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LEGAL INSIGHTS QUARTERLY

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Preface to the June 2013 Issue

The changes realized on the Turkish legal landscape during 2012 continued to echo in the first half of 2013, with amendments being realized to render the new legislation suitable for practice. One such amendment applied to the provisions regulating warranty agreements, annulling the condition that merchants should obtain the consent of their spouses in order to execute warranty agreements.

In addition, newly enacted legislation continues to fill the gaps in the Turkish legal system with much needed regulation in areas like data privacy law. Regulation on the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector will finally become effective on July 24, 2013, promulgating certain obligations for operators active in the electronic communications sector, such as taking preventive measures for the protection of personal data and increasing disclosure obligations.

On the competition law front, this issue focuses on the Guideline Regarding the Regulation on Active Cooperation for the Purpose of Discovery of Cartels, published on April 19, 2013, with the purpose of providing guidance to undertakings on the policies and procedures involved in leniency applications to the Turkish Competition Authority for participation in cartels.

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.

June 2013

Corporate Law

Mergers and De-mergers

The Turkish Commercial Code ("TCC"), which entered into force on July 1, 2012 and which was amended from time to time following its entry into force, introduced an essential framework for mergers and de-mergers of companies.

a) Mergers

According to Article 136 of the TCC; companies can be merged in two ways: (i) acquisition of a company by another company, technically called "merger by acquisition" or (ii) merger of two companies under a new company, technically called "merger by formation of a new company". Mergers of companies are materialized through amalgamation of their assets and their businesses. Indeed, the first condition of a merger of companies is their assets melding together.

According to Article 145 of the TCC, a written merger agreement should be signed by the companies participating in the merger and be approved by their general assemblies. The general assembly of the limited liability companies may issue merger resolutions by three quarters of the shareholders representing the issued capital, while general assemblies of joint-stock companies may issue merger resolutions by three-quarters of the votes of all shareholders, provided that a majority of the share capital is represented at the meeting. As soon as the merger resolution has been adopted by the companies participating in the merger, companies should apply to the Trade Registry to have the merger registered and announced in the Trade Registry Gazette.

Both the target company and the acquiring company participating in the merger are required to present the merger agreement, merger reports, financial tables and annual reports of the previous three years for the inspection of the shareholders, holders of the profit sharing certificates, bearers of securities issued by the company, stakeholders and other relevant parties and, for public joint-stock companies, at locations determined by the Capital Markets Board, 30 days prior to the general assembly resolution.

The merger takes effect upon the registration of the merger at the relevant Trade Registry. Concurrent with registration of the merger at the Trade Registry, all assets and liabilities of the target company are automatically transferred to the acquiring company and the target company is dissolved.

As a result of the merger, shareholders of the acquiring company become shareholders of the target company. This being said, personal liabilities of the shareholders of the acquired company are not transferred to the acquiring company.

TCC also introduces the concept of 'partition payment', which allows the parties to the merger agreement to offer their shareholders shares in the acquiring company or a partition payment corresponding the real value of the shares of the target company. If the merger agreement offers a partition payment, affirmative votes of ninety per cent of the shareholders of the acquired company must be obtained.

In the cases where the merger will be realized between two related companies, the TCC allows a simplified procedure for the merger. Accordingly, if the acquiring company owns all of the shares bearing voting rights of the target company, or if a company or a real person or a group of people bound by law or a contract own all the shares with voting rights of the merging companies, the simplified

merger procedure can be applied for the merger. In addition, if the acquiring company owns ninety per cent of the shares with voting rights of the target company, and proposes to the remaining shareholders a cash cover equal to the real value of those shares and does not impose a personal liability or a personal debt obligation against them, the merger can be carried out in accordance with the simplified way. In this way, a basic merger agreement can be prepared and would not need to be approved by the general assembly. Furthermore, a merger report would not be required.

b) De-mergers

According to Article 159 of the TCC; a company can de-merge through split-up or spin-off processes.

In a *split-up*; all of the assets of the target company are divided into parts and transferred to the acquiring companies. The shareholders of the target company acquire the shares and rights of the acquiring company. The target company would terminate upon completion of the split-up.

In a *spin-off*; one or more parts of the company's assets are transferred to the acquiring companies. In exchange for the asset parts acquired, the shareholders of the target company could either (i) acquire shares and rights of the acquiring company or (ii) acquire shares and rights in the acquiring company and whereby establish a subsidiary.

