ISSN 2147 – 558X

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LEGAL INSIGHTS QUARTERLY

September 2013 - November 2013

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Eylül / September, 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*

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

ISSN 2147 – 558X

Preface to the September 2013 Issue

The summer of 2013 has witnessed significant developments within the Turkish legal landscape. Two of these brand new legislations have sparked public debates. The first of these legislations is with regard to newly imposed regulations on the sale of alcoholic beverages. The second piece of legislation is the new oil legislation which enhances the capabilities of foreigners with regard to search and licensing procedures.

In addition, The Regulation on Company Websites has been enacted, clarifying the way in which the obligation to establish websites introduced with the new Turkish Commercial Code ("TCC") should be implemented.

On the competition law front, this issue delves into the Turkish Competition Board's analysis about the decisive influence of the executives in a cartel. As for the data privacy law, Regulation on Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector has been amended with the aim of harmonizing Turkish legislation with that of the European Union, as well as keeping up with the technological developments.

Finally, the white collar irregularities section analyses the results of the Transparency International's Global Corruption Barometer 2013 from a comparative perspective with regard to Turkish and global trends.

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.

September 2013

Corporate Law

Three New Secondary Legislations on Company Websites, Commercial Books and the Adaptation Period for the new Turkish Commercial Code have been Enacted

1. The Regulation on Company Websites

The Regulation on Company Websites ("Regulation") published in the Official Gazette of May 31, 2013 and numbered 28663, entered into force on July 1, 2013. The Regulation is issued according to Articles 210 and 1524 of the Turkish Commercial Code ("TCC"). The companies which are subject to audit as per Article 397 of the TCC have to establish websites within 3 months after being registered with the trade registry, as per Article 5 of the Regulation. The companies that have become subject to the said audit after the effective date of the Regulation must establish a website within 3 months. Paragraph 1 of Article 6 of the Regulation counts the necessary content that should be featured in the website at all times, such as the company's trade name, address of the headquarters, subscribed and paid capital, name and address of the auditor, branches (if any) etc.. Paragraph 3 specifies the content that must be featured in websites for at least 6 months. According to Temporary Article 1 of the Regulation, the companies incorporated before July 1, 2013 must establish a website within 3 months, starting from July 1, 2013.

Article 7 and the subsequent articles of the Regulation regulate the organization of the Central Database Service Provider ("CDSP") and CDSP's obligations, such as informing the Ministry of Customs and Trade in case of emergence of an obstacle that prevents the CDSP from carrying out its actions. Article 9 of the Regulation states that the CDSP submits a report to the Ministry of Customs and Trade, before March of every year, regarding the services provided by the CDSP the year before along with the information regarding the companies CDSP has served. Article 10 of the Regulation stipulates that the companies will notify the CDSP regarding the content required to be provided in the websites in the format set by the Ministry of Customs and Trade; if a format is not set by the Ministry of Customs and Trade, the notification must be made electronically.

2. Amendment in the Communiqué on Commercial Books

Article 15 of the Communiqué on Commercial Books ("Communiqué") has been amended with a communiqué published in the Official Gazette of June 6, 2013, numbered 28669. As per the amended Communiqué; the daybook must be certified by a notary public's seal and signature with the expression of "Approved" stipulated under the last record before the end of the sixth months of the following accounting period and the resolution book must be certified by a notary public's seal and signature with the expression of "Approved" stipulated under the last record before the end of the first month of the following accounting period.

3. Time Extension of the Adaptation Period for the New TCC

Article 22 of the Code on Effectiveness and Enforcement of Turkish Commercial Code regulated that the articles of association of joint stock companies and limited liability companies shall be adapted to the new Turkish Commercial Code within 18 months following the effective date of new TCC. This period has been extended with the Communiqué published on the Official Gazette of June 29, 2013, numbered 28692. Following the relevant communiqué, the said companies shall be obliged to adapt their articles of association to TCC before July 1, 2014.

Competition Law / Antitrust Law

Sodium Investigation Decision of the Competition Board (03.05.2012, 12-24/711-199)

The Turkish Competition Board ("Board") recently published the reasoned decision of the sodium manufacturers' cartel investigation. One of the highlights of this decision is the leniency application of one of the investigated undertakings, and the Board's assessment concerning this application. Another highlight is that the Board imposed monetary fines on the executives of these undertakings. The Board determined that the executives had decisive influence over the cartel. Moreover, the percentage of the administrative monetary fines imposed in this case were the highest percentages that the Board applied in the last 5 years. The previous highest percentage of the fine imposed was in 2005 where the Board applied a fine based on the 6 % of the undertaking's annual turnover (*Sintek*, 10.3.2005, 05-13/156-54).

