to the Right to Sell), which are as follows:

The Squeeze out Right (and the Right to Sell) shall not be applicable in public companies as follows:

(i) those which already have a controlling shareholder by July 1st, 2014. In other words, the Squeeze out Right is not automatically applicable for shareholders who already qualify as the "controlling shareholder" as of the effective date of this Communiqué. Those rights set out under the Communiqué shall become exercisable if and when the controlling shareholder purchases additional shares to enhance its status, or

(ii) for those whose shares are publicly traded, the Squeeze out Right and Right to Sell cannot be exercised for 2 years following the date on which the shares of the company are first traded at the stock exchange.

How to exercise the Squeeze out Right: In order to exercise the Squeeze out Right, the controlling shareholder must apply to the company within 3 months following the date its voting rights in the company reaches at least 95%, or acquisition of additional shares, as the case may be.

Following this application, the board of directors of the company will (i) confirm whether the shareholder has at least 95% of the voting rights, (ii) determine the market value[2] of the shares to be purchased, (iii) resolve on annulment of minority shareholders' shares and issue new shares to

---

[1] Minority Shareholders are shareholders other than the controlling shareholder, *i.e.* shareholders holding 5% of shares or less.

[2] In order for the abovementioned amount to be determined and to ensure that a fair and reasonable evaluation is made, an evaluation report shall be prepared in accordance with the requirements of the Capital Market Law No. 6362, and the board of directors of the company shall evaluate the value determined in this report. However, for companies that are subject to the Capital Markets Law and whose shares are publicly traded, the price is determined based on the weighted arithmetic average of the price established in the stock market during the thirty-day period before the exercise of this right is announced to public.

replace the annulled shares, and (iv) apply to the Capital Markets Board for approval of the issuance of the new shares. Following the approval of the Capital Markets Board, a certificate shall be provided by the Capital Markets Board.

The certificate concerning issuance of new shares should be registered with the Trade Registry and published in the Turkish Trade Registry Gazette within 6 business days following the approval of the Capital Markets Board. Shares subject to the Squeeze out Right shall be deemed annulled as of the said registration date.

The controlling shareholder that exercised its Squeeze out Right must deposit the amount corresponding to the value of the shares it wishes to acquire to the company's bank account within 3 business days following the approval of Capital Markets Board. Following the day on which the controlling shareholder deposits the share price, the company shall apply to the Central Securities Depository in order for this payment to be transferred to the accounts of the minority shareholders which had to sell their shares.

However, for companies that are subject to the Capital Markets Law No. 6362, and whose shares are not publicly traded, share prices shall be paid directly to the relevant minority shareholder.

In addition to the foregoing, companies' that are subject to the Capital Markets Law and whose shares are not publicly traded should make a public disclosure concerning the resolution of their board of directors for annulment of the minority shareholders' shares and issuance of the new shares to replace the annulled shares.

How to exercise the Right to Sell: Any minority shareholder is entitled to exercise the Right to Sell against the controlling shareholder within 3 months following the date on which the Squeeze out Right is gained, *i.e.* the acquisition by the controlling shareholder of at least 95% of the voting rights.

A minority shareholder who wishes to exercise the Right to Sell must exercise this right with regard to all of its shares including both privileged and unprivileged ones via a written application to the company. Upon such application, the company shall determine the value of the shares subject to the sale notice and notify the controlling shareholder of the determined value via a notary public or registered letter within 1 month following the receipt of the application. For companies that are subject to the Capital Markets Law, whose shares are publicly traded, the period for such notification is 3 business days.

The controlling shareholder must deposit the amount corresponding to the value of the shares subject to the Right to Sell to the company's bank account within 6 business days following the receipt of the request for the exercise of the Right to Sell. Subsequent to the controlling shareholder's deposit, the company will pay this amount to the minority shareholder who exercised the Right to Sell, on the first business day following the deposit and realize the transactions with regard to share transfer.

Invalidity of Monetary Limitations in Signature Circulars

Article 321 of the repealed Commercial Code No. 6762 allowed registration of limitations to signature powers only in the cases where such limitations related to (i) business of the company's registered office or a specific branch, or (ii) joint representation. It was further stated that the limitations other than those two exceptions shall not be binding

against third parties acting in good faith. In other words, monetary limitations to signature powers considered to be null and void in the eyes of the third parties.

On the other hand, in practice, until recently Trade Registries always allowed companies to register and announce board of directors' resolutions (for joint stock companies) and board of partners' resolutions (for limited liability companies) setting out monetary limitations, thus contradicting the above mentioned rule in practice. Companies have issued signature circulars where powers are limited to certain monetary thresholds or by means of types of transactions in order to balance and observe the internal governance and a smooth operation of the day-to-day business.

The new Commercial Code No. 6102 ("TCC") has basically repeated the rule stipulated in the Article 321 of the repealed Commercial Code No. 6762 (together with its exceptions) on limitations on signature authorities and provided that monetary limitations shall not be binding against the third parties acting in good faith.

Although the legislation remains unchanged, the General Directorate of Domestic Trade of Ministry of Customs issued a circular letter dated May 7th, 2013, stipulating that the practice of Trade Registries, which so far contradicted the legislation and allowed for limitations of representation authorities in signature circulars also through monetary thresholds and/or types of transactions, is no longer applicable and that the signature powers for representation cannot be limited save for the two exceptions set forth by the law and that the Trade Registries should reject any further limitations.

Interpretation of the reason behind such change in practice can be attributed to the abolition of the *ultra vires*[3] principle under the TCC. Accordingly, transactions executed by the authorized signatories of a company will be binding and exercisable upon that company regardless of whether the transaction falls in or out of the scope of the field of activities of the company.

Transactions executed by authorized representatives of a company which are contrary to the provisions of the articles of association (*i.e.* the scope of activities of that company) cannot prevent enforcement requests by third parties acting in good faith with respect to relevant transaction.

As a rule, a company must be represented and managed by the board of directors. TCC (same as the repealed Commercial Code) enables delegation of management rights and representing authority. As per the relevant delegation, management rights and representation authority may be assigned in whole or in part in line with the articles of association, or by an internal regulation to be issued by the board of directors. If the authorized representative of the company exceeds his or her authority set out in that internal regulation in a transaction that does not fall within the field of activity of the company, the company will still be bound with that transaction vis-à-vis the third party acting in good faith yet the said authorized (or "internally unauthorized") representative will remain accountable towards the company.

Significant Transactions, Minority Shareholders' Exit Right and Mandatory Offer

The new Capital Markets Law ("CML") enacted on December 30th, 2012 has introduced substantial changes in certain

[3] Ultra vires principle which indicates that the company cannot conduct business outside the scope of its field of operation was abolished in the new TCC.

concepts applied in capital markets. One of the novelties brought by CML is the concept of 'significant transaction'. This change, whose implications have to be taken into account by parties engaging in transactions with listed companies, deserves a closer look:

1. Legislative background: Definitions and principles regarding significant transactions

Articles 23, 24 and 25 of CML regulate, respectively, 'significant transactions', 'exit right' and 'mandatory offer with regards to significant transactions'. While CML does not go beyond dictating the main principles of such concepts, the "Communiqué Regarding Joint Principles on Significant Transactions and Exit Right" ("ST Communiqué"), published on December 24th, 2013, details the principles and implementation thereto.