During spin-off and partial spin-off procedures, shareholding ratios of the companies are not necessarily preserved. Similar to the process in mergers, the parties to a spin-off should execute a written spin-off or partial spin-off agreement. In spin-offs, debts that are not allocated to either of the newly established entities become the joint liability of all newly established entities. In line with the merger process, management bodies of both parties should draft a spin-off report and the spin-off agreement should be approved by the general meetings of all respective parties. The shareholders of the parties will have the right to review the spin-off agreement, spin-off report and the balance sheets.

c) Protection on Creditors

Companies participating in a merger or a de-merger process should make announcements for their creditors to invite them to file their claims and request security for their receivables.

If a creditor files a claim within three months following the date on which the merger becomes legally effective or when the de-merger is announced, the acquiring company would be obliged to secure receivables of the creditors.

Claims concerning personal liability of shareholders arising from the debts of the target company would be subject to a statutory limitation of three years from the announcement date of the de-merger resolution.

Competition Law / Antitrust Law

Turkish Competition Authority Published the Pharmaceutical Sector Inquiry Report

On April 19, 2013, the Turkish Competition Authority ("TCA") presented the Pharmaceutical Sector Inquiry Report ("Report"), at the "*11th Current Developments in Competition Law and Economics Symposium*" in Antalya. On the same day, the TCA published the Report online.

The Report was prepared to provide better insight into the pharmaceutical sector and the dynamics among different players in the market (*i.e.* pharmaceuticals companies, regulatory authorities, etc.) and the future of the sector. The Report underlined that it was not prepared to provide golden rules for each and every issue faced by the sector.

The TCA made countless interviews with sector representatives and information was requested from various associations and institutions, including the Pharmaceuticals Industry Employer's Association (*İlaç Endüstrisi İşverenler Sendikası*), the Association of Research-Based Pharmaceutical Companies (*Araştırmacı İlaç Firmaları Derneği*), the Ministry of Health of Turkey General Directorate of Pharmaceuticals and Pharmacy, the Social Security Institution, the Turkish Pharmacists' Association, and the Turkish Medical Association. The data used for the Report was collected from International Medical Statistics. Also, countless questionnaires were sent out to suppliers to determine the areas of inquiry. The TCA followed the European Commission's Pharmaceutical Sector Inquiry Report closely during the inquiry.

The two main purposes of drafting the Report were stated as: (i) the improvement of price competition at the suppliers' level, and (ii) addressing concerns in relation to the sustainability of pharmaceutical expenses.

In order to achieve the goals of the Report, several suggestions, including the following, were made:

(i) Increasing price sensitivity of the consumers on the demand side by way of informing the consumers of contribution shares and payments as well as obtaining contribution shares for retirees and pharmacists for the least expensive medicine;

(ii) Creating motivation for providing the least expensive drug at the retail level by reorganizing the pharmacists' profit margins once again and determining a method for those pharmacies that do not provide the cheapest drug when switching prescriptions;

(iii) Writing the active ingredient of the drug (instead of the name of the drug) on the prescription in order to decrease levels of prescription-dependency with respect to equivalent drugs;

(iv) On the supply side, incentivizing and increasing the entry of generic drugs into the market;

(v) Facilitating and incentivizing the entry of original products into the market that could lower treatment costs;

(vi) Ensuring that practices in relation to public prices are transparent, objective and consistent (through the Payment Commission meeting more frequently, reflecting price changes to the system from both ways, etc.); and

(vii) Allocating resources to price competition by enabling unmarked generic drugs into the market and testing the appropriateness of the tender process for the Turkish market.

Communiqué on the Procedures and Principles to be Followed in Pre-Notifications and Notifications to be Filed with the Competition Authority for Acquisitions via Privatization to Become Legally Valid (Communiqué No: 2013/2) is Published

The introduction of the Communiqué No 2013/2 on the Procedures and Principles to be Followed in Pre-Notifications and Notifications to be Filed with the Competition Authority for Acquisitions via Privatization to Become Legally Valid ("Communiqué") is a clear indication that the 2013 agenda of

the Turkish Competition Authority will have merger-control-related items.

To begin with, the purpose of this Communiqué is to establish the procedures and principles to be followed in pre-notifications and notifications filed with the Competition Authority in order for acquisitions realized by privatization to become legally valid, in accordance with Article 7 as well as Article 27, paragraph 1, subparagraph (f) of the Law No. 4054 on Protection of Competition.

To that end, the Communiqué stipulates: (i) the types of acquisitions that fall under the Communiqué; (ii) acquisitions via privatization subject to pre-notification; (iii) acquisitions via privatization subject to notification; and (iv) the procedures for such applications.

As per the Communiqué, any acquisition of all or part of the equity stakes or other rights and instruments of an undertaking in such a way as to change control over the undertaking or to affect its decision-making bodies, and all types of acquisitions via privatization of units intended for the production of goods and services, shall be subject to the provisions of the Communiqué.

