ISSN 2147 – 558X

ELİG
GÜRKAYNAK
Attorneys at Law

LEGAL INSIGHTS QUARTERLY

December 2016 – February 2017

Corporate Law

Distribution of Advance (Interim) Dividend

Capital Markets Law

Significant Transactions and Shareholder's Right to Exit the Company

Banking and Finance Law

Interface between General Terms and Conditions and Credit Loan Agreements

Competition Law / Antitrust Law

The Turkish Competition Board has Published the Reasoned Decision on the Preliminary Investigation against MEDAŞ

The Board's Decision is Annulled in Diye Danışmanlık

The Board Clears Philips from Allegations of Abuse of Dominance

The Competition Authority Publishes Cement Sector Inquiry Report

Labor Law

Termination of Employment Agreements due to Insufficient Performance

Property Law

Overview of the New Law Regulating Movable Property Pledges in Commercial Actions

Litigation

The High Court of Appeals Rules that Judges cannot Resort to Experts in Assessment of Likelihood of Confusion in Trademarks

Telecommunications Law

Regulation on Electronic Communications Infrastructure and Information System

Data Privacy Law

Employee Monitoring under the Brand New Data Protection Law

What to Understand from the Definition of Personal Data

Regulation on Processing and Protecting the Privacy of Personal Health Data

Retail Trade Law

An Overview of the Long-Awaited Regulation on Retail Trade

Real Estate Law

Overview of the New Communiqué Regulating Coastal Investments

Anti-Dumping Law

New Developments in Steel Industry: Turkey's WTO Complaint against Morocco's Anti-Dumping Measures

White Collar Irregularities

2016 FCPA Enforcement Actions and Highlights

© 2016 ELIG, Attorneys-at-Law. All rights reserved.

LEGAL INSIGHTS QUARTERLY

December 2016 – February 2017

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

Aralık / December, İstanbul

Yayın Türü / Type of Publication
Yerel Süreli / Local Periodical

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

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

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

ISSN 2147 – 558X

Preface to the December 2016 Issue

This issue, the banking and finance law section discusses whether the general terms and conditions in credit agreements would be valid in the face of the provisions regulating general terms and conditions in the Code of Obligations No. 6098.

On the competition law front, this issue explores Turkish Competition Board's reasoned decision on the preliminary investigation into allegations that MEDAŞ violated Article 6 of Law No. 4054 on the Protection of Competition by engaging in discriminatory behavior while evaluating applications for unlicensed electricity production by rejecting access to network requests of the complainants in favor of the producers of its own economic entity.

This issue the data privacy law section attempts to answer the significant question of to what degree employees might be monitored by their employers in light of the new Law No. 6698 on Protection of Personal Data.

Finally, on the white collar irregularities front, this issue analyzes 2016 FCPA enforcement actions taken by the DOJ and SEC.

This issue of the Legal Insights Quarterly addresses these and several other topical legal and practical developments, all of which we hope will provide useful guidance to our readers.

December 2016

Corporate Law

Distribution of Advance (Interim) Dividend

Communiqué on Distribution of Advance Dividend ("Communiqué"), introduced by the Ministry of Customs and Trade, regulates the procedures and principles of distribution of advance (interim) dividend within the relevant fiscal year in (i) joint stock companies that are not subject to the capital markets legislation, (ii) limited liability companies, and (iii) limited partnerships divided into shares. As the latter is almost non-existent in daily business life, this article concentrates on joint stock companies and limited liability companies.

1. What is "dividend" and "advance dividend"?

While "dividend" refers to the monetary amount which is distributed to shareholders or other relevant persons upon a decision of the general assembly over the annual net profit or free reserves, "advance dividend" refers to the monetary amount which is calculated over the profit generated in accordance with the interim period financial statements, distributed to shareholders upon a decision of the general assembly and to be ultimately deducted from the dividend.

In this respect, the Communiqué enables companies to distribute advance dividend in certain circumstances provided that this amount will be deducted from the net profit generated by the end of the relevant fiscal year. The companies cannot distribute the dividend at the end of the relevant fiscal year or further advance dividends unless such deduction is made.

2. Conditions for distribution of advance dividend

As per Article 5 of the Communiqué, in order for a company to distribute advance dividend, the following conditions should be met:

i. the company should have made profits in the respective interim period/periods preceding the distribution of advance dividend, according to the respective interim financial statements (3-month, 6-month or 9-month periods),

ii. general assembly of the company should resolve on distribution of advance dividend.