1.1. Significant transactions

According to Article 23 of CML and Article 5 of ST Communiqué, the following shall be considered as 'significant transactions':

a) mergers, demergers, type conversions, termination;
b) transfer of or lease out the whole or an important part of the assets or establishing a right *in rem* thereon,
c) change in the field of activity in a substantial manner,
d) provide new share privileges or amend the existing ones,
e) delisting,
f) Acquire from or lease assets of the 'related parties',
g) A cash capital increase where such capital contribution will be set-off against the debts incurred in connection with the transfer of non-cash assets to the company,
h) A cash capital increase where (i) the increased amount exceeds the current capital of the company, and (ii) such amount will, fully or partially, be utilized to pay off the debts due to 'related parties' arising from the non-cash asset transfers made by such.

In addition to the transactions identified above, ST Communiqué further stipulates a provision to cover transactions to be deemed significant. According to sub-paragraph (3) of Article 5, Capital Markets Board may deem a transaction significant, should the transaction result in a (i) substantial deviation from the 'prospects, undertakings and material aspects' reflected by the company prior to the public offering, or, (ii) substantial change in the commercial activities of the company.

1.2. Materiality threshold

The transactions falling within the scope of (b), (c) and (f) above will be considered significant, only if the corresponding value or change of scope falls within the 'materality criteria' set forth under Article 6 of ST Communiqué. According to said article, a transfer or lease out of an asset by the company will be deemed significant (i) if the value of the transferred/leased asset exceeds 50% of value of the total assets, or the enterprise value of the listed company, or (ii) the revenue generated by such asset is more than 50% of the annual revenues.

Moreover, subparagraph (3) of Article 6 of ST Communiqué obliges the board of directors to consider the value of the asset, not only within the above mentioned monetary criteria, but also in conjunction with the core business of the company. In other words, the board of directors may and shall seek a shareholders' approval, should the overall value of the asset to the business is deemed essential.

2. Legislative background: Definitions and principles regarding shareholders' approval, exit right and mandatory offer

Article 24 of CML and Article 7 of ST Communiqué, regulate the flip side of the coin, the rights that the shareholders become entitled to in case of a 'significant transaction'. These provisions provide the shareholders the right to (i) discuss and vote upon whether the 'significant transaction' shall be entered into (*i.e.* the shareholders' approval) and (ii) to exit from the company (*e.g.* exit right, put right) if they are outvoted during the shareholders' approval process.

2.1. Shareholders' approval

To engage in a 'significant transaction', the listed company shall seek the shareholders' approval, or, in other words, adopt a general assembly resolution approving such transaction. Article 7 of ST Communiqué details the principles for such approval. There is no meeting quorum applicable in such a general assembly and the decision quorum requires, unless increased by the articles of association of the company, the affirmative votes of at least two thirds of shares represented in such general assembly. In case more than 50% of all shares are represented, the decision quorum will be simple majority.

The company would not be "obliged" to pursue and close the significant transaction, even if the shareholders' approval is duly obtained. On the other hand, according to subparagraph (5) of Article 9 of ST Communiqué, the shareholders may opt not to allow the company to engage in the transaction by adopting a 'renunciation resolution' in the same general assembly, provided that the criteria and conditions to such renunciation have been announced with the general assembly agenda.

2.2. Exit right

The shareholders, who are outvoted in the resolution consenting to the 'significant transaction' at the general assembly will have the right to exit, by transferring their shares to the company itself. The dissenting shareholders must have their negative opinion annotated with the general assembly minutes in order to be able to benefit from such right. The general assembly meeting agenda shall include information regarding the exit right (*e.g.* per-share purchase price, timing etc.). The valuation parameters applicable to the purchase price are stipulated under Article 10 of ST Communiqué. Furthermore, should the 'significant transaction' trigger the mandatory offer obligation as mentioned below, the dissenting shareholders cannot enjoy an exit right but instead they will be receiving a mandatory offer.

In addition to the exemption mentioned above, Article 12 of ST Communiqué lists the 'significant transactions' upon which the exit right does not arise. For example transactions to be engaged in to comply with the mandatory provisions of applicable law, revocation of all shares' privileges, or leasing out assets by real estate investment trusts are all considered as exemptions to the general rule entitling the shareholders with the exit right.

2.3. Mandatory offer:

In conjunction with the 'significant transactions' concept, CML and ST Communiqué have introduced a new and additional mandatory offer requirement. According to Article 25 of CML and Article 11 of ST Communiqué, the transactions referred to in sub paragraphs (d), (e) and (g) above will trigger the liability of a shareholder to issue a mandatory offer. The shareholder who shall make such an offer is the one who would benefit from such transaction. The principles applicable to such offer are the same with the principles regarding the exit right, which are dictated under Article 10 of ST Communiqué. The mandatory offer obligation (and therefore the shareholders' right to exit) will supersede the exit right stipulated under Article 9 of ST Communiqué.

3. Final remark:

The newly introduced 'significant transaction' concept not only provides new 'protection rights' for minority shareholders in listed companies, but also imposes new liabilities onto the management of such companies. Third parties who consider engaging in such transactions with listed companies shall also take these provisions into account prior to concluding any "significant transaction" thereto. The High Court of Appeal's interpretation of such provisions, especially the 'catch-all' provisions, shall also be closely followed.

Competition Law / Antitrust Law

The Turkish Competition Board Imposed Record-Breaking Fine on Turkey's Largest Energy Company

The Turkish Competition Board ("Board") recently concluded the high-profile competition law investigation against TÜPRAŞ, Turkey's largest energy company (Law No. 4054). The Board found that TÜPRAŞ abused its dominant position through abusive pricing practices and contracts. It imposed an unprecedented administrative fine of TL 412,015,081.24 (approx. EUR 136,062,134; USD 185,997,345) on TÜPRAŞ, which equals 1% of TÜPRAŞ's annual turnover for 2013. This is the highest fine levied on a single undertaking in the Turkish Competition Authority's enforcement history, at almost double the previous highest fine on a single undertaking [the monetary fine of TL 213,384,545.76 (approx. EUR 70,444,995; USD 96,328,898)] against Garanti Bankası, one of the largest banks in Turkey.

The Board did not find sufficient evidence of an Article 4 violation (anti-competitive agreements) so cleared TÜPRAŞ and OPET of the allegations. Therefore OPET received no fine as the Board did not find sufficient evidence of any violation on the part of OPET. Finally, the Board decided to deliver an opinion to the public authorities concerned that pricing mechanisms for refineries should be restructured in a manner to yield consumer benefit. TÜPRAŞ will also be warned to avoid similar behavior.

The Turkish Competition Authority Delivered an Official Opinion for the Draft Law on the Regulation of Retail Trade

The Turkish Competition Authority ("Authority") has announced its official opinion for the Draft Law for the Regulation of Retail Trade ("Draft Law") on its website. The opinion makes various references to the Authority's Fast Moving Consumer Goods Retail Sector Report in Turkey. The Authority sums up the Draft Law's fundamental purpose as the following: (i) addressing the inconveniences regarding the suppliers, and (ii) regulating the structural change in the sector in accordance with city planning considerations.