The Board investigated the claim of customer sharing and agreement on sodium prices between Sodaş Sodyum Sanayi A.Ş. ("Sodaş") and Otuzbir Kimya and San. Türk Ltd. Şti. ("OKS"). The second claim concerns customer sharing and an agreement on salt prices between Alkim Alkali Kimya A.Ş., Sodaş and OKS. The decision found that an agreement on sodium prices did in fact exist between Sodaş and OKS, and it was considered as cartelist behavior. Conversely, the Board did not consider the agreement on salt prices and customer sharing in the salt market as cartel activity.

The Board calculated the administrative monetary fine (TL 417,746.05) on the basis of 6 % of OKS's 2011 annual turnover. Sodaş, similarly, received an administrative monetary fine (TL 545,735.98) of 4.5 % of its 2011 annual gross revenues; however, the Board reduced Sodaş's fine by 1/3rd as Sodaş had applied for leniency "after the preliminary inquiry decision but before the submission of the investigation report." According to the decision, Sodaş was not granted full immunity from fines because the company did not apply to the Competition Authority before the preliminary inquiry decision of the Board. Additionally, the decision was released after the publication of the Draft Guidelines on Leniency Application, therefore, this decision could also be considered as an implementation of the Leniency Guidelines. Although in this decision the Board did not provide a thorough analysis of the leniency application, compared to the Board's previous leniency decisions, the relevant decision contains some explanation about the information provided by the leniency applicant and based on which provisions the leniency application was accepted.

Furthermore, the Board imposed administrative monetary fines on each of the two executives of Sodaş and OKS, forcing them to pay 3 % of the administrative monetary fines imposed on their respective undertakings. The Board, however, reduced the fine on Sodaş's executive by half, for active cooperation and for accepting the violation. There are only a few instances where the Board imposed monetary fines on individuals and thus, this decision is a significant example of the Board's analysis about the decisive influence of the executives in a cartel.

On a different note, as mentioned above, in this case the Board applied the highest monetary fine percentages that it has applied in the last five years. Although the case handlers advised a monetary fine between 2 % and 4 %, the Board fined OKS on the basis of 6 % of its annual turnover. Therefore, it can be said that especially in the last three years, the Turkish Competition Authority has become more aggressive in its dealings with cartel cases and this particular decision is one of the recent examples of the Authority's aggressive approach.

Paper Sector Investigation with Administrative Monetary Fine Request for Waste Paper Export Restrictions Resulted in Individual Exemption

The Turkish Competition Board ("Board") conducted an investigation against nine Turkish paper recycling companies. ELIG has represented Modern Karton, the largest Turkish paper recycling company, in this investigation, which has been closed without a monetary fine. This investigation marks one of those rare files in Turkey where a policy concern not directly related to competition law (*i.e.* a policy concern relating to minimizing trade deficit) may have played a role in the ultimate decision, together with a state action defense argued by the parties concerned, as the parties' behavior was influenced by a set of rules brought by the relevant ministry tackling trade deficit.

The Board found that the defendants violated competition laws by harmonizing their commercial behaviors and colluding against waste paper producers that aim to export waste paper. However, the Board did not levy turnover-based monetary fines against the defendants and granted 3-year exemptions (as of the effective date of the Communiqué No: 2011/6, *i.e.* June 2011) under objective criteria. These objective criteria are not yet announced but will be delivered to the defendants by the Presidency of the Turkish Competition Authority soon.

Per the regulation on the registered export of waste paper which entered into force in 2011 (Communiqué No: 2011/6), waste paper producers have to submit at least three approval letters issued by Turkish recycling companies to let these waste paper producers export. Upon a complaint that the Turkish recycling companies misused this regulation to prevent the waste paper export and coordinated their commercial behaviors vis-à-vis waste paper producers, particularly the issuing of the letters, the Board initiated an investigation. After the presentation of the defenses, the Board concluded that the defendants violated Article 4 of Law No. 4054 on Protection of Competition (which is akin to and closely modeled on Article 101 of Treaty on the Functioning of the European Union). However, as the cumulative conditions of individual exemption were met, the Board granted 3-year exemption to each defendant as of June 2011 which will expire on June 2014.

