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LEGAL INSIGHTS QUARTERLY

June 2016 - August 2016

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Preface to the June 2016 Issue

This issue the data protection section focuses on the Turkey's first Law on Protection of Personal Data, which was awaited for years. The internet law front evaluates EU's 2015 Turkey Progress Report in relation to the freedom of expression and freedom of press.

On the corporate law front, the certain situations where the Turkish Commercial Code regulates the invalidation of board of directors' resolutions in both joint-stock companies and limited-liability companies are evaluated.

The competition law front explores New Block Exemption Communiqué on Research and Development Agreements, which shows Competition Authority's approach for taking the EU Regulation on R&D Agreements as a reference and also the effort to catalyze the aim of creating coherence between the EU and Turkish competition law instruments.

Finally, on the white collar irregularities front, this issue delves into the new guideline published by Deparmtent of Justice, which puts a light on the efforts of DOJ to solve and mitigate FCPA related matters. On this issue, the labor law section delves into a significant topic under the white collar irregularities front, namely, the dismissal of an employee upon unethical behavior.

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 2016

Corporate Law

Amended Independent Audit Criteria

Pursuant to the "Decree on the Amendment of the Decree on the Determination of the Companies Subject to Independent Audit" which was published in the Official Gazette dated March 19th 2016, to be effective as of January 1st 2016, criteria for determination of companies subject to independent audit have been changed.

In accordance with the abovementioned amendment, companies which meet at least two of the three criteria stated below two years in a row, solely or together with their affiliates, shall be subject to independent audit and the general assembly shall elect an independent auditor. Said three criteria are as follows:

• total assets worth of forty million or more Turkish Liras,

• having net sales revenue of eighty million or more Turkish Liras, and

• employing two hundred or more employees

These criteria must exist in the two previous activity years, not in the current activity year.

Companies subject to independent audit must open up a website and allocate a specific part of this website to the announcements which must be made by the companies as per the legislation. In addition, (i) the trade registry number (ii) trade name (iii) registered address and (iv) the address of the registered website must be stated on the letter headed papers issued by the company and the documents which the records on the commercial books are based on. All this information should also be issued on the website of the company. Also names and surnames of the chairman and members of the board of directors and amount of the subscribed and paid in share capital shall be issued on this website.

Invalidity of a Resolution of the Board of Directors

As a novelty compared to the former Turkish Commercial Code, Article 391 of the Turkish Commercial Code No. 6102 ("TCC") regulates the invalidation of board of directors' resolutions. Such provision is applicable for the board *(of directors)* resolutions in both joint-stock companies and limited-liability companies as per Article 644 of the TCC.

A board resolution will be declared invalid by the court if, in particular, it (i) contradicts with the principle of equal treatment; (ii) does not comply with the structure of the joint stock company or the principle of preservation of the capital; (iii) violates, in particular, the irrevocable rights of shareholders or restricts or makes these rights difficult to exercise; or (iv) violates the non-delegable authorities of other bodies and aims at transferring such authorities (Article 391 of the TCC).

As stated above, the foregoing are given as examples only, and reasons for invalidation are not limited *(numerus clausus)* to those that are stated in Article 391.

Everyone with an interest may initiate a declaratory lawsuit for the invalidity of a board resolution. Shareholders, board members and creditors are, *inter alia*, entitled to initiate such lawsuits depending on their interest.

Court decisions with respect to invalidity of resolutions of the board of directors are retroactive. Thus, a resolution declared invalid will be deemed null as of the resolution date. However, an invalid resolution binds the company if the counterparty concerned by such resolution has acted in good faith. There is no statute of limitation for claiming invalidity.

A brief explanation on each exemplary invalidity reason mentioned in Article 391 of the TCC is given below:

1. Resolutions which contradict the principle of equal treatment

The TCC defines "equal treatment principle" (Article 357) as equal treatment to all shareholders as well as beneficial holders[1] who are subject to the same conditions. For example, a board resolution shall be deemed invalid if it calls the outstanding part of the capital from the shareholders on unequal/*non-pro rata* terms. If the board of directors calls the outstanding share capital, such resolution should include equal provisions for all shareholders.

Those who are obligated to comply with the principle of equal treatment are the general assembly of shareholders and the board of directors. In principle, the shareholders too are obligated to comply with the said principle. If the majority shareholder *de facto* manages the company, it should observe such principle when taking actions on behalf of the company as well.

2. Resolutions which do not comply with the basic structure of the joint stock company or the principle of preservation of the capital

Resolutions which are not in compliance with (i) the fundamental principles of the joint-stock company, (ii) the rules regarding rights and obligations of the shareholders and organizational structure, or which (iii) violate the principle of preservation of the share capital, qualify as resolutions which do not comply with the basic structure of the joint stock company.

For example, a board resolution contrary to the "principle of sole obligation", *i.e.* the sole obligation of a shareholder being the payment of its capital contribution, or regarding distribution of profit (which should be resolved by the general assembly) would fall into this category.

3. Resolutions which violate, in particular, irrevocable rights of shareholders or restrict or make these rights difficult to exercise

Shareholding rights have the characteristic of being irrevocable and inalienable even if shareholders may consent otherwise. Irrevocable rights are, among others, the rights to (i) participate in general assembly meetings, (ii) initiate a lawsuit regarding cancelation or invalidity of a general assembly resolution, and (iii) initiate a liability lawsuit against board members or other managers.

Since such shareholding rights cannot be restricted or made difficult to exercise, any board resolution to that end shall be declared invalid.

For example, a resolution regarding (i) requiring approval of the board of directors before initiating a cancelation lawsuit, (ii) a waiver from the objective of generating and sharing profit or (iii) prohibition to participate in general assemblies by proxy, shall be declared invalid.

4. Resolutions which violate the non-delegable authorities of other bodies and aim at transferring such authorities

Each body of a joint-stock company has inalienable duties and authorities set forth under the TCC. Some of the inalienable authorities of the general assembly are (i) making amendments to the articles of association, (ii) appointment of board members, and (iii) distribution of profit. Thus, such authorities cannot, partially or fully, be transferred to another body of the company, or the board of directors may not resolve a decision with respect to aforementioned issues.

[1] In Turkish, intifa hakkı sahipleri.

Banking and Finance

Full-Fledged Adoption of Basel III by Turkey

In our previous issue, we had reported that a regulation on repo transactions had been recently published on the Official Gazette by the Banking Regulation and Supervision Agency ("Agency"). Another article regarding the newly published Regulation on the Significantly Important Banks was also recently prepared by ELIG associates. Both pieces of legislation could be deemed to be among the steps taken by the Agency to ensure compliance with the Basel framework. Both the Agency and the Central Bank of the Republic of Turkey are represented on the Basel Committee on Banking Supervision ("Committee").

Turkey's adoption of Basel III started as of the year 2013, and was expected to be completed by the year 2019.[2] That said, the Agency recently announced that Turkey was found to be compliant with respect to both risk-based capital regulations and liquidity coverage ratio regulations.[3] Turkey received C's in all components assessed by the Committee's Regulatory Consistency Assessment Programme ("RCAP") Assessment Team.[4]

A "C" stands for "Compliant", the highest possible grade to be granted by the RCAP Team as per the assessment scale.[5] Accordingly, all components assessed by the RCAP Assessment Team were assessed as compliant with the minimum Basel standard.