On the other hand, the cases which fall out of the scope of the Communiqué are listed as per Article 2 as follows:

"a) Transfers to public institutions and organizations including local governments and to education institutions with the nature of public entities,
b) The transfer of immovables which are not intended for production of goods and services,
c) Sales in foreign capital markets,
d) Public offerings,
e) Block sales which include delayed public offerings with a duration of no more than 3 years, without prejudice to the provisions of the legislation on capital markets,
f) Transfers to the employees,
g) Sales in stock markets by normal orders as well as by special orders which do not lead to a change in the control of the undertaking,
h) Sales to securities investment funds and/or securities investment trusts,
i) Transfer of shares which do not lead to a change in the control of the undertaking"

As per Article 3 of the Communiqué, acquisitions via privatization transactions within the scope of the Communiqué will be subject to pre-notification if the turnover of the undertaking or unit intended for production of goods or services to be privatized exceeds 30 million Turkish Lira. Accordingly, it is mandatory to file a pre-notification with the Competition Authority before the public announcement of tender specifications in order to receive the opinion of the Competition Board which will include a competitive assessment. The opinion of the Competition Board will be valid for 3 years. After 3 years, a new pre-notification needs to be filed with the Competition Board. The pre-notifications need to be submitted by the Directorate of Privatization Administration.

Moreover, the Communiqué stipulates that for the privatizations that are subject to pre-notification, after the tender process each bidder needs to submit merger control notifications to the Competition Board. Such notifications have to be made before the decision of the High Board of Privatization on the acquisition of the undertaking or unit intended for production of goods or services to be privatized.

As evidenced by the legislative activity in merger-control related issues, 2013 is expected to be an important year for the modernization of the Turkish competition legislation.

The Turkish Competition Authority Unveils the Guideline Regarding the Regulation on Active Cooperation for the Purpose of Discovery of Cartels

The Regulation on Active Cooperation for Discovery of Cartels ("Leniency Regulation" or "Regulation") was published in the Official Gazette dated February 15, 2009 and numbered 27142 and thus entered into force. The Guideline Regarding the Regulation on Active Cooperation for the Purpose of Discovery of Cartels ("Leniency Guideline" or "Guideline") is prepared in order to provide certainty in interpretations, to reduce uncertainty in practice and to provide guidance for the undertakings in order for them to benefit from the leniency program more efficiently as a requirement of the transparency principle. The Leniency Guideline was published on April 19, 2013.

The Leniency Guideline contains comments and explanations concerning the Leniency Regulation. The main titles and their explanation are provided below:

I. The Scope of the Leniency Regulation

As cartels are secret by their nature compared to other competition law violations, for the purpose of revealing and investigating cartels, it would be beneficial to grant immunity from monetary fines or provide reduction on monetary fines to the active cooperators that apply to the Competition Authority ("Authority"). In this regard, pursuant to paragraph 7 of the Leniency Guideline, the general principle is to reach a conclusion that is in favor of those who are in cooperation with the Authority in cases which are not clearly regulated by the Leniency Regulation (in Article 7 of the Regulation), or at least which require an interpretation.

In this respect, the executives / employees of the applicant undertakings (executives / employees who are actively cooperating and disclosing the undertaking's violation in relation to the reductions on the fines) can also benefit from the exemption or reduction governed by the Regulation even if the applications are made by the undertakings. Therefore, paragraph 8 of the Leniency Guideline provides that former or present executives / employees, who may be subject to the fines due to their determining effect on the violation, may choose to apply independently based on justifications, such as not being able to persuade the undertaking for a leniency application. Paragraph 12 of the Leniency Guideline highlights that the Leniency Regulation has started a triple race between the undertakings, between the executives / employees and between the undertakings and the executives / employees in order to be the first to apply and benefit from the Regulation.

II. Non-Imposition or Reduction of Fines

Regarding the immunity from fines, paragraph 14 and subsequent paragraphs of the Guideline provide that Article 4 (relating to immunity from fines granted to undertakings and their executives / employees) and Article 7 (relating to executive / employee's independent application from their undertaking), set forth four alternative conditions with respect to which the existence of one such condition rules out the others.

Paragraph 20 and subsequent paragraphs of the Guideline provide that the probability of receiving immunity from fines is higher for applications made prior to the preliminary investigation's initiation. The application's acceptance after the initiation of the preliminary investigation depends on whether the Board has any evidence indicating that

Article 4 of the Law on Protection of Competition No. 4054 ("Law") is violated or not. In other words, as opposed to the applications made before the initiation of the preliminary investigation, the Authority has discretion as to whether it will accept applications made at this stage. If the Authority already possesses evidence justifying the conclusion that Article 4 of the Law has been violated, the application will be handled as a request for reduction of the fine.