Alcohol Law

Alcohol and Alcoholic Beverages Monopoly Law

The Alcohol and Alcoholic Beverages Monopoly Law numbered 4250 ("Alcohol Law"), regulating the sale, distribution and pricing of alcoholic beverages, introduced significant changes following the enforcement of the new law which brings amendments to certain laws and statutory decrees ("Amendment Law"). The following article sheds light on the drastic changes realized in Articles 6, 7 and 9 of the Alcohol Law, by the effect of the relevant law which came into force on June 11, 2013.

One of the most crucial amendments is in Article 2 of the Amendment Law, which strictly prohibits any type of advertisement and promotion of alcoholic beverages for consumers. Indeed, the relevant article limits advertisement freedom and disrupts the previous regulation, which allowed alcoholic beverages to be advertised in a restricted way, provided that the conditions mentioned within the Alcohol Law were also met. Under the new law, it should also be pointed out that, distributors, producers and importers of alcohol beverages may not support any event, including those of international sectorial fairs and sectorial organizations, with the (i) brands, (ii) insignias or (iii) signs of their alcoholic products. Furthermore, television programs, music videos or television series may not broadcast any incentive images of alcoholic beverages.

Another amendment that may lead to some difficulties for the retail sector is that, as per Article 6 (7) of the Alcohol Law, the retail sale of the alcohol beverages are allowed provided that they are not seen from outside of workplace. Pursuant to the Amendment Law, alcoholic beverages may not be sold in shops and restaurants of petrol stations, although it is currently allowed for the shops and restaurants of petrol stations to sell alcohol beverages having maximum 5 % of alcohol.

The retail sale of the alcohol beverages is also not allowed as per the Amendment Law between the hours of 22:00-06:00. This regulation may lead small business owners and package stores to have incalculable losses. Additionally, it is prohibited to sell alcoholic beverages for consumption outside of the business that has an alcoholic beverages license. Hence, should clients consume alcohol beverages outside of the restaurants which has an alcohol license, for example, the restaurant's owner may be subject to an administrative fine due to the consumption of the relevant alcohol beverages by the clients outside of the restaurant.

As per Article 2, one of the most debated articles of the Amendment Law, the places which are engaging in retail, wholesale and open sale of alcoholic beverage products are obligated to have a hundred-meter door-to-door distance from any education institution, private teaching institution, dormitories and sanctuaries nearby.

Furthermore, according to the Amendment Law, except the ones that has been produced for export, every alcoholic beverage that has been produced in Turkey or imported into Turkey must have a warning, written in Turkish, with respect to the dangers of alcohol on the wrapping. These warnings may be in terms of images, shapes or graphics. An alcoholic beverage which does not contain these messages cannot be sold.

Oil Law

Introducing the New Code of Oil Numbered 6491

The new Turkish Code of Oil numbered 6491 ("Code") has entered into force as of June 11, 2013. The Code, which annuls the Code of Oil numbered 6326, which dates back to 1954, introduces comprehensive amendments to the search and licensing procedures practiced and acknowledged for over 50 years.

Similar to the previous code, the Code's purpose is to provide fast, continuous and effective search, improvement and production of oil resources of the Turkish Republic, in line with national interest, as stipulated under Article 1. The usage of the expression "national interest" has been limited with this article, with no further use in the remaining sections of the Code. To that end, the criterion of "being in compliance with national interest", sought during license applications under the old code, has been revoked with the enactment of the Code.

The separation of the Turkish lands under the Code also departs from the previous practice. Specifically, the new Code distinguishes and separates Turkish lands into two: land and sea. The shoreline is determined as the border separating land and sea areas and the sea areas are split into two: inside and outside of territorial waters.

One of the new practices introduced by the Code which had remarkable influence on public is the privilege granted to foreigners. To that end, the Code grants permit for research, search and operation granted to equity companies subject to foreign countries' legislation, provided that they are in compliance with the provisions of the Code. Moreover, with the Code, a new article has been inserted to the Code numbered 815, which paves the way for foreigners to obtain the right to conduct search and production activities for oil within Turkish territorial waters. The Code also allows the employment of foreign personnel for oil operations for a period of 6 months, without being subject to the requirements of the legislation governing working permits of foreigners.

Another important amendment brought by the Code is the removal of the limit on search permits to be owned by one corporation. Whereas the old code stipulated that a corporation could own a maximum of 8 search permits in a specific region, the new Code removes this limitation on the number on search permits.

The aforementioned explanations provide an overview for the most important changes and provisions regarding the new Turkish Code of Oil. With these new provisions, it is clear that foreign companies seeking to operate and search oil in Turkey will benefit a lot more from the Code rather than the old legislation.