Among the components assessed were, with respect to capital framework:[6]

- Pillar I, Minimum Capital Requirements: Credit risk, counterparty credit risk, market risk, operational risk in light of certain approaches; securitization framework; capital buffers, both conservation and countercyclical.
- Pillar II, Supervisory Review Process: Legal and regulatory framework for the supervisory review process and for taking supervisory actions.
- Pillar III, Market Discipline: Disclosure requirements.

And with respect to liquidity coverage ratio framework:[7]

- Definition of high-quality liquid assets, net outflows and net inflows; disclosure requirements.

Although the RCAP Assessment Report regarding risk-based capital regulations, for example, states that *"[i]n a number of areas, the Turkish rules go beyond the minimum Basel standards"*,[8] it does not fail to mention that "the intended prudential outcomes in Turkey will critically depend on how effectively the regulations are put into practice, monitored, and supervised".[9] Accordingly,

[2] Ministry of the European Union, Turkey. "Memorandum on the Basel III Regulations Published by the Agency" (in Turkish). *ab.gov.tr*. Ministry of the European Union, Turkey, n.d. Web. 23 Mar. 2016.
[3] The Banking Regulation and Supervision Agency, Turkey. "Press Release" (in Turkish). *bddk.org.tr*. The Banking Regulation and Supervision Agency, Turkey, 16 Mar. 2016. Web. 27 Apr. 2016.
[4] Bank of International Settlements. "Regulatory Consistency Assessment Programme (RCAP) Assessment of Basel III Risk-based Capital Regulations – Turkey". *bis.org*. Basel Committee on Banking Supervision, Mar. 2016. Web. 27 Apr. 2016; Bank of International Settlements. "Regulatory Consistency Assessment Programme (RCAP) Assessment of Basel III LCR regulations – Turkey". *bis.org*. Basel Committee on Banking Supervision, Mar. 2016. Web. 27 Apr. 2016.

[5] ibid.
[6] RCAP Assessment of Basel III Risk-based Capital Regulations – Turkey (n 3).
[7] RCAP Assessment of Basel III LCR regulations – Turkey (n 3).
[8] RCAP Assessment of Basel III Risk-based Capital Regulations – Turkey (n 3) 9.
[9] ibid 4.

although a very positive step in alignment of domestic regulations with the Basel framework, as with every legislative piece, the method of implementation will play the important role in creating the outcome expected to be achieved by the aligned regulations.

Capital Markets Law

Share Capital Increase through Utilization of Internal Sources and by way of Share Capital Subscription in Joint Stock and Limited Liability Companies

I. Introduction

Increasing the share capital in joint stock and limited liability companies by utilizing internal sources and by way of share capital subscription are generally subject to slight differences. That being said, in all cases preservation of at least 1/3 of the share capital is a prerequisite to a share capital increase.

The 1/3 ratio is the "technical bankruptcy" threshold established by Article 376 of the Turkish Commercial Code No. 6102 ("TCC") and this threshold should be determined by a certified accountant's report.

II. Share Capital Increase by utilizing Internal Sources

a) Joint Stock Companies

The TCC has a specific provision for joint stock companies regarding share capital increases where internal sources are utilized.

As per the first paragraph of Article 462 of the TCC, this method may be used in the following situations:

(i) when reserve funds are set aside in accordance with the articles of association or a general assembly resolution but where these funds have not been allocated for any specific purpose; or

(ii) portions of statutory reserves may be freely utilised; or

(iii) funds permitted to be included in the balance sheet and added on the share capital by the legislation can be capitalized.

b) Limited Liability Companies

The TCC does not provide a specific provision as to share capital increases by utilizing "internal sources" for limited liability companies. Therefore, there is no restriction on making this type of share capital increase.

Article 94/1(c) of the Regulation on Trade Registry permits limited liability companies to increase their share capitals by utilizing their internal sources.

Both in joint stock and limited liability companies, the existence and the amount of "internal sources" should be determined by a certified accountant's report.

In case of share capital increase by utilizing internal sources, share capital contributions of all shareholders are automatically increased on a pro rata basis.

III. Share Capital Increase by way of Share Capital Subscription

a) Joint Stock Companies

As per the third paragraph of Article 462 of the TCC, if the balance sheet of a joint stock company entails funds that are permitted by the legislation to be added to the share capital, no share capital increase by way of capital subscription can take place unless and until such funds are capitalised. The share capital can be increased by way of share capital subscription simultaneously and in the same amount with the aforementioned funds to be capitalized.

Pursuant to Article 12 of the Capital Markets Law, this provision is not applicable to public companies or companies which have applied to the Capital Markets Board for a public offering.

On January 25th, 2013, the General Directorate of Domestic Trade of the Ministry of Customs and Trade ("General Directorate") published a circular to the attention of all trade registries regarding the third paragraph of Article 462 of the TCC. In accordance with this circular, the share capital of a joint stock company can be increased by way of share capital subscription, without first capitalizing the said funds or with a subscription amount that is higher than the amount of the capitalized funds, if the general assembly resolution regarding the share capital increase is adopted unanimously by the shareholders.

Thanks to this circular of the General Directorate, joint stock companies generally prefer to increase their share capitals by way of share capital subscription without first capitalizing said funds, and trade registries do not seek the fulfilment of "capitalisation of funds" prerequisite in practise, if the general assembly resolution is adopted unanimously. However, the circular of the General Directorate is criticized by legal doctrine because of the fact that it is contrary to the TCC thus violates the hierarchy of norms.

b) Limited Liability Companies

For limited liability companies, the TCC does not provide any specific provision or reference to the third paragraph of Article 462 of the TCC. Therefore, the prerequisite of capitalisation of funds is not obligatory for limited liability companies.

In the case of both joint stock companies and limited liability companies, share capital cannot be increased unless and until the outstanding capital contribution commitments are fully paid-in. It is important to note that share capital increase through utilization of internal sources is excluded from this restriction and share capital can be increased through utilization of internal sources even if outstanding capital contribution commitments have not been fully paid-in. In case of a capital increase by way of share capital subscription, the subscribed amount can be paid in cash and/or in kind, both in joint stock and limited liability companies.

If the share capital is subscribed in cash, at least 25% of the subscription amount should be paid before registration of the share capital increase with the trade registry. The remaining amount should be paid within 24 months. Payment of at least 25% of the subscription amount is evidenced by a bank letter and this bank letter is submitted to the trade registry.

Pursuant to Article 127 of the TCC, unless otherwise provided in the applicable legislation, the following may be contributed as capital to commercial companies:
a) cash, receivables, negotiable instruments and shares of companies;
b) intellectual property rights;
c) movable and immovable properties of any kind;
d) usufruct and beneficial rights of movable and immovable properties;
e) personal labour;
f) business reputation;
g) commercial enterprises;
h) transferable electronic media, domain names, markings and similar values being used under property rights;
i) mining licenses and other similar rights with an economic value; or
j) any valuable items transferable and convertible to cash.

However, it is important to note that according to Article 342 for joint stock companies and Article 581 for limited liability companies, both joint stock and limited liability companies are excluded from contributing capital in kind

from the assets outlined in Article 127/ (e) to (f) above.