Paragraph 26 of the Leniency Guideline provides that within the scope of Articles 6 and 9 the wording of "the documents and information containing products affected by the cartel, duration of the cartel, parties to the cartel, dates, locations, attendees of meetings in connection to the cartel" does not imply an obligation to submit evidence which adds significant value to the case compared to that which is already at the Authority's hand. In other words, once the conditions of Articles 6 and 9 are met, the reduction of fines is automatically granted.

III. Conditions

Paragraph 33 of the Leniency Guideline stipulates that the undertakings cannot benefit from the Leniency Regulation if they apply collectively. This is because when the cartel members realize that the cartel is going to disperse, they could apply to the leniency program together. As a result, this would allow them to receive the benefit from the cartelistic behavior and also to be immune from fines or to receive very low fines. This would create the risk of making the formation and maintenance of cartels easier.

Paragraph 33 of the Leniency Guidelines provides examples of documents that can be used as evidence. Paragraph 34 provides that the expression "possessed" also covers the newly possessed documents and information required during the investigation. However, it is stated that no obligation which cannot be easily fulfilled would be imposed on the undertakings.

Paragraph 36 of the Leniency Regulation provides that there is a burden of not keeping the information and documents confidential and not destroying them. Paragraph 39 emphasizes that this condition obliges the undertaking to provide related documents in their possession and all documents to be possessed in the future to the Authority, and that destroying these documents will violate Articles 6 and 9 of the Leniency Regulation. In case such documents are destroyed by the employees or executives of the undertaking, the Authority will assess whether such behavior is one-off. The facts of whether the respective undertaking informed the Authority right after it became aware of the behavior and whether it took necessary precautions in order to prevent such behavior would be significant for determining whether this behavior would be attributed to the undertaking or not.

Paragraphs 40 and 41 of the Leniency Guideline, under the condition of ceasing to be a party to the cartel, provide that the Authority might request from the leniency applicant to continue to remain in the cartel until the on-site inspections are completed. In this case, the applicant must inform the Cartel and On-Site Inspection Support Unit about all communications made with other cartel members.

Articles 6 and 9 of the Leniency Regulation provide that unless stated otherwise by the authorized division, the principle is to keep leniency applications confidential until the service of the investigation report. The Guideline explains the purpose of such provisions as avoiding the possibility of spoliation of evidence through disclosure to

the members of cartel before the investigation is completed. Additionally, the Guideline provides the option for the undertakings to provide information to other competition authorities or institutions, organizations and auditors, on the condition that the confidentiality of the investigation will not be harmed. Furthermore, as per paragraph 44 of the Guideline, if the confidentiality principle is not complied with, the Board will evaluate the situation on a case by case basis based on the criteria of whether the person at issue is a high level manager or whether the Board was notified promptly after the breach.

Paragraph 46 governs the sub-titles of the obligation under the Leniency Regulation for the undertakings to actively cooperate with the Board between the process of completion of the investigation and the conveyance of the final decision. Pursuant to the relevant paragraph, in cases where the undertakings obtain new information and documents, as per the obligation to cooperate, they shall submit these, and they shall answer the requests of the Board regarding the explanation of such information / document, provide theopportunity of utilizing the testimony of former managers and employees and, if the participation in a cartel is denied at the beginning, shall avoid providing explanations that conflict with the information and documents submitted during the application.

The Leniency Regulation provides that, if the applicant coerced other undertakings that are party to the cartel to participate in the violation, the applicant will not benefit from the immunity, but may still receive a reduction in monetary fines. Furthermore, paragraph 48 of the Guideline provides the cases that lead to coercion. As per the relevant paragraph, if there is physical violence or serious economic pressure such as a mass boycott, or if there is strong evidence proving such threats, it can be said that there is coercion. This being said, according to the Guideline, having the largest market share in the market, leading the cartel alone or with other companies, threatening to enter into a price war if the other parties do not participate in the cartel, decreasing the prices in order to minimize the profit or punishing the undertakings that do not comply with the agreement are not interpreted as cases of coercion.

IV. Procedure

Under the headline of Procedure, The Leniency Guideline covers, in parallel with the Leniency Regulation, the procedural aspects of applying to the Cartel and On-site Investigation Support Unit, the timelines, oral submission, learning the result of the application in a short time and the final decision to be given after the completion of the investigation, by separating each issue into a sub-section and providing in-depth guidance.