The Authority notes that Article 4 of the Draft Law stipulates that the Strategic Commercial Plan which determines the trade zones, optimum numbers of retail undertakings and associated operation fields is binding for big stores like shopping malls, chains, dealers and authorized economic units in terms of their opening and operation processes but advisory for craft and related trades undertakings. In this regard, the Authority criticizes the binding structure of the Strategic Commercial Plan for organized retailers and states that the rule should not be applied in a discriminatory manner. The Authority further adds that such regulation may trigger an increase in merger or acquisition transactions for the sake of elimination of permission procedures and therefore could have a negative impact on market structure.

The Authority also points out certain restrictions imposed on retailers under Article 11 of the Draft Law. The relevant article sets forth that retailers cannot request any premium or payment on grounds such as new store opening, renovation, turnover deficit, bank and credit card contribution price unless it has direct effect on product demand. The Authority criticizes this restriction on the grounds that such regulation is disadvantageous for the consumer and has a restrictive effect on competition.

As regards to the private label products, the Draft Law does not currently include any restrictions. However, Article 13 of the Draft Law provides that private label products may be limited in the future with respect to the kind of products or the ratio of private label products in a store through secondary legislation. The Authority states that (i) restrictions regarding private label products are not necessary, and (ii) the boundaries of the potential restrictions are not well established. Therefore, the Authority suggests the removal of the relevant provision.

Furthermore, Article 14 of the Draft Law restricts rebate and campaign periods. The Authority states that such limitations on term and scheduling of campaign sales would have a negative impact on consumers and that consumers' opportunity to benefit from the product sales with campaigns for a longer time should not be limited with law.

Lastly, the Authority points out that the PERBİS system, which is an electronic system coordinating all permission applications regarding opening and operations of retail companies, functions as a database allowing the exchange of information. The Authority warns that this system may increase market transparency and could therefore potentially facilitate coordination. To that end, the Authority points out that the promulgation of the secondary legislation regarding this system should also include input from the Authority.

The Turkish Competition Authority Opens Public Consultation on the Draft Regulation on Administrative Fines

The most significant recent development in Turkish competition law circles is the announcement for the public consultation on the Draft Regulation on Administrative Monetary Fines for the Infringement of Law on the Protection of Competition ("Draft Regulation"). The Draft Regulation is set to replace the current Regulation on Monetary Fines for Restrictive Agreements, Concerted Practices, Decisions and Abuse of Dominance ("Regulation on Fines"). Similar to the Regulation on Fines, the Draft Regulation provides for a two-staged fine calculation procedure *i.e.* determination of the base fine in the first place and factoring in the aggravating and mitigating factors afterwards.

The most significant change the Draft Regulation brings about is the concept that turnover should be taken into account when calculating the base fine and in the calculation of the turnover, Communiqué No. 2010/4 (Communiqué No. 2010/4) on Mergers and Acquisitions Requiring the Approval of the Competition Board needs to be taken into account. For the first point, unlike the Regulation on Fines, according to which the base fine is determined on the basis of "the total turnover", the Draft Regulation requires the base fine to be determined based on "the turnover generated in the relevant market which is directly or indirectly related to the respective competition law infringement". For the latter point, the fact that Communiqué 2010/4 needs to be taken into account would bring about the parental liability concept into play, as a result of which the entire group's Turkish turnover in the relevant market would need to be taken into account.

The impact and the duration of the infringement will also be taken into account in calculating the base fine. As a general rule, the base fine is determined at a level of up to

30% of the turnover generated in the relevant market multiplied by the amount of years during which the infringement continued. In the course of deciding whether the base fine should be set at the lower or higher end of that scale, the Competition Board will take into account factors such as (i) the concerned undertaking's market power, (ii) the infringement's nature and (iii) the actual or potential damages of the infringement. Hard-core competition law violations, such as price fixing, customer/market sharing, bid rigging, output-limitation or determining sales conditions will be fined at the higher end of the 30% scale. In terms of analyzing the weight to be given to the actual or potential damages of the infringement, the Board would take into account the geographical scope of the violation, the combined market share of the undertakings involved and whether the infringement has been implemented or not.

The second stage of the fine calculation is the factoring in the aggravating and mitigating factors. As opposed to the Regulation on Fines, which sets forth only two cases of aggravation where the Board is obligated to increase the base fines, the Draft Regulation includes three aggravating factors (being the leader or the initiator of the infringement, coercion, non-compliance to commitments previously made to the Board and recidivism) which increase the base fine by half or one-fold. In terms of mitigating factors, the current Regulation on Fines provides the Board with discretionary powers in their application. The Draft Regulation, on the other hand, obliges the Board to reduce the fine when mitigating factors exist, without any discretion. These factors include the evidence demonstrating: (i) the partial or full compensation of damages, (ii) that the infringement resulted due to encouragement or coercion by public authorities, (iii) that the undertaking's participation in the violation is limited. In addition, cooperation with the Board beyond cooperation required by the law is also taken as a mitigating factor.

Further to these factors, the Draft Regulation adopts another new approach and grants the Board with the discretion to increase the fines in certain cases, with the intent to ensure deterrence.

Article 10 of the Draft Regulation regulates potential financial difficulties the undertaking may face. In cases where the administrative fine would compromise the ability of maintaining the respective undertaking's economic activities, the Board can reduce the fine upon request. The reduction would be conditioned upon the provision of objective evidence demonstrating that the fine compromises the economic activities of the undertaking.

The upper limit of the administrative fines is 10% of the overall turnover determined by the Board and generated by the undertaking in the financial year preceding the decision. In case the fine calculated by the Board exceeds that limit, the Board will reduce the fine to 10%, a limitation which exists under the Regulation on Fines also.

Finally, as opposed to the Regulation on Fines, the Draft Regulation is applicable to unlawful concentrations. To that end, fines for unlawful concentrations would be calculated in view of the above mentioned principles.

The Turkish Competition Law is on the Verge of Change

Long-awaited amendments to the Law on Protection of Competition No. 4054 ("Competition Law") became a hot topic when the Turkish Parliament announced that the draft law containing the amendments ("Draft Law") was officially added to the drafts and proposals list. The Prime Ministry sent the Draft Law to the Presidency of the Turkish Parliament on January 23rd, 2014. The Draft Law is expected to be discussed in the Turkish Parliament's Industry, Trade, Energy, Natural Sources and Information Technologies Commission ("Parliament Commission") during the first half of February.

The Draft Law is designed to be more compatible with the actual enforcement of the law. It also aims to further comply with the EU competition law legislation on which it is closely modeled. It adds several new dimensions and changes which promise a procedure that is more efficient in terms of time and resource allocation.

To start with, one of the most important new additions introduced by the Draft Law is the *de minimis* rule. By this new provision, the Board may disregard agreements, concerted practices and decisions which do not exceed a certain market share and/or turnover threshold. Importantly, the draft provision does not exclude the cartel cases. This addition aims to enable the Board to concentrate on serious infringements and avoid trivial cases such as the recent local bakeries and driver schools investigations.