Based on the abovementioned articles of the TCC, if the share capital is subscribed in kind, value of the in-kind capital should be determined by experts to be assigned by the competent commercial court of first instance which has jurisdiction over the company's headquarters. The valuation report shall explain in detail, with satisfactory reasons and in accordance with the principle of accountability, the following;

- the selected method of valuation is the most fair and appropriate method for the particularities of the case at hand;
- the claims contributed as capital in kind are actual, valid and comply with Article 342,
- the collectability chances and full values, and
- the amount of shares and equivalence in Turkish Lira that must be allocated against each asset contributed in kind.

Founders or other beneficiaries may object to the expert report. The expert's report, once approved by the court shall be final.

On September 27th, 2013, the General Directorate published a further circular to the attention of all trade registries regarding the contribution of receivables to share capital as "in-kind capital". The circular noted that if a shareholder contributes a receivable from the company to another company during the incorporation or share capital increase of the latter, the value of the receivable (in-kind capital) should again be determined by experts to be assigned by the competent commercial court of first instance which has jurisdiction over the company's headquarters. However, if the shareholder contributes a receivable from the company to the indebted company's capital, the value of the receivable (in-kind capital) could be determined by either a certified accountant's report or the court's expert report. In this case, the trade registries accept the certified accountant's report and do not seek the court expert's report as required by the aforementioned circular.

However, once again it should be noted that this circular of the General Directorate has also been criticized by legal scholars because of the fact that it is contrary to the TCC thus violates the hierarchy of norms.

Competition Law / Antitrust Law

The Draft Block Exemption Communiqué on Vertical Agreements in the Motor Vehicle Sector

Turkish Competition Authority ("Authority") has released the Draft Block Exemption Communiqué on Vertical Agreements in the Motor Vehicle Sector ("Draft Communiqué") together with the Guidelines ("Draft Guidelines") with respect thereto, in an effort to repeal the existing Block Exemption Communiqué Concerning Vertical Agreements and Concerted Practices in the Motor Vehicles Sector No. 2005/4 ("Communiqué No. 2005/4"). Within this scope, the Authority has submitted the Draft Communiqué and Draft Guidelines for public consultation on March 2nd, 2016.

The provisions on the conditions of general exemption within the Draft Communiqué and the Communiqué No. 2005/4 are regulated distinctively. The Communiqué No. 2005/4 regulates the application of the exemption based on market share thresholds related to the preferred distribution system (*i.e.* the exemption would be applied "if the market share of the provider in the relevant market where it provides motor vehicles or spare parts or maintenance and repair services does not exceed 30%, or 40 % for agreements where quantitative selective distribution is preferred for the distribution of motor vehicles."). The Draft Guidelines, however, states that such diverse market share thresholds do not lead to the efficiency aimed within the market, rather it creates difficulties in the

enforcement. Therefore, the Draft Communiqué stabilizes the market share threshold to 30% for both quantitative selective and exclusive distribution systems with respect to all sales of new motor vehicles and motor vehicle aftermarkets, which enables such exemption to be applied to the vertical agreements where the market share of the provider does not exceed 30% in the related sale of new motor vehicle market or motor vehicle aftermarket, regardless of the preferred distribution system. In addition, both the Communiqué No. 2005/4 and the Draft Communiqué do not provide any market share conditions for vertical agreements where qualitative distribution system is preferred. Apart from the revision regarding the market share thresholds, other general conditions such as the recognition of freedom to transfer the agreement, written reasoning termination procedure and mandatory arbitration clauses which were regulated under Communiqué No. 2005/4 are removed by the Draft Communiqué.

Both the Draft Communiqué and the Communiqué No.2005/4 define non-compete obligation as any direct or indirect obligation which avoids the buyer to produce, purchase, sell or resell competing goods or services with the goods or services which are subject of the agreement. However, unlike the Communiqué No. 2005/4, the Draft Communiqué regulates non-complete obligation for the new motor vehicle supply market and motor vehicle aftermarket separately. Accordingly, based on the buyer's purchases in the previous calendar year, any obligation directly or indirectly imposed on the buyer obliging the buyer to buy more than (i) 80% of its products or services or the substitutive product or services from the supplier or the assigned person by the supplier in the new motor vehicle supply market and (ii) 30% of its products or services or the substitutive product or services from the supplier or the assigned person by the supplier in the motor vehicle aftermarket, shall be deemed as non-compete obligation. Therefore, the Draft Communiqué extends the scope of the exemption for the new motor vehicle supply market by defining non-compete clause as a purchase requirement of more than 80% of the products instead of 30% of the products as it was previously regulated under the Communiqué No. 2005/4. Nevertheless, such extension by the Draft Communiqué on the non-compete obligation has been brought only for new motor vehicle supply market since the buyer's purchase requirement remained 30% for the motor vehicle aftermarket.

In addition, Article 6 of the Draft Communiqué, regulates the exemption of vertical agreements in which non-compete obligation exists separately for motor vehicle distribution, spare parts distribution and supply of repair and maintenance services. Accordingly, (i) any non-compete obligation imposed on the buyer for the distribution of motor vehicles exceeding 5 years; and (ii) non-compete obligation imposed on the buyer within the term of its agreement with respect to the distribution of spare parts and provision of supply of repair and maintenance services up to 5 years can be exempted under the Draft Communiqué. Moreover, the vertical agreement can benefit from the block exemption if the non-compete obligation provision, imposed on the buyer for the distribution of motor vehicles or independent spare parts or the provision of repair and maintenance services is (i) related with the competing products; (ii) limited with the operating facilities of the buyer; (iii) an essential necessity for the supplier to protect its know-how transferred to the buyer; and (iv) limited with one year after the termination of the agreement.

Furthermore, as stipulated under the Draft Guidelines, the Authority aims the Draft Communiqué to include provisions allowing providers to establish a more flexible distribution network when distributing new

motor vehicles. Within the scope and with respect to such activities, the Authority amends provisions of the Communiqué No. 2005/4 on the sale of different trademarks and opening additional sales outlets and ensures that inclusion of a restriction of (i) multi-branded distribution structure and (ii) liberality to open additional sales outlets, in a vertical agreement on the distribution of motor vehicles, does not prevent such agreement to benefit from the exemption under the Draft Communiqué. Nevertheless, such restrictions in relation to aftermarket (*i.e.* sale spare parts or repair and maintenance service markets) do not benefit from the exemption.

As a result, the Draft Communiqué and the Draft Guidelines involve significant changes in comparison with the Communiqué No. 2005/4, particularly in relation to conditions of general exemption, non-compete obligations and multi-branded distribution structuresSince the Draft Communiqué and Draft Guidelines have not been ratified yet, it is early to observe its results in the enforcement.

The Administrative Court upholds the Board's Hyundai Dealers Decision

In December 2013, Turkish Competition Board ("Board") concluded its investigation on whether 22 Hyundai dealers violated Article 4 of Law No. 4054 on the Protection of Competition ("Law No. 4054") through an agreement to fix the resale prices and sale conditions of Hyundai branded new cars and car accessories (16.12.2013, 13-70/952-403). One of the dealers subject to investigation, Tuna Otomotiv Ticaret Ltd. Şti. ("Tuna"), applied for leniency under the Regulation on the Active Cooperation for Detecting Cartels ("Leniency Regulation"). Nevertheless, the Board evaluated this application under the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position ("Regulation on Fines") within the scope of active-cooperation on the grounds that the infringement in question did not constitute a cartel violation.