The Leniency Guideline, under the title "4.2. Providing Time for the Applicants", explains the scope of the time period for the applicants to complete the necessary information and documents that are requested pursuant to the Leniency Regulation.

Pursuant to paragraph 57, in principle every person that requests so should be granted time; nevertheless, if such request is made at a very late stage of the investigation, then time may not be granted due to time constraints or a very short time may be granted. In the subsequent paragraphs, it is set forth that the time to be given will be evaluated on a case by case basis but in any case the granted time cannot exceed one month. Finally, it is provided that if there are rightful reasons such as there being thousands of files to be viewed or too many employees to be interviewed, the anticipated time may be extended as per the requests of the relevant parties.

In relation to oral submission, the Guideline provides that in cases where the information regarding the cartel is provided orally, such information will be converted into a written copy by the authorized persons and upon receiving the confirmation of the information provider, such information will be recorded via electronic devices. As per paragraph 66 of the Guideline, after the information that is provided orally is converted into written format, kept as an inner correspondence of the Board and accepted as evidence by the authorized persons, the parties subject to investigation may view such correspondence within the Board after the service of the investigation report but cannot take a copy.

After the completion of the investigation and the defense stages, if the Board decides that there is a cartel, the fines that will be implemented as per the Leniency Regulation will be calculated and applied. As per paragraph 73 of the Guideline, the Board may conclude in its final decision which will be given after the completion of the investigation that the acts that are subject to the investigation do not constitute a cartel. In this situation, if the Board decides that such acts infringe Article 4 of the Law No. 4054 and therefore imposes a monetary fine, such monetary fine will be calculated within the scope of Article 16 of the Law titled "Administrative Monetary Fines".

V. Additional Reduction

In paragraph 81 of the Guideline, it is provided that if one cannot benefit from the immunity in relation to a given market but makes the first leniency application in relation to a cartel in a different market, it is possible to receive immunity in relation to the second market and a reduction from the monetary fines in relation to the first market.

Litigation

Mediation Law

The new Law on Mediation on Civil Disputes numbered 6325 ("Mediation Law") , published on June 22, 2012 in the Official Gazette will enter into force one year after its release date, i.e. June 22, 2013. Furthermore, the Regulation on Mediation Law on Civil Disputes ("Regulation") published on January 26, 2013 in the Official Gazette sheds light with respect to the provisions of the Mediation Law which have been for the first time embodied in Turkey.

Under the Mediation Law and Regulation, mediation is defined as a "*method of voluntary dispute settlement system carried out in the presence of an impartial and independent third party; who is specially trained to convene the relevant parties by way of systemic techniques with the purposes of helping such parties to understand each other, to conduct negotiations and to reach a resolution through a process of communication*".

The Mediation Law, as an alternative dispute settlement method in Turkey, shall only apply to the resolution of civil law disputes arising from matters and proceedings, including those bearing foreign elements. Nevertheless, civil disputes containing allegations of family violence do not fall within the scope of the Mediation Law.

According to Section 2 of the Regulation, three fundamental principles constitute mediation: (i) the voluntary participation and equality of the parties; (ii) confidentiality; and (iii) non-use of documentation and statements. Therefore, firstly parties are free to resort to a mediator, and to sustain, terminate or renounce a process of mediation.

Furthermore, as per Article 9 of the Mediation Law, the mediator must treat the parties equally and may not act or behave in a way which would cause any scepticism over his impartiality. Secondly, with regard to confidentiality, a delicate subject of the mediation process, the Mediation Law and Article 6 of the Regulation obliges the mediator to keep confidential all information, documentation and any other forms issued for, arising out of, or in connection with the mediation. According to Article 33 of the Mediation Law, if the mediator acts against the confidentiality principle, legal and penal remedies may be imposed. Lastly, parties, the mediator or a third party who participated in the mediation process cannot use the reports and the documentation mentioned within the extent of Article 7 of the Regulation as evidence, should litigation or an arbitration processbe initiated due to the relevant dispute.

As per Article 13 of the Mediation Law, parties may agree to apply for a mediator prior to or during the litigation process. The mediator shall be selected by the parties, unless otherwise agreed. Pursuant to Article 15, the mediator may not take any action on matters that fall within the jurisdiction of a judge. Additionally, Article 16 of the Mediation Law also stipulates that the period beginning from the initiation of mediation process until its termination shall not be taken into account whilst calculating the lapse of time and statute of limitation.

According to Article 20 of the Mediation Law, the mediator has to be: a Turkish citizen and a graduate of a faculty of law with at least five years of seniority in the profession; may not have been sentenced for an intentional crime; has to have an absolute ability in addition to the obligatory training that ought to be completed; and has to pass a written and practical exam.