The Draft Law proposes several significant changes in concentration provisions. First, the substantive test for concentrations will be changed. The EU's SIEC Test (significant impediment of effective competition) will replace the current dominance test. Secondly, in accordance with the EU competition law legislation, the Draft Law adopts the term of "concentration" as an umbrella term for mergers and acquisitions. Thirdly, the Draft Law eliminates the exemption of acquisition by inheritance. Fourthly, the Draft Law abandons the Phase II procedure, which was similar to the investigation procedure, and instead provides a four-month extension for cases requiring in-depth assessments. During in-depth assessments, the parties can deliver written opinions to the Board, which will be akin to written defenses. Finally, the Draft Law extends the appraisal period for concentrations from the current 30-day period to 30 working days, which equates to approximately 40 days in total. As a result, obtaining a Phase I decision, which currently takes around 45 to 60 calendar days, is expected to be extended.

The Draft Law introduces three tools, known in many other jurisdictions but new to the Turkish competition law, to end investigations prematurely. First of these is the settlement procedure, which enables the Board to settle with those parties subject to investigation that admit their infringements before the investigation report is served to them. The second is the commitment procedure, which paves the way for the Board to accept reasonable commitments submitted by the parties during preliminary investigations or investigations, and decide not to launch an investigation or to end an ongoing one. The Board will provide the details of these new procedures by secondary legislation. Thirdly, the Board may decide to end an investigation, wholly or partially, before the investigation report is served to the parties, if it is convinced by the case handlers' recommendations that the parties did not violate the law.

The Draft Law also proposes significant changes in the investigation procedures for competition law violations. First of all, the six-month investigation period will be reduced to four months. This period may be extended up to four months, compared to an extension limit of six months now. Secondly, the Draft Law removes the first written defense mechanism, which is the defensive response to the investigation notice. Therefore, the parties will have two written defense rights instead of three. The Draft Law also extends the deadlines for defense submissions and the case handler's additional opinion. Moreover, it sets a one-month deadline for the Board's announcement of its final decision following the oral hearing or the end of the written defense rights period. Additionally, the Draft Law proposes that the reasoned decision be served within two months after the final decision is made.

The Draft Law proposes to abandon the fixed rates for certain procedural violations, including failure to notify a concentration and hindering on-site inspections, and set upper

limits for the monetary fines for these violations. This new arrangement gives the Board discretionary space to set monetary fines by conducting case–by-case assessments. On the other hand, the Turkish Competition Act's other provisions on fines are left untouched.

All of these proposals will enter into force if the Turkish Parliament approves the Draft Law. As the Draft Law has been submitted to the Presidency of the Turkish Parliament on January 23rd, 2014, the Parliament's Commission is expected to be discussing it within the first half of February. Therefore, even though the specific effective date remains unknown, it seems fair to expect it very soon.

Labor Law

The Significance of Additional Compensation in Securing the Validity of Mutual Termination Agreement

In cases where an employee's employment agreement is to be terminated through a mutually signed agreement instead of a unilateral termination by the employer, determination of the settlement package to be paid to the employee requires the utmost discretion on the employer's side. Although, in most cases, the employer includes the employee's legal and contractual rights, including severance pay and payment in lieu of notice, it is actually the amount besides those payment items (legal and contractual receivables) which renders a settlement, *i.e.* mutual termination agreement, valid.

The validity of a mutual termination agreement relies on whether the relevant employee obtains a benefit in executing such an agreement. The employee's benefit could be identified by his/her financial inducement to accept the mutual separation agreement.

The High Court of Appeals acknowledges that an additional compensation should be paid to the employee in order to prove the existence of financial inducement for an employee to accept the mutual termination agreement. In that context, pursuant to High Court of Appeals' precedents, it is accepted that the additional compensation should be defined in line with the reinstitution compensation ("Reinstitution Compensation") and the payment in lieu of the unemployment period ("Unemployment Compensation") which the employee would be entitled to in case of a reinstitution lawsuit. On that note, the compensation amount referred to herein includes the reinstitution compensation (minimum four months - maximum eight months' salary) and the payment in lieu of the unemployment period (a maximum four months' salary).

Deriving from that precedent, in an effort to determine the reasonable amount of additional compensation, the abovementioned receivables will be projected, assuming a reinstitution lawsuit is brought by the relevant employee. Accordingly, projection of the Reinstitution Compensation and Unemployment Compensation that the employee could receive as a result of filing a reinstitution lawsuit becomes the priority, when it comes to determining a settlement package.

The Reinstitution Compensation can be projected by virtue of High Court of Appeals for the 9th Circuit's recent decision dated February 4th, 2013 and numbered 2012/28221 E., 2013/3963 K. It is stated in the relevant decision that the Reinstitution Compensation that should be paid to the employee (i) whose seniority is 6 months up to 5 years is 4 months of his/her salary, (ii) whose seniority is 5 years up to 15 years is 5 months of his/her salary and (iii) whose seniority is more than 15 years is 6 months of his/her salary.

Unemployment Compensation is, almost without exception, ruled to be 4 months of the employee's salary since finalization of reinstitution claims take far more than 4 months, *i.e.* 1.5 – 2 years.

The following conclusion emanates as the projections with regard to Reinstitution Compensation and Unemployment Compensation are jointly taken into account: The additional compensation that should be paid to the employee (i) whose seniority is up to 5 years is 8 months of his/her salary, (ii) whose seniority is 5 years up to 15 years is 9 months of his/her salary and (iii) whose seniority is more than 15 years is 10 months of his/her salary.

In the light of the foregoing, observing the abovementioned benchmarks would safeguard the validity of a mutual termination agreement.

Medical Device Law

A Look Inside The New Regulation on Opticianries

The New Regulation on Opticianries ("Regulation") regulating epicenters ranging from the opening, activities, audit, promotion and advertising of opticians to all conditions that opticianries are subjected, was published in the Official Gazette dated January 18th, 2014, numbered 28886. The Regulation became effective on the day of its publication and thus the current Regulation on Opticianries ("Abolished Regulation"), which was published in the Official Gazette dated September 27th, 2004, was abrogated.

Shedding Light on What was Amended

As we try to draw a picture of changes brought with the Regulation, some of the significant amendments are as follows:

(i) Age boundary for application: While a considerable portion of the documents required in license application are being preserved, Article 7 of the Regulation imposes an additional document to submit during the license application. As of January 18th, 2014, administrators of opticians whose ages are above sixty five will have to submit a health certificate showing their capability of practicing opticianry activities during the license application.

(ii) Evaluation of the application:

- Time periods; according to Article 8 of the Regulation, similar to the Abolished Regulation, the Directorate will evaluate submitted documents in fifteen business days and notify the applicant in case of any lacking documentation, once the application is received by the Provincial Directorate of Health ("Directorate"). That being said, if the application is well-built and no notification is needed, on-site inspection will be performed by the Directorate in thirty business days in accordance with Article 8.

- On-site inspection; as briefly mentioned above, the Directorate conducts an on-site inspection on the location which will be used as the opticianry. Upon such examination, if the Directorate determines that the location does not fulfill criteria for opticianry practices, the applicant is given forty five days to fulfill the necessary criteria and submit a petition without resubmitting its file for the application.