The Board assessed the agreement subject to the investigation in the scope of "other infringements" defined under the Regulation on Fines and therefore, decided a fine of 5‰ of the infringing undertaking's annual turnover. However, the decision does not contain explicit reasoning why the dealers' behavior did not amount to a cartel. According to Turkish competition law, leniency is only available for cartelist behaviour, since the Board did not consider the investigated behavior as a cartel, it granted a reduction of one fourth of the fine to be imposed to the applicant dealer, Tuna, on the basis of its active-cooperation instead of evaluating the matter under Leniency Regulation. The other 14 Hyundai dealers were imposed a monetary fine equal to 3‰ of their annual turnover after applying aggrevating and mitigating factors. On the other hand, for the remaining Hyundai dealers, the Board concluded that i) 5 of them did not violate Article 4 of Law No. 4054, and ii) sufficient evidence proving the infringement of Article 4 of Law No. 4054 was not found for 3 of them, and thus, the Board did not impose any monetary fines on these dealers.

Subsequently, Tuna appealed the Board's decision and the appeal court (Ankara 18th Administrative Court) upheld the Board's decision (26.11.2015; 2014/1911E., 2015/1485K.). The Administrative Court indicated 15 Hyundai dealers were involved in the infringing behavior and such behaviour was related to only a certain brand and a certain area. Due to this rationale without any other explicit reasoning (as the Board did in its reasoned decision), the Administrative Court concluded that such behaviour in question cannot be characterized as a cartel defined under the Regulation on Fines. The Administrative Court also indicated that even

if this behaviour was characterized as a cartel by the Board, since the applicant did not add value to the ongoing cartel investigation whereas the Board already possessed sufficient documents to prove the violation at the time of the investigation, the applicant would not have been granted full immunity under the Leniency Regulation. Consequently, the Administrative Court approved the Board's approach on the reduction of the monetary fine according to active cooperation under Regulation on Fines.

Although the Board's relevant decision is not yet finalized as it may be appealed to the Council of State, it still has its practical relevance, as it raises a blurry distinction between "cartelist behaviour" under Leniency Regulation and "other infringements" under the Regulation on Fines. In light of the foregoing, the decision may be interpreted as a discouraging one for future leniency applications.

New Block Exemption Communiqué on Research and Development Agreements

The Turkish Competition Authority ("Authority") recently released the Block Exemption Communiqué on Research and Development Agreements No. 2016/5 ("Communiqué"), which has been published on the Official Gazette, dated March 16th, 2016 and No. 29655. The Communiqué overhauls the Block Exemption Communiqué No. 2003/2 on Research and Development Agreements ("Communiqué No. 2003/2") and sets out refurbished rules for the block exemption regime for research and development ("R&D") agreements in Turkey.

Earlier on November 5th, 2015, the Authority had released the Draft Block Exemption Communiqué on Research and Development Agreements ("Draft Communiqué") for public consultation.

First of all, even though the studies on R&D bear a great deal of importance in Turkey in terms of technological and economic developments the agreements, applications and decisions regarding such studies fall within the scope of Article 4 of the Law No. 4054 ("Law No. 4054") to the extent they cannot benefit from the block exemption.

The Authority pays close attention to the developments in the EU competition law and seeks to retain the harmony amongst the EU and Turkish competition law instruments. As such, the Communiqué largely resembles the Commission Regulation No. 1217/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements ("EU Regulation on R&D Agreements"). Some of the most significant amendments comprised in the Communiqué as well as new regulations introduced as a result of the public consultation procedure are set out below.

Article 4 of the Communiqué highlights the addition of broader definitions regarding various terms within the scope of the Communiqué. With the explicit and extensive definitions, compared to the definitions in the current Communiqué No. 2003/2, legal certainty has been enhanced and thus undertakings have been provided with a clearer foresight on exemption conditions. For instance, the definitions for the terms such as "potential competitor" and "competing undertaking" which have not been provided in the Communiqué No. 2003/2 have been included in the Communiqué. Additionally, the term "specialization in exploitation", which was defined concisely within the Draft Communiqué, is defined more comprehensively by pursuing harmony with the EU Regulation on R&D Agreements. That is to say, it is explained in detail in the Communiqué that benefits of specialization arise through (i) allotment of functions such

as production and distribution between the parties, or (ii) imposition of restrictions on territorial exclusivity or customer allocation, or (iii) when production or distribution of products subject to the agreement is carried out by only one of the parties under an exclusive license granted by the other parties. Also, in line with the EU Regulation on R&D Agreements, the terms "know-how" and "trade secrets", which were neither included within the scope of the Communiqué No. 2003/2 nor the Draft Communiqué, have been defined in the Communiqué. Article 6 of the Communiqué sets out market share thresholds within the span of general terms of the exemption so that parties to the R&D agreements would benefit from block exemption. As in the case of Communique No. 2003/2, compared to the EU Regulation on R&D Agreements, the Communique still comprises a higher general market share threshold for the block exemption, permitting R&D Agreements to qualify for the block exemption in cases where the parties' combined market share in the relevant market does not exceed 40%. In the case of paid-for R&D, where the same party is the financing party in multiple R&D agreements regarding the same contract products or contract technologies, the above market share threshold of 40% is sought for the combined market share of the financing party and all the relevant parties. However, the R&D agreements including exclusive distribution mechanism is an exception to the above market share thresholds with the market share threshold of 20%. Through this 20% market share threshold, the scope of the Communiqué is substantially narrowed down. Additionally, Article 6(3) of the Communiqué, in line with the EU Regulation, clearly states in order to ensure the legal certainty that, the market share thresholds will not be applicable to the agreements between the undertakings that are not competitors.

With regard to the period exemption regulated under Article 8 of the Communiqué, the 5-year exemption period set forth in the Communiqué No. 2003/2 and Draft Communiqué is revised as 7-years. Considering the period of benefit has an importance and the R&D activities require a significant investment cost, the parties enjoy the results of their investment in a long-term period.

In relation to the restrictions falling outside the scope of the exemption, the Communiqué has also adopted the same approach as the EU. It divided such restrictions into two different sections: (i) "hardcore restrictions" (which result in the agreement to not benefit from the block exemption as a whole) and (ii) "excluded restrictions" (only the problematic parts of the agreement are excluded from the scope of the block exemption). Unlike hardcore restrictions, if an R&D agreement includes excluded restrictions, the block exemption may still be applied to the rest of the agreement. In parallel with the EU Regulation on R&D Agreements, excluded restrictions under the Communiqué include (i) restricting the right to challenge the validity of the related intellectual property rights after completion of the R&D; and (ii) restricting the right to grant licenses to third parties to manufacture the contract products or to apply to contract technologies, where the agreement does not provide for the joint exploitation of R&D results or such exploitation does not in fact take place. Under Communique No. 2003/2, both of the restrictions above were considered hardcore restrictions under Article 6(b) and 6(g) respectively.