Lastly, pursuant to Article 21 of the Regulation, a mediation process may be terminated: (i) if the parties reach mutual agreement on the dispute; (ii) if the mediator, after consulting the parties, ascertain that the efforts towards mediation are useless; (iii) if one of the parties declares to the other party or to the mediator that he / she withdrew from mediation; (iv) if the parties mutually agree to terminate the mediation process; or (v) if it has been determined that the dispute is not convenient for being resolved through mediation or the dispute is subject to a crime which is not included within the scope of crimes that may be resolved by reconciliation according to Criminal Procedure Code numbered 5271 and dated December 4, 2004.

Law of Obligations

Warranty Agreement Under the New Turkish Code of Obligations No. 6098

Almost a year has passed since the new Code of Obligations No. 6098 ("Code") has entered into force. This being said, amendments which have the potential to lead to drastic changes in practice continue to apply to the Code. One of those amendments would eliminate the much-debated requirement for the consent of the spouse for the issuance of warranty agreements, as introduced by the omnibus bill announced on the Official Gazette on March 28, 2013, to be effective as of this publication date. The amendment has in a way been a reminder of the warranty agreements as governed by the Code and the new provisions introduced thereby. To that end, the below serves as an overview of the warranty agreements as regulated by the Code, as well as discussion of the significant amendment brought by the omnibus bill of March 28, 2013.

To begin with, the new Code strengthens the written form requirements of the warranty agreements. In this regard, in order to for the warranty agreement to become valid, the warrantor, in hand writing, shall state: (i) the minimum amount of responsibility; (ii) the date of the warranty; and (iii) in cases where the warrantor will be solely responsible for the debt, an exclusive indication of this statement. The same formality conditions would apply to the warrantor's warrantor, warrantor for the counter-party or to a third party. As per the relevant articles, if such conditions are not complied with and if the warrantor's responsibility is increased without complying with such formality conditions, any changes made would be rendered invalid. Also, it should be noted that the parties of the warranty agreement may hold the warrantor liable only for a certain amount of the debt.

As per Article 586 of the Code, new conditions are stipulated for the creditor to apply (without applying to the debtor in the first place) to the sole warrantor directly. Accordingly, in order to apply to the sole warrantor directly, (i) fulfillment of the debt should be delayed or (ii) the notice sent to the debtor should be ineffective or (iii) the debtor shall explicitly be insolvent.

Moreover in joint warranties, parallel to the old code of obligations, it has been drafted that each warrantor in a joint-warranty relationship shall be responsible from the entire amount of the debt.

The expiry of the warranty is legislated as per Article 598 of the Code. For natural persons, any given warranty shall expire automatically in ten years starting from the execution of the warranty agreement. Even if the warranty is given for more than ten years, unless it is extended or a new warranty is given, the warrantor shall not be responsible after the time exceeding the period of ten years. As per the same article, the warrantor might extend the warranty for a maximum of ten years by complying with the written formalities at least one year before the expiry of the warranty.

As per Article 599, if (i) the debtor's financial situation has worsened significantlysince the time of occurrence of the debt or (ii) if it turns out that the warrantor's financial situation is actually worse than the warrantor assumed based on good faith, the warrantor may renege from the warranty agreement by notifying the creditor in writing and on the condition that the debt has not yet occurred. This being said, it has been legislated that the warrantor is still obliged to compensate for the loss of the creditor which has occurred as a result of the creditor's trust in the warrantor.

Another newly introduced and much debated provision is Article 584, which stipulates that if the warrantor is married, the warrantor can only become a warrantor if he / she obtains the consent of his / her spouse. The consent must be given before the execution of the warranty agreement, or at the latest at the time of the execution thereof. However, changes made after the execution of the warranty agreement that (i) do not increase the responsibility of the warrantor, or (ii) is in warrantor's benefit, or (iii) do not shift the warranty into a sole warranty relationship, or (iv) do not significantly decrease the securities of the warranty, are not subject to the consent of the warrantor's spouse.

As indicated above, an amendment has been made to this article, the original of which likely causes practical difficulties for merchants since it obliges them to seek their spouses' consent each time they desire to enter into a warranty agreement. To that end, the amendment as introduced by the omnibus bill announced on the Official Gazette on March 28, 2013, relieves the owners, partners

or managers of a registered business from obtaining their spouses' consent for the warranties to be issued in relation to the company or the business. In this respect, it is safe to assume that this new amendment, which became effective on its date of publication on the Official Gazette, would be most welcomed by businessmen and merchants, whose daily practice likely includes issuance of warranties.