(iii) Deed of assignment: Upon assignment, Article 9 of the Regulation regarding the transfer and assignment of the opticianries requires parties to submit to the Directorate a deed of assignment along with a petition, in addition to other the required documents set out in Article 7 (2). In addition, the Regulation removes the one-month limit regarding the application to be made to the Directorate after transfer of the opticianry.

(iv) Sale in supermarkets: Probably the most controversial provision introduced by the Regulation is the ban on the sale of opticianry products in markets and supermarkets, which was previously allowed under the Abolished Regulation. With the amendment in Article 11 of the Regulation, the parliament aimed to prohibit opticianries from being incorporated with markets and supermarkets.

(v) Title distinction: Article 12 of the Regulation regarding the opticianries' titles and signs, requires the opticianries located in the same province to use distinctive titles to prevent misunderstandings. Also, in case the same person or entity owns more than one opticianry, such opticianries should be dissociated by including expressions as to the district or street number in their titles.

(vi) Leave notice made by the administrator: Article 14 of the Regulation governs that in case the administrator takes a leave of absence for more than thirty days due to health and other crucial conditions, the Directorate should be notified of the situation.

On top of that, Article 14 expands the time limit of the notice from twenty four hours to forty eight hours.

(vii) Leave notice made by the owner: Pursuant to the Regulation, the notice which shall be served upon the administrator's resignation, discharge, loss of capability in executing the opticianry activities and death, now has to be made by the owner in five days or in fifteen days depending on the reason of the administrator's leave.

(viii) Electronic record system: Grant of right to preserve medical records in an electronic environment might be considered most noteworthy and practical amendment made by the legislator on the opticianries' side. To that end, to maintain an electronic record system will enable the opticianries to abandon the practice of keeping a prescription book providing the confidentiality, security and sustainability of electronic records.

(ix) Display window settings: The Regulation amended Article 24 regarding the promotion and advertisement of optic products. To that end, the opticianries have been given the green light to exhibit (i) the products they're selling and (ii) prices of such products in the enterprise's display window. Without any surprise, as was governed in the Abolished Regulation, Article 24 of the Regulation also prohibits inaccurate advertisements of optic products.

(x) Prohibitions: Legislator brings two additional items to Article 25 of the Regulation regarding prohibited activities of the opticianries, namely; (i) prohibition of the sale of products that are not registered in National Databank of the Turkish Medicine and Medical Device Institution and (ii) prohibition of the sale of products in absence of the administrator.

(xi) Audit: Article 26 of the Regulation sets forth the general conditions of the opticianries' audit to be conducted by the Directorate. In line with the changes made in Article 26, the opticianries will face the risk of losing their license in case it is determined as a result of the audit that the opticianry remained closed more than one month without the administrator's notification to the Directorate.

Telecommunications Law

Regulation on Quality of Service in the Electronic Communications Sector

On January 21st, 2014, an amending regulation ("Amending Regulation") was published in the Official Gazette and came into force regarding the Regulation on Quality of Service in the Electronic Communications Sector ("Quality Regulation"). Quality Regulation covers the principles and procedures regarding the provision of services and/or operating networks in compliance with national and international service quality standards by operators in the telecommunications sector in Turkey.

Under the Quality Regulation, parameters quality of service should be understandable, applicable and up-to-date, information regarding the quality of service standards should also be sufficient, comparable and accessible and quality of service standards

should be compatible with international standards. Operators are obliged to comply with the international standards and procedures, International Telecommunications Union recommendation documents and European Telecommunications Standards Institute standards about quality of service criteria measurements and field tests on the matter. Practices increasing the user satisfaction and decreasing user complaints should be encouraged and non-discrimination and equality in service supply should be provided, such as arrangements in accords with special conditions of users. To that end, the disabled users should be considered especially.

Operators are obliged to comply with the aforementioned legislation on service quality and show maximum effort to provide service in a continuous manner. Article 5 of the Quality Regulation states that:

(i) Universal services provider fixed telephone service operators are obliged to provide service in accordance with the quality of service targets determined under Annex-1 of the Quality Regulation, which has been amended recently by the Amending Regulation and report the quality of service measurement to Information and Communications Technologies Authority ("ICTA").

(ii) GSM mobile telephone operators are obliged to provide service in accordance with the service quality targets determined in Annex-2 of the Quality Regulation which has been amended recently by the Amending Regulation and report the quality of service measurement to the ICTA.

(iii) Also, authorized internet service providers are obliged to provide service in accordance with the quality of service targets determined in Annex-3 of the Quality Regulation which has been amended recently by the Amending Regulation and report the quality of service measurement again to the ICTA.

(iv) Authorized operators that provide services to end users are obliged to provide service in accordance with the quality of service targets determined under Annex-4 of the Quality Regulation which has been amended recently by the Amending Regulation and again report the quality of service measurement to the ICTA.

(v) Authorized operators that provide IMT-2000/UMTS mobile phone services are obliged to provide service in accordance with the quality of service targets determined under Annex-5 of the Quality Regulation which has been amended recently by the Amending Regulation and again report the quality of service measurement to the ICTA.

Annexes of the Quality Regulation in general include quality of service parameters, parameter related data, measurement unit of the parameter and target units of the parameter which the operators should comply with.

ICTA may either publish quality of service reports on the official web site of ICTA or oblige operators to publish it. ICTA may inspect the operators whether the quality of service information is accurate or not, due to a complaint or on its own initiative.

Internet Law

Recent Amendment to the Internet Law in Turkey

Legislation to amend certain laws in Turkey, including the Law No. 5651 on the Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts ("Law No. 5651") was published in the Official Gazette on February 19th, 2014 and came into force on the same day. The amending legislation introduced significant amendments to the internet law in Turkey and has been highly criticized by the public opinion and media, mostly in terms of freedom of speech grounds which we will explain below. The amending legislation ensures that

internet bans will increase even more in Turkish Internet law practice.

First of all the definitions section of the Law No. 5651 has now brand new terminologies. An IP restriction is defined under "removal of content from broadcast" for the content and hosting providers residing outside of Turkey. Access ban methods are diversified as access ban through domain name, access ban through IP address, access ban to content (URL) and similar access ban methods. Technical measures to be used for these methods and "similar access ban methods" are not set out under the amending legislation. However, the amending legislation states that access providers will provide all the hardware and software necessary to apply the decision. The notice method is defined as the notification method in which the content provider is contacted at first and then if there is no result achieved within a reasonable time, the hosting provider is contacted through their contact information by the persons claiming that their rights are violated due to content being broadcasted on the internet medium for the removal of content.

Article 86 of the amending legislation stipulates that the notifications to the ones carrying out activities in Turkey or abroad that fall within the context of Law No. 5651, may be served through e-mail message or other communication tools which are found based on information gathered from the sources such as the communication tools on their internet pages, domain name, IP address and similar sources. With the relevant provision, it will become possible to make a notification with a simple e-mail message which may be perceived as spam message and which is not a secure and binding official notification process under Turkish notification law. Moreover by using the phrase "the ones carrying out activities in Turkey or abroad", the amending legislation covers the ones who are carrying out activities abroad which should not be subject to Turkish laws. Such a provision is clearly against the principle of territoriality of the laws.