The Authority has also revised the scope of hardcore restrictions in the Communiqué in line with the EU Regulation on R&D Agreements. For instance, under Article 8(1)(d) of the Communique, allocation of customer groups or territories, which is regarded as a hardcore restriction under Article

6(f) of the Communiqué No. 2003/2, no longer constitutes a hardcore restriction where the R&D Agreement includes specialization in the context of exploitation. In parallel with Article 5(d) of the EU Regulation on R&D Agreements, the relevant Article also provides that passive sales to certain customers and territories may also be prohibited where the agreement includes exclusive licensing.

In light of the above, the Communiqué manifests overt and pellucid provisions which eloquently portray the stance of the block exemption and how it is applied to R&D agreements in Turkey. The Authority's approach for taking the EU Regulation on R&D Agreements as a reference also catalyzes the aim of creating coherence between the EU and Turkish competition law instruments.

Labor Law

Termination of Employment Agreement upon Unethical Behavior at Workplace

Ethics are concerned with whether what people do is 'right', 'just', 'fair' or 'good'. Work ethics focuses on the same, but in the workplace. Even though it is a basic universally acknowledged concept, in reality ethical behavior in the workplace can be improved drastically. Whilst there is no specific law in Turkey that regulates work ethics or codes of conduct in the workplace, the basis for these regulations can be found in the Turkish Labor Law, Criminal Law and other regulations as well as Court of Appeals' precedents.

Lack of ethics in the workplace gives rise to white collar irregularities, which can result in termination of employees based on valid or rightful reasons, with or without notice period and severance compensation and sometimes reach to the level of a punishable crime *e.g.* theft, fraud etc.

Termination based on valid reason

An employer, who employs at least 30 employees, is obligated to present a valid reason for termination of an employee who worked for at least six months under an indefinite-term agreement per Article 18 of the Labor Law. These valid reasons are:

-Reasons arising from incapability of the employee (*e.g.* underperformance)

-Reasons arising from improper behavior of the employee (*e.g* causing disturbance in workplace)

-Reasons arising from requirements of business, workplace or work (*e.g* department closure due to merger)

In addition, according to Article 19 of the Labor Law, termination based on valid reason entitles employees to notice period (or compensation in lieu of notice) and severance compensation and reason for termination must be realized in writing and be clearly and definitely expressed.

Termination based on rightful reason

Employers can immediately terminate an employment agreement based on one of the rightful reasons set forth under Article 25 of the Labor Law (same right is also granted to employees under Article 24 with similar provisions).

Article 25 of the Labor Law regulates "rightful reasons" under four subtitles:

-Health reasons (Article 25/I)

-Situations violating morale and good faith rules or alike (Article 25/II)

-Force Majeure that prevents employee from working longer than a week (Article 25/III)

-Employee being unable to work longer than applicable notice period per Article 17 due to custody or imprisonment (Article 25/IV)

As indicated above, behavioral issues may result in termination of employment. The reason is that employees have a 'duty of loyalty' towards their employers. This principle of loyalty is based on the general rule of honesty and good faith *(bona fide)*. Under labor law, the duty of loyalty requires fulfilling work in compliance with the interest of the employer and avoiding any behavior that may damage the employer.

Acts of theft, sharing a commercially valuable secret of employer, fraud, providing unjust benefits to third parties, abuse of employer's reliability, avoiding transfer of a payment to employer, forgery on the invoices, bribing an official, accepting benefits or presents that fall beyond the normal standards, transferring client's money to one's own personal bank account and marketing one's own products under the name of employer, would be considered unlawful.

Litigation

A Game-Changing Decision from the 11th Circuit on Limitation Period of Compensation Claims Connected to Competition Law Violations

The High Court of Appeals for the 11th Circuit ("the 11th Circuit") opened a new front on the discussion about what the statute of limitations should be for claims connected to competition law violations. What is more, the 11th Circuit did so by revising its initial appellate decision after a post-judgment relief request was made for revising its decision. The general specifics of the case brought before the 11th Circuit was as such:

The case was filed for compensation of damages incurred due to actions violating Article 6 of Law No. 4054 on the Protection of Competition ("Law No. 4054"), abuse of dominant position to be specific, which was established by Competition Authority. So the case, in a nutshell, had compensation claims connected to competition law violations. The local court dismissed the case due to lapse of statute of limitations on compensation claims. At the time, the claims were subject to the statute of limitations stipulated in Article 60 of the abrogated Code of Obligations No. 818 ("Former CoO"), namely one year from the time the claimant becomes aware of the damage and the identity of the damaging party ("Subjective Limitation Period"), and ten years from the date of the damaging act ("Absolute Limitation Period").

The plaintiff filed for appeal but the 11th Circuit denied the request and approved the local court's dismissal decision. Where things have changed is after the plaintiff filed for post-judgment relief, which is quite unusual in Turkish law practice since post-judgment relief request are rarely a success for the applicant. As the 11th Circuit reviewed its approval decision once again upon post-judgment relief request, the Circuit this time took into consideration the language of the provision on statute of limitations, saying that *"if the compensation claim is borne from an action that requires a fine, for which criminal laws stipulate a longer statute of limitations, compensation claim becomes subject to this longer statute of limitations"*, and thereby developed the following reasoning for determining the length of statute of limitations:

(i) Competition law violations are, in essence, actions that require "administrative sanction", since administrative fines given upon competition law violations are considered to be a type of administrative sanction as per Article 16 of Misdemeanor Law No. 5326 ("Law No. 5326").

(ii) Administrative sanctions are categorized as "misdemeanor" under Article 2 of Law No. 5326, which ultimately makes competition law violations, by definition, a misdemeanor.

(iii) Statute of limitations on misdemeanors is 8 years as per Article 20 of Law No. 5326.

(iv) Pursuant to Article 60 of Former CoO, the Subjective Limitation Period is 1 (one) year.

(v) Since Article 60 of Former CoO dictates that where criminal laws stipulate a longer statute of limitations for compensation claims borne from an action that requires a fine, the longer statute of limitations is applied, therefore the statute of limitations, the Subjective Limitation Period to be specific, on competition law violations is 8 years.

The 11th Circuit also concludes that this 8 years' limitation period starts from the date on which the claimant filed its complaint for competition law violation before the Competition Authority, meaning that this is accepted to be when the claimant is deemed to have knowledge of the violation, the damage and the identity of the damaging party.

It follows from the foregoing that the 11th Circuit established that, for cases which fall in purview of the Turkish Code of Obligations No. 6098 in terms of statute of limitations, the Subjective Limitation Period for compensation claims borne from competition law violations is not 2 years as Article 72 dictates, but 8 years due to the reasoning explained out above.

The 11th Circuit's decision in that regard is surely a game-changer and therefore will be in the center of quite a controversy, likely to be attacked by infringers of competition law arguing that competition law violations cannot be considered misdemeanor.

Internet Law

Internet Law Related Matters on EU's 2015 Turkey Progress Report

Since the beginning of membership process of Turkey to the European Union, progress reports included certain criticisms addressing Turkey with respect to freedom of speech and internet legislations. It should be noted that, EU's 2015 Turkey Progress Report ("Report") includes thus far the most extensive comments on internet regulations and freedom of speech. Former reports included general comments. However, the latest report highlights the details of the latest amendments to the internet legislation and application of the legislation as significant concerns on the way of EU membership. The Report states that Turkey has reached some level of preparation on respect for freedom of expression, the media and the internet and highlights that after several years of progress, serious backsliding has been seen over the past two years.