Data Privacy Law

Processing of Personal Data and Protection of Privacy in Turkish Electronic Communications Sector

Regulation on the Processing of Personal Data and the Protection of Privacy in the Electronic Communications Sector ("Regulation") was published in the Official Gazette of July 24, 2012 with number 28363. As per Article 25 of the Regulation it was expected to become effective as of six months of its publication in the Official Gazette. This being said, a month after it became effective on January 24, 2013, its effective date was postponed to July 24, 2013 by a regulation on amendment to the Regulation, published in the Official Gazette of February 15, 2013.

The Regulation sets out the procedures and principles to be followed by operators performing activity in the electronic communications sector for the processing and the retention of personal data and the protection of privacy. These operators, subject to the Regulation, are defined as the legal entities possessing the right to provide electronic communications services and / or to provide electronic communications networks and to operate the infrastructure within the framework of authorization. The Regulation stipulates certain obligations for these operators such as taking necessary preventive measures for the protection of personal data and notifying the users / subscribers of violation risks and / or of existing violations of personal data protection.

According to the Regulation, personal data should be (i) processed fairly and lawfully, (ii) processed upon consent of the data subject (*i.e.* the owner of the personal data), (iii) adequate, relevant and not excessive in relation to the purposes for which they are collected, (iv) accurate and, where necessary, kept up to date, (v) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed. The processing of data is described as a set of operations performed upon personal data, whether or not by automatic means, including but not limited to collection, recording, storing, alteration, erasure or destruction, re-organization, dissemination or otherwise making available, disclosure by transmission, marking, combination or blocking of personal data. Therefore it would be appropriate to say that the scope of the Regulation is noticeably comprehensive.

The Regulation further obliges the operators to provide their users/subscribers with certain opportunities for special circumstances. For instance, if an operator allows the subscriber's calling number to be visible, it has to provide the subscriber the opportunity to simply and free of charge opt out and keep the phone number confidential. Additionally, the operators are obliged to enable their subscribers to cancel automated call diverts and, if the subscribers' information is used in an address book, the subscribers must be informed of the conditions of such involvement and must be given the opportunity to opt out of this implementation.

Pursuant to Article 21 of the Regulation which stipulates administrative fines and other

sanctions, in case the operators fail to fulfill the liabilities set out under the Regulation, provisions of the Regulation dated September 5, 2004 and numbered 25574 on Administrative Fines and Other Sanctions and Measures to be Imposed upon Service Providers by the Telecommunication Authority ("Regulation on Sanctions") would apply. Even though the Regulation is not yet effective, there are Information and Communication Technologies Board ("Board") decisions for breach of personal data protection in this sector. In April 2011 the Board issued a fine in the amount of TRY 7,483,035,848.69 (which corresponds to 0.15 % of the operator's turnover for the year 2007) for one of the major mobile communications operators in Turkey, regarding its personnel's access to the personal data of subscribers and its failure to limit authorization of its personnel and to provide sufficient measures to prevent its personnel's abusive use of the personal data that they are allowed to access to. The Board based its decision on the Regulation on Sanctions.

As the Regulation is about to become effective, the operators in Turkey needs to make all the necessary adjustments to keep up with the Regulation's regime. The Regulation is likely to mark a new era and set strict boundaries in the Turkish electronic communications sector.

Public Private Partnerships ("PPP")

Legal Framework of Public Private Partnership Projects in Turkey

Law on Building and Renewal of Facilities and Procurement of Services through Public Private Partnership Model No. 6428 ("Law"), the content of which was initially introduced by the supplementary Article 7 of the Health Services Law No. 3359 ("Law No. 3359"), has come into force on March 9, 2013. By taking into consideration the issues that arose as a result of implementation of the previous regulation and the criticism made by parties to such contracts, the Law is formulated as a more comprehensive and satisfactory regulation.

1. Comparison of the Previous and the Newly Enacted Legislation

The Law

Previously, PPP projects were governed by the supplementary Article 7 of Law No. 3359 and Regulation on the Building of Health Facilities in Exchange for Leasing and Renewal of the Areas and Services Outside the Areas for Medical Services in the Facilities in Exchange for Leasing ("Regulation").

The Law repeals the supplementary Article 7 of Law No. 3359, amends Article 4 of the Law on Public Financing and the Regulation of Loan Administration numbered 4749, Article 11/A of the Law on Realization of Certain Investments and Services through Build-Operate-Transfer Model numbered 3996, Article 68/B of the Law on Public Officials numbered 657, and adds a provisional article.