According to Article 88 of the amending legislation, the hosting Provider will remove the illegal content from broadcast, provided that it has been informed about the illegal content pursuant to Articles 8 and 9 of the Law No. 5651. The phrase "if technically possible" is removed from the relevant provision of the Law No. 5651 by the amending legislation and the hosting providers will be in any case obliged to remove the illegal content and will be subject to sanctions for technically not possible removals.

Under the amending legislation a new civil initiative consisting of the access providers providing services in Turkey, namely "Access Providers Union" ("Union"), will be established. The Union will be a legal person subject to private law and the center of the Union will be in Ankara. Access ban decisions which fall outside the scope of Article 8 of the Law No. 5651 will be executed by access providers. All hardware and software necessary to implement these decisions will be provided by the access providers themselves. Access ban decisions which fall outside the scope of Article 8 of the Law No. 5651 will be sent to the Union for execution. The notifications served on the Union in this context will be deemed served on the access providers. All internet service providers in Turkey which are not a member of the Union will not be able to operate.

The procedural process designated under Article 9 of the Law No. 5651 which stipulates content removal procedure, is totally changed in the amending legislation. The amending legislation states that any real person or legal entity or authority or institution who claims that his/her personal rights are violated due to a content broadcasted on the internet medium may (i) apply to the content provider, or to the hosting provider, if the content

provider may not be reached, and request removal of content by the notice method or (ii) may directly apply to a criminal court of peace judge, and request access ban to the content. This provision by-passes internet actors and disables their right to defense, as they will not be aware or informed of the removed or access banned content.

The content and/or hosting provider will reply to requests of persons, who claim that their personal rights are violated due to the content broadcasted on the internet medium, within twenty four hours. Criminal courts of peace may decide to ban access in accordance with the requests of persons whose personal rights are violated due to the content broadcasted on the internet medium. The court may also grant access ban decisions in the scope of this article by banning access to the content method, only for the part, section, broadcast where the personal right violation occurs (URL, etc.). The court, however, may access ban entire broadcasts wherein allegedly violation content is on air, provided that the court indicates the decision's grounds. The new provision paves the way for access ban to entire website and defers the matter to the judge even for the contents allegedly violating personal rights.

The decision given for access ban to content, which is sent to the access provider by the Union, will be implemented by the access provider immediately, latest within four hours.

In case the broadcasts subject to the court's access ban decision, which are in violation of personal rights, or the same kind of broadcasts are also broadcasted at other internet sites, then the relevant decision will also apply to these addresses upon the relevant person's application to the Union without obtaining a court order.

A brand new provision titled "access ban due to privacy of private life" is inserted into the Law No. 5651 as Article 9A, according to the amending legislation. Any person, who claims that his/her privacy of life is violated due to a content broadcasted on the internet medium may directly apply to the Presidency of Telecommunications ("Presidency") and request access ban to content measures to be enforced. The Presidency will send this request to the Union for enforcement and the access providers enforce this request immediately, latest within four hours. Upon the President of the Presidency of the Telecommunications' ("President") order, the Presidency will directly execute access ban for the reasons related to violation of privacy of private life, if it is not convenient to delay the case. It is possible to object to this decision before the criminal court of peace. The amending legislation goes beyond the protection of privacy and includes vague crime definitions and grants a single "administrative" person to order access ban against an online content. Such provision extends the authority of an administrative body by granting judicial powers, whereas it is the duty of judicial bodies to evaluate whether content violates laws.

Internet service providers will be required to keep track of personal data and conduct sweeping surveillance on behalf of the government due to access ban to URL technique. New access ban procedures will make it hardly possible to access the banned content by changing DNS settings.

The amending legislation introduces brand new monetary and legal obligations for internet service providers in Turkey. It is expected that the internet access fees in Turkey would increase accordingly and Turkey will protect its rank for providing one of the most expensive internet access services in the world.

The changes the amending legislation brings are against the spirit of the internet, and it is expected to cause both legal and technical problems with respect to internet usage in Turkey as well as permanent basic human-rights violations with its censorship-tending provisions, and vague, unclear and unlawful procedures.

Real Estate Law

Legislation on the Transformation of Areas under the Risk of Disaster

The legislation setting forth the transformation of areas under the risk of disaster consists of (i) the Law No. 6306 on the Transformation of Areas under the Risk of Disaster ("Law") and (ii) the Regulation on the Application of the Law on the Transformation of Areas under the Risk of Disaster ("Regulation"). The Law and the Regulation will be collectively referred to as the "Legislation".

Since Turkey is geographically situated in an earthquake prone area, the Legislation is much needed for many reasons. The transportation of residences, places of business and industrial facilities located in earthquake prone areas before a disaster occurs would (i) ensure residential and construction security and (ii) prevent the significant economic and social burden and death of thousands caused by the disaster. Consequently, the Law No. 7269 on the Measures and Aids based on the Disasters Harming Public Life ("Law No. 7269") was enacted in 1959. The Law No. 7269 required a "disaster prone area" decision to be obtained in order to proceed with the transformation of the residences and places of business located in the area in question. Unlike the Law No. 7269, the current Legislation enables "voluntary transformation" of the risky areas and risky constructions upon the owners' request.

The Legislation aims at the transformation of (i) reserved construction areas, (ii) risky areas and (iii) risky constructions. The Legislation describes reserved construction areas as "areas determined by the Council of Ministers ("Council") upon the Housing Development Administration ("TOKI") or the administration's ("Municipality") request as new residential areas under the Law". Risky areas are defined as "areas under the risk of causing loss of life and property due to their structure of soil or of housing." The Council decides whether an area is risky upon the Ministry of Environment and Urbanization's ("Ministry") request, taking into consideration the opinion of the Department of Disaster and Emergency Administration ("Department"). Finally, risky constructions are constructions inside or outside risky areas that (a) the economic life has expired or (b) are scientifically and technically determined to be under the risk of degradation or severe damage. Risky areas, risky constructions and reserved construction areas are collectively called as "Application Areas".

Determination of Application Areas:

(i) Reserved areas: The Ministry may *ex officio* determine an area as reserved area. Also, (a) TOKI or the Municipality or (b) real or legal persons upon consent of all the owners may request the Ministry to determine the area as reserved pursuant to the Article 4 of the Regulation.

(ii) Risky areas: Pursuant to the Article 5 of the Regulation, (a) TOKI or the Municipality or (b) real or legal persons owning a real property in the area may request the Council to determine the area as risky. The applicants are requested to provide the documents listed in Article 5, including the technical report demonstrating that the area is indeed risky

(iii) Risky constructions: Pursuant to the Article 6 of the Regulation, the Ministry, the Municipality or institutions licensed by the Ministry (*e.g.* public institutions and organizations, universities, non-governmental organizations, etc.) may determine a construction as risky. Risk determination analysis could be conducted by (a) Property owners or their legal representatives may have the risk determination analysis conducted by the abovementioned institutions at their own expense, or (b) the Ministry may ask the property owners or their legal representatives to have the analysis conducted within a specified period of time or c) the Ministry may ask the Municipality to conduct a risk determination analysis within a specified period of time. If the property owners fail to

have the analysis, the Ministry or the Municipality may have the analysis done on behalf of the property owners.