It is stated that while in recent years it had been possible to discuss some sensitive and controversial issues in a free environment, ongoing and new criminal cases against journalists, writers or social media users are of serious concern. The Report also states that the changes to the internet law, which are a significant step back from European standards, increased the authorities' powers to block content without court order on an unduly wide range of grounds. That being said the report is referring to the amendments made to the Law No. 5651 (i.e. Turkey's internet law) on 2014 and 2015.

The Report states that intimidation of journalists in all its forms, notably investigation of all physical attacks and threats against journalists and actively prevention of attacks on media outlets would defuse the tense political climate which creates an environment curtailing freedom of speech in the media and on the internet.

Access bans for websites are also highlighted under the Report and it is stated that Turkey made more requests to a well-known social media websites to delete content or suspend accounts than any other country in the world. It is obvious that the legislation itself enables

the disproportionate interventions to social media. The Report further states that the distinction between freedom of expression and hate speech is not clearly delineated, as internet legislation in Turkey does not include a measure to prevent hate speech.

The EU supports the good functioning of the internal market for electronic communications, electronic commerce and audio-visual services, as mentioned in the Report and EU legislators support the rules to protect consumers and support universal availability of modern services. The report states that "Turkey is moderately prepared in the area of information society and media". Certain legislative steps to enforce internet technologies are also mentioned in the Report such as adopting the e-commerce law and bringing the broadcasting law more closely into line with the EU acquis.

However, the Report stated that there is an insufficient protection of freedom of expression, privacy and personal data and market access, and the sector is overregulated.These remain issues of serious concern. The Report suggested the following steps for Turkey for the year 2016:

- Strengthen the institutional independence in electronic communications in particular in terms of financing and oversight.

- Revise the law on internet to support an environment conducive for freedom of speech on the internet and protection of privacy and personal rights.

- Further align the authorization regime in electronic communications with the EU acquis.

- Take the necessary steps to complete the digital switchover as soon as possible.

The Report repeatedly states that the Law No. 5651 was amended in March 2015 for the third time, granting the Telecommunications Communication Presidency further extensive and restrictive powers over internet content and usage. It is emphasized and criticized that the legal framework raises serious concerns about freedom of expression, freedom of internet, protection of privacy and personal rights.

Data Protection

Long-Awaited Law on Protection of Personal Data is Approved by the Turkish Parliament and Published on the Official Gazette on April 7th, 2016

The Law on Protection of Personal Data ("the Law") was approved by the Turkish Parliament on March 24th, 2016 and upon the President's approval, it was published on the Official Gazette on April 7th, 2016.

Main aims of the Law, which is prepared based on the European Union's Data Protection Directive (Directive 95/46/EC), are to protect the fundamental rights and freedoms of the people with respect to the processing of personal data, particularly on privacy of private life and to regulate the procedures and principles along with obligations to be followed by the real persons and legal entities which are processing personal data.

The Law includes the "clear, certain and legitimate purpose" as one of the general principles for processing personal data. Data processing must be lawful and in line with good faith, be precise and up to date where necessary and the data processed must be preserved for the period of time determined by the relevant legislation or the period where necessary for the purpose of process.

"Explicit consent" is necessary for the data subject for processing of his/her personal data.

However, there are exceptions for explicit consent requirement (*i.e*. for the performance of a contract, or in order to comply with a legal obligation, *etc*.). According to the Law, if one of the relevant exceptions listed under the Law exists, the personal data can be processed without obtaining the data subject's explicit consent.

The Law also stipulates special categories of personal data. Unlike the European Union's Data Protection Directive, it adds appearance and clothing, data relating to criminal records and biometric and genetic data to the list of special categories of personal data. There are exceptions to this provision, such as that explicit consent will not be sought if a law explicitly allows processing special category of personal data or protection of public health. Having said that, the exceptions for processing special categories of personal data are more limited than the exceptions set out for other types of personal data.

According to the Law, data controllers will be obligated to erase, destruct or anonymize personal data, either *ex officio* or upon the request of the data subject (even if such data is processed in line with the Law or other laws), when the reasons for the processing of personal data are no longer valid.

The Law regulates the transfer of personal data by dividing into two sub-titles as "Transfer of Personal Data" and "Transfer of Personal Data Abroad". Personal data cannot be transferred abroad without explicit consent of data subject. However, the Law sets out certain exemptions for transfer of personal data (within or outside the country).

The Law states that the data controller or any other person authorized by the data controller is obligated to provide the related parties the information set out under the provisions of the Law, during collection of personal data. Another obligation imposed on the data controller is maintaining data safety and security. Accordingly, the data controller is obligated to take all necessary administrative and technical measures, to ensure an adequate level of security is established, so that personal data may not be processed or accessed unlawfully and safeguarded.

It introduces a Personal Data Protection Authority, which will be a new establishment in Turkey and requires enrolment to the Data Controllers' Registry which will be maintained publicly under the supervision of the Personal Data Protection Board. Accordingly, natural and legal persons who process personal data in Turkey will be registered under this registry prior to begin data processing.

The provisions regarding (i) transfer of personal data, (ii) transfer of personal data abroad, (iii) rights of the data subject, (iv) application to data controller, (v) complaint to the Board, (vi) procedures and principles of review by the Board upon complaint or ex officio and (vii) enrollment to the Data Controllers' Registry and the provisions about the crimes and minor offences set forth under the Law will enter into force six months after publication of the Law.

While the Law states that the real and legal persons subject to the Law should be ready to comply with the Law in six months in terms of the foregoing articles, it also states that the secondary legislation will be enacted in one year, which might lead to certain issues in practice. The implementation of the law will be clearer upon the enactment of the secondary legislation.

Although the Law is prepared based on the Directive 95/46/EC, it still differs from the EU's current data protection regime at certain points. Moreover, the Law does not include the new provisions under General Data Protection Regulation. That means, at some point, the Law will need amendments for full harmonization with the EU data protection regime.

It is recommended for real and legal persons who are processing and controlling personal data to re-evaluate the internal data protection policies. In the light of the newly approved Law, revisiting privacy policies and conducting a gap analysis to determine if additional internal administrative and technical measures are needed might be beneficial.

Telecommunications Law

The Upcoming Communiqué Regarding Principles and Procedures on Providing Value-Added Electronic Communication Services

Value-added services ("VAS") have been penetrated in our daily lives and became an indispensable part of electronic communications for the last two decades. However Turkish law did not have a definition for these services and there was a lack of regulation on how to actually provide them in the Turkish jurisdiction. Information Technologies and Communication Authority ("ITCA"), which is the regulatory and supervisory authority for telecommunications, announced a draft Communiqué Regarding Principles and Procedures on Providing Value-Added Electronic Communication Services ("Communiqué") on their official website for gathering public opinion on the draft.