The Law introduces new provisions with the aim of preventing the problems encountered during the execution of Article 7 of Law No. 3359, the Regulation, and other regulations mentioned above. The Law also aims at avoiding criticism often posed by the private sector especially concerning the demands and guarantee requirements of finance providers.

With the Law, the attempts to stand equidistant to private legal persons during the long term partnership due to the inherent complexities posed by just any "partnership". To that end, the definition of special purpose entity (which is the entity to be party to the agreement) under the Law limits the corporate form of the entity to a joint stock company.

A PPP contract will be subject to the provisions of private law and its term shall be determined by the state, up to thirty years, depending on the characteristics of facility and the feasibility report, excluding the fixed investment period specified in the relevant contract. The contractor / "*private party*" shall not only be responsible for the project design of the buildings and commissioned works in relation to the facility, in addition to financing, construction, maintenance and repair, but also for providing any and all types of long-term services within the context of the relevant PPP project. Following the expiration of the PPP contract term, the private partner undertakes to transfer the facility to the relevant ministry free of any and all encumbrances, as well-kept, operational and available for use.

To name a few of the important regulations included in the Law:

Tender Types and Procedure

The Law, as the Regulation previously did, governs the cornerstones of tender procedures and stipulates the options on how a tender will be conducted, i.e. open tender procedure, tender procedure between predetermined bidders, and tender procedure through negotiation. In case of tender by underbidding, should the initial bidder (who offered the lowest bid during the tender) fail to reach an agreement with the administration during final negotiations, the administration continues its final negotiations with the second bidder (who offered the second-lowest bid during the tender). In case the final offer of the second bidder is lower than the initial bidder, the administration offers the final amount to the initial bidder. If the initial bidder accepts such amount, the administration awards the tender to the initial bidder, and not to the second bidder.

The Law introduces the "tender executive" as the top executive of the central organization of the Ministry of Health and its sub-undertakings or the provincial organization, as the case may be. Accordingly, the tender executive is responsible for the execution of the contract and is the expenditure authority.

Tax

Tax and other levies that would be applicable to the agreements with respect to any business activities, transactions, and any papers that will be executed between private and public partners concerning the investments to be made, will be exempt from stamp tax and applicable charges, on the condition that it will be limited to the investment period.

Usage of Turkish Goods

According to the Law, at least 20% of the medical instruments and apparatus that are part of the fixed investment have to be manufactured in Turkey.

Re-arranging the Partnership Structure / Step-in Rights

In cases where the following conditions are met, finance providers are entitled to re-arrange the shareholding structure of the private partner / contractor upon mutual agreement with the public partner / administration:

(a) In case the contractor is unable to fulfill its undertakings under the partnership contract during the construction phase:

- administration shall first serve a written notice explicitly stating the circumstances, and grant the contractor a cure period suitable for the contractor to take necessary measures

- if the contractor fails to realize its undertakings within the cure period, the administration and the finance providers could re-arrange the partnership structure and have the project completed. Should this not be possible, the state is entitled to terminate the partnership agreement.

(b) In case the contractor is unable to fulfill its undertakings under the partnership contract during the operation phase, excluding the facts of the matter where the health services become unsustainable:

- administration shall first serve a written notice explicitly stating the circumstances, and grant the contractor a cure period suitable for the contractor to take necessary measures

- administration shall also notify the financial providers of project financing in case the contractor fails to realize its undertakings within the cure period, the administration shall ensure the contracted services are provided for and on behalf of the contractor.

If healthcare services become unsustainable:

- the facts of the matter shall be notified to the contractor in the quickest fashion and the administration shall have the works performed by third parties for and on behalf of the contractor, where the administration also reserves the right to terminate the contract

- same rules apply in cases where the contractor fails to meet the performance grades prescribed in the partnership contract

- if the contractor fails to realize its undertakings within the cure period, the administration and the financial providers could re-arrange the partnership structure and have the project completed.

Suggestions

General Comments

Although it is recognized that the law maker attempts to stand equidistant to private legal persons during the long term partnership due to the inherent complexities posed by the public private partnership, we think that it is necessary to have a clear partnership contract that will be executed between the parties, and some amendments should be made in the "standard" contracts so that the private legal persons may have the opportunity of a fair negotiation.

The fact that topics such as the facilities' construction, renovation and the obtaining of services are not clearly regulated in the Law, and the fact that these issues will be addressed in secondary regulations, could bring with it arbitrary applications. For instance, the limits of the concept of "*commercial service fields*" must be carefully determined because this concept has constituted the ground for stay of execution of certain tenders made within the scope of Article 7 of Law No. 3359 and the Regulation, and also was previously subject to the Council of State's review.

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