A copy of the report demonstrating that the construction is risky is sent to the Directorate of Infrastructure and Urban Renewal (or District Directorate of Environment and Urbanization, as applicable) ("Directorate") of the place where the property is located within seven days for review. The Directorate conveys the report to the relevant title deeds registry office ("Office") within 10 days. The Office makes the necessary amendments on the land register of the property and notifies the owners of the property that (i) they may object to the determination before the relevant Directorate within 15 days following the date of receipt of the notification and if not, (ii) the risky construction shall be demolished within a period of time to be granted by the Municipality. The time granted for the demolition cannot be less than 60 days. A technical council assesses the objections with the majority of the members present as per Article 10 (4) of the Regulation. If the technical council decides that the construction is not risky, it notifies its decision to the Office.

Demolition of the risky construction:

Article 5 of the Law stipulates that it is essential to reach an agreement with the owners of the property for the demolition. The article further states that temporary residence or rent allowance may be provided to the (i) owners, (ii) tenants or (iii) holders of restricted real rights over the property.

Once the technical council rejects the objection or the objection is not timely filed, the Directorate requires the Municipality to have the risky construction demolished. Pursuant to the Article 8 of the Regulation, the Municipality:

a) Asks the property owners to have the property demolished within the specified period of time (not less than 60 days),

b) Draws up the demolition permit within 6 days, upon one or more property owners' request and without seeking their consent, after it is evidenced that the facilities (water, electricity and gas) are cut off and the static technical responsible is assigned for demolition,

c) If the demolition has not taken place within the specified period of time, gives the owners an additional time of not less than 30 days and notifies them that the administrative authorities will have the property demolished if the owners do not abide by this notification,

d) If the property is still not demolished at the expiry of the specified time periods, asks facility providers to cut off their services and informs the administrative chief (*i.e.* the governor or the district governor).

The administrative chief demolishes the property or has it demolished. The Municipality or the Directorate may file a criminal complaint against the persons hindering the application of the process. The administrative chief notifies the cost of the demolition to the Office and the Office annotates a joint mortgage on the title of the property. Accordingly, all the owners become jointly and severally liable of the demolition costs.

Valuation of the property:

Valuation commissions to be formed within The Ministry, Municipality or TOKI ("Related Institutions"), as applicable, may assess the value of the property in the Application Areas, using the parameters stipulated in Article 11 of the Expropriation Law No. 2942. Also, this service may be purchased from third party assessors.

Rights of the owners of the real property in the Application Area:

Once the construction is demolished and the real property becomes a plot, the construction servitude and property ownership previously

established on the property are *ex officio* cancelled by the Office upon the Ministry's request without the consent of the owners (Article 6 of the Law). Subsequently, the plot will be registered in the name of the owners pro rata their shares and in line with the agreement to be made with the Related Institution as explained below. Two-thirds majority of the owners (pro rata their shares) is required to decide the method of revaluation of the property, *e.g*. amalgamation of the parcels, sales of the shares, having another construction on the plot, etc. Shares of the owners who do not agree with the decision within 15 days may be sold by auction to the other owners at the current market value to be determined by the Ministry. If not sold, these shares will be registered in the name of the Undersecretariat of Treasury and will be deemed to be allocated to the Ministry with the two-thirds majority decision of the owners. The Ministry pays the current market value of the property to the dissenting owners.

The Related Institution signs an agreement with the owners of the real property in the Application Area whereby primarily they will be given a residence or a place of business from the construction to be built in the Application Area. The assessed value of the property will be deducted from the construction costs of the newly built property.

If, after the deduction, the Related Institution owes an amount to the owner, the Related Institution may (i) pay the remainder in cash, or (ii) give more real properties or (iii) shift the development right into another area to pay its debt to the owner.

If the owner owes an amount to the Related Institution after the deduction, the owner may pay it in installments to be determined by the Related Institution based on the project.

Moreover, owners evacuated due to demolition may be granted a temporary residence or place of business until the new sections are delivered, if possible. If not, they may receive a rent allowance of up to TL 600 for a maximum period of 18 months.

Rights of the tenants and holders of restricted real rights over the property:

For the remaining independent sections of the new construction, if any, the Related Institution may enter into an agreement with the tenants or holders of restricted real rights residing there for more than one year and give them a residence or a place of business. If the number of tenants or right holders exceeds the number of sections available, those who will be given a section will be designated by casting lots.

Furthermore, tenants or holders of restricted real rights may, at once, receive a rent allowance of up to twice the amount to be determined by the Ministry.

Finally, lawsuits may be initiated against the administrative acts realized under the Law within 30 days following the date of receipt of the act in question, as per the Code of Administrative Procedure No. 2577. However, the Administrative Court may not issue a stay order in such lawsuits.

White Collar Irregularities

Third Party Liability in Light of the FCPA

As actors in a global economy, multinational companies invest in different parts of the world with divergent business cultures and rules. Therefore, multinational companies retain the services of third party agents when conducting business transactions in different jurisdictions. Such parties may be consultants, distributors, agents, lawyers and joint venture partners who assist the company in its overseas operations. Although such hiring is common place, the actions of these business partners may lead to significant risks under the Foreign Corrupt Practices Act ("FCPA"). This is because the FCPA prohibits any corrupt

payments made to “any person, while knowing that all or a portion of such money or thing of value will be offered, given or promised, directly or indirectly, to any foreign official, to any foreign political party or official thereof, or to any candidate for foreign political office”. Accordingly, the FCPA explicitly prohibits any payments made to intermediaries with the knowledge that such payment will be channeled to foreign public officials (and other persons prohibited by the FCPA) for corrupt purposes. The knowledge requirement includes not only cases of active awareness where the company knew the corrupt acts of its third party agents, but also situations where the company should have known of the relevant acts. Therefore, companies are advised to periodically conduct thorough due diligence procedures regarding their business relationships with third party agents.

The Due Diligence Process

The first step in third party due-diligence would be finding out the general situation of the business partner with regard to its expertise in the field the company will retain its services, business reputation and whether the business partner has any relationship with government officials. Initiation of a business relationship with a third party that has; (i) little expertise in the area, (ii) a shady reputation and/or (iii) close ties to public officials in the country it will provide services, could be regarded as conscious disregard / willful blindness by the Securities and Exchange Commission (“SEC”) or the Department Of Justice (“DoJ”) during an FCPA investigation.

The second step in the due diligence relates to the terms of the relationship between the company and its business partner. First and foremost, the company should determine whether it actually needs to employ a third party for the relevant business transaction, the reasons for employing a third party and if already employed, what services this third party will be performing. In fact, the contract to be executed with the third party should clearly and explicitly define the services to be provided by the third party. Furthermore, the company should specifically check if the payment terms, *i.e.* payment amount, payment method, account details (whether the payments will be realized to an already existing account or to an offshore account…) etc., requested by the third party are common to the relevant industry. When all of the abovementioned steps are realized and the third party is set to perform the services explicitly written in the contract, it would also be diligent to control whether the third party is actually performing the relevant services.

The third step of the third party due diligence is continuously monitoring the business partners In order to be able to perform this step, contract terms and provisions should provide the company and/or its agents with periodical audit rights. Additionally, both the DoJ and the SEC evaluate the inclusion of terms obliging third parties to abide by the compliance policies of the company in the contracts to be executed between them.