The Communiqué aims to protect rights and benefits of the consumers and defines as its scope, obligations of the providers regarding VAS. The Communiqué names VAS as "value-added electronic communication services" defines these services as *"electronic communication services which transfer to the subscribers/users additional, different or reconstructed sound or data; or provide them with access to contents which are of entertainment, voting, competition, participation, information, sexual or similar purposes through processing the content, code, protocol or similar features by computers or any other way."*

Considering that the Communiqué's definition of VAS encompasses Over-the-top ("OTT") content, mobile payment, mobile commerce and mobile advertisement services amongst others, the obligations indicated in the Communiqué appear to be relevant for many commercial entities, independent from whether they are conglomerates providing their services in a global scale or local companies operating on a more local and specific level if they are providing their services via electronic communication. For example OTT services are used more and more in Turkey with each passing day in accordance with the global trend. Currently, Turkey does not have a dedicated and specific regulation regarding OTT services, therefore the legal framework for providing such services is uncertain. While this uncertainty is a drag on Turkish authorized operators, it provides an opportunity for others who are not yet under the supervision of ITCA. Once the Communiqué enters into force the obligations included therein might be applicable for all VAS providers operating or providing their services in Turkey including OTT content providers like Netflix and OTT messaging service providers like WhatsApp.

The Communiqué provides VAS providers/operators with obligations as to transparency and with respect to information and statements which, as part of marketing, advertisements or within the scope of providing the relevant services, will be presented to the customers regarding amount of fees, billing and payment methods, scope of services to be provided. For instance, the Communiqué obligates VAS providers to provide the end users with "opt-out" options and detailed explanation as to methods which shall be made available to the customers by the VAS provider in order to enable use of these "opt-out" options.

Different methods of providing VAS have been regulated separately within the

Communiqué. According to the Communiqué, there are VAS: (i) which can be subscribed to or bought over WEB, (ii) which can be subscribed to or bought over WAP, (iii) subscription or buying process of which can be started by sending SMS, (iv) which can be subscribed to or bought by making/receiving a call, (v) which can be subscribed to or bought over data lines and (vi) which can be subscribed to or bought by other means. The Communiqué specifies what shall be notified to the customers during and after their subscriptions or before and after they bought the service. The relevant articles of each method also determine the ways in which the customers' consent must be obtained for the purposes of the relevant VAS.

The Communiqué also includes restrictions on service fees and states that no fee shall be charged on the customer, if the customer does not use the services, after the subscription until the renewal date and requested to cancel his/her subscription.

VAS operators' responsibilities with respect to VAS are regulated as (i) the burden of proof regarding fulfillment of their obligations during subscription or buying processes, (ii) documentation of consumer complaints and answering consumer complaints in a maximum of 10 working days, (iii) providing solutions to consumer complaints received through the hot-lines and communicating said solution to the consumer before the call ends, (iv) taking necessary technological precautions to prevent possible fraudulent activities and (v) obligations with respect to protection of personal data. According to the relevant article of the Communiqué, these obligations shall be fulfilled by the operator who collects and/or intermediates collection of the VAS fees. The Communiqué refers to the relevant provisions of the Information Technologies and Communication Authority Administrative Sanctions Regulation with respect to administrative fines and other sanctions in case the obligations set forth by the Communiqué are not fulfilled.

The Communiqué is still at an early stage of its legislative process and may eventually be subject to many changes following the opinions obtained from the public and the other stakeholders in the sector. If the Communiqué gets issued by the ITCA, there might be a period for transition, since the Communiqué would introduce new obligations to be fulfilled by the VAS providers.

Decision of Turkish Tobacco and Alcohol Market Regulatory Authority

An Update on Tobacco Products: Brand Stretching in Turkey

As is known, the Law on the Prevention and the Control of Damages arisen from Tobacco Products explicitly stipulates that a tobacco brand name, emblem, trademark, logo or other signs or any other distinctive features should not be used for non-tobacco goods and services. Similarly the Turkish Tobacco and Alcohol Market Regulatory Authority ("TAPDK") in its decision dated October 12th 2012 and No. 7055 ("Decision"), by way of following the same view, strictly prohibited brand stretching in tobacco products. In this respect, tobacco companies are not allowed to use their brands for non-tobacco products in Turkey.

On April 19th, 2016, TAPDK's decision dated March 30, 2016 and No. 10936 ("Amendment Decision") amending the Decision has been published on the Official Gazette No. 29044. While the Amendment Decision did not include any amendments as to the brand-stretching prohibition itself, the amendments pertain to the procedures and the assessment period of TAPDK regarding brand-stretching matters.

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

- Associability criterions to be taken into account by the TAPDK

Article 6 of the Decision as to criteria on the associability between tobacco and non-tobacco products has been amended with the Amendment Decision.

While the criteria are mainly preserved in their current form, a second sub close which stipulates that a commission consisting of nine members *(representatives working in different fields such as; representative of the Ministry of Customs and Trade and the Ministry of Health, a commercial law expert, a public health expert etc.)* will review the TAPDK's report and will get the final say in determining the encouragement of tobacco usage, association and/or similarity between tobacco and non-tobacco components in a product, is added to the Article.

- Recognition level of tobacco brands

As per the amendment made in Article 7 of the Amendment Decision, in identifying the breach of brand stretching prohibition, the relevant tobacco company's (i) registration date and (ii) nation-wide popularity as well as recognition level will be taken into account, respectively.

- Applications of tobacco companies

Article 8 of the Decision obligates tobacco manufacturers, importers and distributors to demonstrate their compliance with the brand stretching prohibition during the applications made to the TAPDK.

The Amendment Decision takes the regulation under Article 8 one step further and details the TAPDK's assessment procedure of applicants' compliance with brand stretching prohibition.

- Final note

As of the enforcement of the Decision on October 12th, 2012, neither new legislative amendments have been introduced nor new developments at this front has occurred in a way to pave the way for brand stretching in tobacco products.

Also with the changes introduced with Amendment Decision, it would be safe to assume that the legislative doesn't seem to deviate from its attitude against brand stretching in Turkey.

Real Estate Law

Questioning a Frequently Encountered Practice: "Key-Money"

As well known in practice, the Code No. 6570, which has been repealed upon the implementation of the Turkish Code of Obligations No. 6098, explicitly banned any payment to be realized under the name of "key-money".

The Code No. 6570 took the "key-money" practices seriously and stated that the persons who receive key money payments or any payment which exceed the rental fee generated in accordance with the law, or the persons acting on behalf of such, shall be sentenced to imprisonment from six months to a year and a monetary fine which amounts to a three-year rental fee. In this respect, the law had provided sanctions to any person who receives key money or any person acting on behalf of such, without making any reference to a "lessor" or a "lessee", without leaving a room for further interpretation.

Today, after the Code No. 6570 fell into desuetude, the subject of "key-money" should be assessed in light of the provisions under the Turkish Code of Obligations No. 6098, which abolished and replaced the Code No. 6570.

With this article, we aim to provide an overview on the legitimacy of current "key-money" practices in Turkey as per the current legislation in effect.

- What is considered as "key money"?

Key-money, refers, under Turkish laws, to the payment received by the lessor from the lessee for the mere transaction of lease. To that end, key-money is not received in exchange for an asset or portfolio of a business and not during the transfer of business.