Data Privacy Law

Recent Amendments on Data Protection for Electronic Communications Sector

Regulation on the Amendment of Regulation on Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector ("Regulation") was published in the Official Gazette dated July 11, 2013. There have been some significant changes made to the relevant electronic communications regulation.

The recent amending of the Regulation also serves the harmonization process with the European Union ("EU") legislation, and aims to keep up with recent technological developments. The Regulation sets forth certain protective measures for the personal information of subscribers or users of the electronic communication services, including but not limited to the following ones. Article 5 of the amending Regulation stipulates that traffic data required for the marketing of electronic communication services and providing value-added electronic communication services can be processed only by anonymizing the data or obtaining the consents of subscribers or users after they are properly informed. Such processing can only be performed in accordance with the consent obtained from the user or subscriber and in the amount and for the time required by the electronic communication services, marketing activities and similar services.

Location data and the identity of the relevant persons may only be processed in case of a disaster, a state of emergency and an emergency call, in the absence of consent by the subscriber or user, other than the cases designated under relevant legislations and judicial decisions.

The term "anonymizing" is described under Article 1 of the amending Regulation as processing data in a way that they cannot be associated with any real person or legal entity who is identified or identifiable or in a way of preventing the identification of the source.

Another significant amendment which might be criticized is about the transfer of personal information abroad. In accordance with Article 2 of the amending Regulation, personal data cannot be transferred abroad. This article may have certain side effects on the nature of the development of information technologies. As an example, such a provision may constitute an obstacle against using the cloud computing services which sometimes require transfer of personal data abroad. Also this provision might affect the free flow of the data of within or in between multinational companies.

With respect to EU Data Protection Directive, transfer of personal data from a member state to a third country with an adequate level of protection is authorized. "Adequate level of protection" requirement under this provision is explained as having a separate data protection law. Although there is a data protection draft law of 2008, it has not yet entered into force. Therefore, transfer of personal data from an EU member state to Turkey is not authorized under the EU Data Protection Directive. Moreover the recent amendment has also disabled the transfer of personal information abroad. Under these circumstances free flow of personal information is more restricted.

Due to Article 4 of the amending Regulation, in case of a risk of violation of network security and the personal data, operator is obliged to inform the Information and Communication Technologies Authority ("Authority") and, its subscribers or users about this risk in an effective and prompt manner, if it is deemed necessary by the Authority. Even if the general effective date of the Regulation is July 24, 2013, a specific effective date is designated for this aforementioned obligation to inform the Authority and users or subscribers if it is deemed necessary by the Authority, which is January 1, 2014. Additionally the Authority has the right to request all the information and documents with respect to the systems where personal data is kept and the security measures taken by the operators, from the operators and request for changes in the aforementioned security measures. The amending Regulation has not designated under which circumstances it will be "deemed necessary" by the Authority, therefore this provisions may be criticized also for granting a wide power to the Authority.

The permission given to the operator by the subscriber or user also involves the processing of the personal data by the parties which are authorized by the operator. Such processing should be carried out fitting the purposes of the service provided to the subscriber or user. If a third party is authorized by the operator for processing the personal data of the user or subscriber, the operator is liable for ensuring the personal data's privacy, security and use of data fitting the purpose, including violation of the Regulation by the third parties.

The traffic data of subscribers or users which is processed and stored must be deleted or anonymized after the completion of the activity required for the processing and storage in the first place.

The Regulation also designates the period of storing personal information. In accordance with the Article 10 of the amending Regulation, personal data that is subject to investigations, evaluations, inspections or disputes must be stored until the relevant processes is concluded. In any case, records regarding the access to personal data and relevant systems shall be stored for four years.

White Collar Irregularities

Transparency International's Global Corruption Barometer 2013

Transparency International ("TI") has published its Global Corruption Barometer for the year 2013 ("Barometer") which constitutes the most comprehensive study to be conducted on public opinion with regard to corruption, with a total of 114,000 participants from 107 countries. This being said, it is important to note that the Barometer's results exclude information from countries like China, Saudi Arabia, Iran, Niger, Honduras and Nicaragua. The key findings of the Barometer depict a bleak picture. The Barometer has found that globally, (i) "bribery is widespread", (ii) democratic pillars of the society, *i.e.* political parties, are perceived as the most corrupt institutions and (iii) governments are not using best efforts to combat corruption. Significantly, more than half of the respondents believed that the decisions of the government were being directed by powerful groups, rather than the public.