Throughout this due diligence process, the level of scrutiny should be heightened as alarming factors surface.

Red Flags

The red flags mentioned below could constitute serious FCPA risks for the company. Therefore, if a company encounters with one of the below-mentioned red flags during the third party due diligence process, it should increase its scrutiny into the third party. As closer scrutiny uncovers more and more red flags, the company should consider whether to retain the services of the third party at all. A non-exhaustive list of FCPA red flags would be:

(i) excessive commissions given to third party agents or consultants, (ii) unreasonably large discounts to the third party, (iii) third party consulting agreements in which the services

are not or only vaguely described, (iv) when the consultant has little or no experience in the field s/he is hired for, (v) association of the third party with an official of the country in which business transaction is being conducted, (vi) the business partner becoming a party to the deal due to the explicit request by the public official of the country of the transaction, (vii) the third party is a shell company (viii) the third party requests payment to be made to offshore accounts, (ix) the third party apparently lacks resources to realize the transaction, (x) the reputation of the jurisdiction the business transaction is being conducted in.

Conscious Disregard / Willful blindness

FCPA seeks to prevent companies from excluding FCPA responsibility by putting a barrier (a third party) between themselves and the actual/conscious knowledge of the breach, through retaining third parties. Accordingly, the knowledge standard in the FCPA has been created so as to overcome this ‘head in the sand’ situation. Section 78dd-1 (f) (2) of the FCPA provides that “knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believed that such circumstance does not exist.” A landmark case that demonstrates how conscious disregard / willful blindness can constitute an FCPA breach is the below-mentioned United States v. Viktor Kozeny, et al.

In July 10th, 2009, Frederic Bourke was sentenced to a 1 year and 1 day in prison, 3 years of probation and a fine of $ 1 million due to FCPA violations. Bourke was part of an investment consortium that aimed to buy Azerbaijan’s state-owned oil company during its privatization. The investment consortium was led by Viktor Kozeny who bribed Azerbaijani government officials with the aim of finalization of the privatization in favor of the investment consortium. The court held that Mr. Bourke was liable under the FCPA since (i) he was aware that the leader of the consortium was nicknamed “the Pirate of Prague” due to his dealings with government officials, (ii) knew that the jurisdiction in which the transactions was realized was prone to corruption and (iii) Mr. Bourke had even established companies to shield himself from FCPA liability. In other words, the court held that Mr. Bourke had remained willfully blind to the fact his business partner was bribing government officials. Therefore, Mr. Bourke himself was liable.

The example of United States v. Viktor Kozeny, et al. demonstrates that companies could be liable for the acts realized by their business partners if they choose to ignore the red flags they encounter during the continuous due diligence processes.

Exemplary Cases

In August 2012, American computer technology corporation Oracle agreed to pay a $ 2 million fine to SEC due to violation of books and records provisions of the FCPA. According to a SEC press release employees of Oracle’s Indian subsidiary organized a scheme whereby the distributors of the subsidiary would sell products and services to the Indian government and the distributors would keep an excessively large part of the amount paid by the government in side funds. The employees of Oracle’s Indian subsidiary would then provide invoices to the distributors, instructing them to pay the relevant amounts to companies on the invoices. Although there was insufficient proof that the money paid to these companies actually went to government officials, SEC was still able to charge Oracle with the breach of FCPA’s books and records provisions. Significantly, SEC held that Oraclet had failed to conduct sufficient audits into its distributors so as to be able to determine if excessive margins were introduced into its pricing structure. Oracle could have determined this by comparing the price the product was sold to the distributor and the price the distributor sold the product to the end user.

In 2013 Parker Drilling agreed to pay a $ 4 million fine to settle SEC charges that it has authorized a third party to make corrupt payments to Nigerian officials. Parker Drilling further entered into a deferred prosecutions agreement with the DoJ in which it paid the DoJ $ 11,760,000 in fines. In 2001 and 2002, Parker hired a company to take care of its compliance with the customs law in Nigeria. The company paid bribes to customs officers, in order to render the customs process less expensive for Parker. However, in 2002 Nigerian government formed a panel to investigate corruption in its customs processes and discovered Parker's actions. In order to defend itself against the panel, Parker hired an outside agent who was known for his influence on the Nigerian government and whose resume did not include any prior dealings in the customs sector. Subsequent to Parker executives granting several suspicious payments to the outside agent with the purpose of entertainment of panel members, the panel had, without any explanation, reduced the $ 3.8 million penalty to $ 750,000 without explaining any reasons.

In 2010, Daimler entered into a deferred prosecution agreement with the DoJ, having to pay a fine of $ 185 million. For 10 years (1998 - 2008), Daimler used third party agents such as consultants and sales agents to channel its corrupt payments to be made to government officials in the striking geographical variety of more than a dozen countries. In these schemes, use of offshore accounts and deceptive pricing arrangements caught the eye.

In 2012, Pfizer subsidiaries Wyeth LLC and Pfizer H.C.P. agreed to pay more than $ 40 million in fines to SEC and DoJ. Part of the reason Pfizer H.C.P. entered into this deal was because its use of sham consulting agreements and its distributors to pay the government officials in order to secure contracts in Croatia, Bulgaria, Kazakhstan and Russia.

In November 2013 Weatherford International pleaded guilty of breaching the anti-bribery provisions of the FCPA. The company agreed to pay $252,690,606 in penalties and fines to SEC and DoJ. For Weatherford International's business transactions in Africa, the local authorities chose with whom the company would be establishing a joint venture. These joint venture partners also turned out to be relatives of local government officials. Weatherford failed to investigate why these partners were involved in the deal who did not make any capital or expertise contribution. In fact these partners were only serving the purpose of funneling money to local government officials. Weatherford also channeled corrupt payments to government officials through third party consultants it retained. In addition, the company also provided one of its distributors with extra-discounts, believing that these were being used to create slush funds used to bribe local government officials.

Conclusion

Companies use third party agents when conducting businesses abroad. However, retaining third party agents without conducting proper due diligence mechanisms pose significant risks for the company at hand. The cases above suggest that when it comes to FCPA liability, the SEC and the DoJ do not accept *"It was not me"* or *"I-did-not-know scenario"* regarding the actions of the company's third party agents if red flags have been raised before them and the company had simply *looked the other way*. Therefore, companies retaining third party agents should be cautious when it comes to these third parties and refuse to work with them when increasing scrutiny over these partners uncovers more and more red flags.

ELİG
LOKMANHEKİM • GÜRKAYNAK
Attorneys at Law

ELIG aims at providing its clients with high-quality legal service in an efficient and business-minded manner. We focus on the interests of our clients, and strive for finding flexible legal solutions that fit the everchanging needs of our clients in their international and domestic operations.

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, EC law, banking and finance, litigation, internet law, energy, oil and gas law, corporate compliance/white-collar irregularities, administrative law, real estate law, and intellectual property law.

Çitlenbik Sokak No: 12 Yıldız Mah. Beşiktaş 34349, Istanbul / TURKEY
Tel: +90 212 327 17 24 • Fax: +90 212 327 17 25
www.elig.com