In its decision dated July 15th, 2005 and numbered E. 2005/4735 and K. 2005/12388, the Supreme Court also stated that the money, offered by a prospect lessee to the current lessee for the transfer of the lease, is indeed key money, and thus is against law.

-"Key-money" issue under the current legislation

The Turkish Code of Obligations No. 6098 ("Code") which entered into force on July 1st, 2012 and repealed the Code No. 6570, refrains from explicitly referring to the term "key money". However, Article 346 of the Code has introduced the following provision:

"Liability of payment other than the lease payment and ancillary expenses cannot be imposed on the lessee."

In this respect, the payment of key money would be evaluated within the scope of Article 346 of the Code, which bans any payment to be realized by the lessee, except for the rental fee and ancillary expenses.

The doctrine also stipulates that the payment of key money would fall outside the scope of the "rental fee" and "ancillary expenses", which legally can and should be paid by the lessee.

This being the case, as per Provisional Article 2 of the Law on the Amendment of Certain Laws for the Acceleration of Judiciary Services No. 6217, the implementation of Article 346 of the Code has been deferred for 8 years (until July 1, 2020) for commercial leases. To that end, Provisional Article 2 which has deferred the implementation of Article 346 stipulates that the principle of freedom of contract would step in and up until July 1st, 2020, the provisions of the relevant agreement on these matters will apply as agreed by the parties. In cases where the agreement does not regulate the content of the deferred article, then the abolished Code of Obligations would apply.

- Assessment of the legal gap pitfall

As is understood from the foregoing explanations, there is currently a legal gap on the payment key money for commercial leases, due to the suspension of the article regulating thereof.

However, considering that the payment of key money would indeed become illegal in 2020 for commercial leases also and considering the previous (before the implementation of the Code) substantial approach of the doctrine and the Supreme Court on this issue, one can easily argue that receiving and paying any payment which would be considered as "key money" is against the law and that all financial papers arranged for the payment of these shall be rendered void.

White Collar Irregularities

DOJ Launches FCPA Pilot Program for Voluntary Self-Disclosure – What does it offer?

On April 5th, 2016, the Department of Justice ("DOJ") announced the Foreign Corrupt Practices Act Enforcement Plan and Guidance ("Guidance") which aims to ensure greater accountability for Foreign Corrupt Practices

Act ("FCPA") violations and provide greater transparency for companies with regard to mitigation. The Guidance launches a pilot program that provides even further mitigation possibilities to companies which fulfill the conditions set out in the Guidance. The pilot program will be effective for a year, starting from April 5th, 2016.

Before delving into the pilot program, the Guidance points out the two other ways the DOJ targets to increase accountability. The first of these is an increase in FCPA enforcement resources. The second is an increase in international cooperation between law enforcement authorities around the world.

The third and the last method through which the DOJ aims to increase accountability is the pilot program. The pilot program opens the door for more mitigation opportunities by the DOJ, in case companies (i) voluntarily self-disclose, (ii) cooperate fully and (iii) remediate timely and appropriately with regard to FCPA matters. Accordingly, the pilot program aims to motivate companies to voluntarily self-disclose, deter FCPA violations and encourage companies to enact strong compliance programs.

What are the credits for companies under the program?

The Guidance sets out a twofold mitigation system depending on how much one complies with the pilot program. The first option is for companies who fully undertake the aforementioned three conditions of the pilot program. Such companies may (i) be awarded up to a 50% fine reduction from the bottom end of the U.S. Sentencing Guidelines fine scale and (ii) not be appointed a compliance monitor, given the existence of an already effective compliance program.

The second option is applicable to those companies which fail to disclose but fully cooperate with the DOJ and fully remediate. Such companies may be awarded utmost a 25% fine reduction from the bottom end of the U.S. Sentencing Guidelines fine scale. The Guidance further points out that when the conditions of the pilot program are met, the DOJ may consider a declination decision.

How can companies be eligible for the pilot program?

In order to be eligible under the pilot program, companies have to (i) voluntarily self-disclose, (ii) cooperate fully and (iii) remediate timely and appropriately with regard to FCPA matters.

- *Voluntary Self-Disclosure:* Not every self-disclosure is deemed voluntary by the DOJ. In order for a self-disclosure to be deemed voluntary, it should not have been made due to any laws, agreements or contracts. In addition, the disclosure will have to be made (i) prior to an imminent threat of government action; (ii) in a reasonably prompt time following the company being aware of the conduct and (iii) by disclosing all facts known to the company, including about individuals involved. According to the Guidance, it is the company's burden to prove the timeliness of the disclosure.

- *Full Cooperation:* The following are the demanding criteria to be considered as fully cooperative under the pilot program:

  - Disclosure of all facts regarding the wrongdoing and individuals involved in criminal acts on a timely basis,
  - Proactive and not reactive cooperation; this means that the company should provide all information that it has with regard to the violation, rather than just answering the questions asked by the government,

- Preservation, collection and disclosure of all relevant documents and information,

- Timely updates regarding the company's internal investigation,

- De-confliction of an internal investigation with DOJ, if requested,

- Provision of all facts relevant to the potential criminal conduct by third parties,

- Making the employees, including the ones abroad and former, available for interviews,

- Disclosure of all relevant facts gathered during the company's investigation,

- Disclosure of overseas documents, their location and who found them,

- Translation of relevant documents and

- Facilitation of third party production of documents and witnesses from foreign jurisdictions.

The Guidance emphasizes that full cooperation does not require a waiver of attorney-client privilege. Further, companies may decline to provide the abovementioned information where foreign laws prevent them from doing so. However, it will be the company's burden to establish the foreign law prohibition.

- *Timely and Appropriate Remediation:* Eligibility under this criterion should be evaluated on a case by case basis. However, the following is said to be generally required:

- An effective compliance program is crucial, which includes but is not limited to the following:

(i) Whether the company has a culture of compliance,

(ii) Dedication of sufficient resources to compliance,

(iii) Whether the compliance function is independent,

(iv) Whether the compliance program is based on the appropriate risk assessment and tailored accordingly,

(v) The quality and experience of the compliance personnel,

(vi) How the compliance personnel compensated and promoted when compared with the other employees,

(vii) The auditing of the compliance program,

(viii) Reporting structure of the compliance personnel,

- An appropriate disciplining system for employees and

- Any further steps that recognizes the seriousness of the corporation's misconduct.

All in all, the Guidance is another effort by the DOJ to make sure that the FCPA violations are sanctioned and deterred. Companies are encouraged to self-disclose to get reductions on heavy fines imposed by way of the pilot program. The effectiveness of the pilot program for the following year will determine if the pilot program is to settle into general DOJ practices.

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ELİG is committed to providing its clients with high-quality legal services. We combine a solid knowledge of Turkish law with a business-minded approach to develop legal solutions that meet the ever-changing needs of our clients in their international and domestic operations.

Our legal team consists of 65 lawyers. While we take pride in being able to assist our clients in almost all fields of law, the main focus of our practice consists of corporate law, mergers & acquisitions, competition law, EU law, banking and finance, litigation, technology, media and telecommunications law, internet law, data protection and privacy law, energy, oil and gas law, administrative law, real estate law, white collar irregularities, and intellectual property law.

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

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

All members of ELİG team are fluent in English.

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