The Barometer has found that corruption is a serious, increasing problem which has plagued public services. On a scale of 1-5, the respondents rated the seriousness of the problem of corruption as 4.1. 53 % of the respondents believe that the level of corruption has increased or increased a lot in the last two years. Turkey is among the countries in which the respondents have stipulated that the corruption levels have increased. More than one person in four report to have paid a bribe in the last 12 months for the obtainment of either police, judiciary, registry, land, medical, education, tax and utilities services ("Public Services").

Around the globe, 31 % of the respondents have stated that they have bribed the police in the last 12 months. This finding suggests that among the Public Services, police is the institution most prone to corruption, as also suggested with the results of the Barometer 2010/2011. The judiciary followed the police with 24 % of the respondents stating that they have paid bribes to obtain judiciary services. As for the corruption levels, on a scale of 1-5, political parties scored 3.8, rendering them the public institution which is perceived to be the most corrupt. Unsurprisingly, the police were perceived as the next most corrupt institution, with a score of 3.7.

The findings of the Barometer suggest that corruption trends in Turkey are mostly in line with the global results. In Turkey, 38 % of the participants believed that over the last 2 years, the level of corruption has increased a lot. On the opposite end, 10 % believed that the corruption levels have significantly decreased. According to the results, the first three institutions that were held to be corrupt or extremely corrupt were (i) the political parties with 66 %, (ii) the media with 56 % and (iii) the parliament with 55 %. More than one in four respondents reported that either they or someone in their household had bribed someone while obtaining education services within the last 12 months. Within the same period, this level drops to 23 % for police officers and 22 % for land services.

Although the Barometer identifies bribery as the most prominent type of corruption, it also states that less visible types of corruption may be as damaging as bribery. Among such less visible types of corruption is "use of personal contacts and undue influence", which leads to the biased allocation of public services. According to the findings of the Barometer, 64 % of the respondents believed that having personal connections with public officials facilitated the obtainment of public services. With regard to undue influence, 54 % of the respondents from around the globe believed that their governments were being run by interest groups instead of being run by the public.

This percentage varies in OECD countries, one of which is Turkey, from 5 % in countries like Norway, to 83 % in crisis-stricken Greece. Turkey with 49 % has scored closer to Czech Republic 49 %, Australia 52 % and Portugal 53 %.

Among the key findings of the Barometer, is the fact that the respondents believe that they are ready to fight against corruption. In Turkey, 68 % of the population agrees or strongly agrees that ordinary people can make a difference in this fight. However, this agreement does not mean much, unless it is mobilized and transformed into action. To that end, the Barometer examines the forms of actions people employ in order to promote anti-corruption. Globally, 72 % of the respondents stated that they would sign a petition to combat corruption. Respectively, people stated that they would "spread the word about corruption through social media", conduct peaceful protests, "pay more to buy from a corruption free company" and "join anti-corruption organizations". In Turkey, the Barometer found that the activity in which the highest number of people would be engaged in is to "pay more to buy from a corruption free company".

The Barometer also delves into the reasons people do not get involved in the combat against corruption. The Barometer has found that the foremost reason people do not join in is the fear of reprisals, in case they dared to blow the whistle. The second reason following the fear of reprisals is the belief that one's involvement in anti-corruption efforts will not make a difference. This belief is embodied in the Barometer's finding that 54 % of the respondents believed that their governments' efforts in fighting corruption were inefficient. These results embody the importance of the mechanisms people should be provided to be able to report corruption, namely whistleblower protection laws. TI conveniently recommends that such laws should provide people with follow-up mechanisms and protection from reprisals, in order to mobilize more people to participate in the combat against corruption.

In order to ameliorate the pessimistic findings about the status quo, TI recommends that governments should promote transparency in their own processes, enact and enforce access to information laws and issue codes of conduct for their employees. It also suggests that law enactment and enforcement authorities should be freed from corruption in order to "bring back the rule of law". Accordingly, anti-corruption reforms should be realized within the police departments; the judiciary should be independent and impartial and the governments should manage to strike a balance between the requests of interest groups with those of the public's. TI has addressed corruption in political parties under the title "clean-up democratic processes". Under such title TI recommends that governments should enforce laws which require political parties to disclose donors and the amounts of the donations as well as setting up a mandatory registrar for lobbyists. Most importantly, TI's recommendations draw attention to the enactment and enforcement of whistleblower protection laws which might be important tools in mobilizing ordinary people in the fight against corruption. This way, ordinary people will be mobilized to combat corruption and Barometer's more optimistic finding with regard to the people's willingness to engage in the fight against corruption may turn into action.

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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.

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