3. Calculation of the advance dividend

As per Article 7 of the Communiqué, the advance dividend is calculated through deduction of (i) total loss carried over from previous years, (ii) tax, funds and financial allowances, (iii) legal reserves which shall be set aside in accordance with the laws and articles of association, and (iv) rights of the shareholders holding privileged shares, or other relevant persons having the dividend right certificate, or who are entitled to dividend from the profit made in the interim period. However, the advance dividend to be distributed cannot exceed half of the total advance dividend.

If the company makes profit in the following interim periods as well and intends to distribute further advance dividends, the new advance dividend shall be calculated through deduction of the previously distributed advance dividend(s) together with the foregoing items, from the profit made within the relevant interim period. In this case, again, the advance dividend to be distributed cannot exceed half of the total advance dividend amount.

4. Requirements set forth in the Communiqué for the general assembly meetings and resolutions

Article 6 of the Communiqué determines meeting and decision quorums in order for the companies to resolve distribution of advance dividend.

In this respect;

- in joint stock companies (and limited

partnerships divided into shares) at least 1/4 of the shareholders or their representatives should be present at the meeting to constitute the "meeting quorum" whereas the "decision quorum" is votes of the majority who attended the meeting unless the company's articles of association stipulates a higher quorum;

- in limited liability companies, decision quorum constitutes with majority of the votes represented in the meeting, unless the company's articles of association stipulates a higher meeting quorum and/or a specific decision quorum.

Article 6 of the Communiqué also requires that the general assembly resolutions as to distribution of advance dividend shall include the following wording:

"a) At the end of the relevant fiscal year, if the company cannot make net profit to cover the advance dividend which has been distributed within the year;

(i) excessive amount of the advance dividend shall be deducted from the company's free reserves shown in the previous year's balance sheet,

(ii) if the free reserves cannot compensate for the excessive advance dividend, such portion of the advance dividend shall be returned by the shareholders to the company upon notification of the management body.[1]

b) At the end of the relevant fiscal year, if the company incurs loss;

(i) general legal reserves and free reserves (*if any*) shown in the previous year's balance sheet shall be used to compensate the loss in the first place. If they cannot cover the loss, all of the advance dividend distributed within the year shall be returned by the shareholders to the company upon notification of the management body,

(ii) after deduction of the general legal reserves and free reserves from the loss incurred in the relevant fiscal year, remaining part of the free reserves shall be deducted from the advance dividends. As a result of this, if the amount of the advance dividend distributed within the fiscal year is higher than the remaining part of the free reserve funds, the exceeding portion shall be returned by the shareholders to the company upon the notification by the management body."

5. Duties of the management body

Upon obtaining the decision on distribution of advance dividend by the general assembly, the management body of the company shall be liable to prepare a report, and declare in such report that the interim period financial statements that serve as a basis for distribution of advance dividend have been prepared in conformity with the "fair presentation principle" and that the advance dividend to be distributed has been calculated in compliance with relevant articles of the Communiqué as to calculation of the advance dividend as explained under section 4 above.

The management body should also adopt a resolution regarding payment procedure of the advance dividend to the shareholders.

6. Distribution and payment of the advance dividend

The advance dividend may only be distributed to the shareholders within 6 weeks following the resolution of the management body, *pro rata* to their shares regardless of the privileged shares.

If a shareholder is in debt to the company, the debt amount is deducted from the advance dividend to be distributed.

The advance dividend shall not be distributed to non-shareholder persons who are entitled to the dividend, non-shareholder management body members, or (non-shareholder) persons holding dividend right certificates.

[1] Management body refers to "board of directors" in joint stock companies and limited partnerships divided into shares, and to "board of managers" or the "manager" in limited liability companies.

If the company increases its share capital following distribution of the advance dividend and the company decides within the same financial year to further distribute advance dividend, new shareholders, if any, shall have priority during distribution of the advance dividend until they obtain an advance dividend in the amount equaling the amount distributed to previous shareholders.

Capital Markets Law

Significant Transactions and Shareholder's Right to Exit the Company

In principle, the board of directors of a joint-stock company is entitled to manage the company. In other words, except for issues that are explicitly among the authorities of the general assembly, the board of directors is authorized to resolve any matter.

However, in some cases, in order to protect the shareholder's rights and due to the principle of equality between the shareholders, regulators set forth more conservative provisions in favor of the shareholders.

"Significant transactions" and shareholder's right to exit the company are also among the aforementioned provisions. The Capital Markets Board ("Board") is not satisfied with a resolution of the board of directors regarding a significant transaction but it also obliges companies subject to the capital markets legislation to hold a general assembly meeting to approve such transactions. Unless the general assembly approves such transaction, the company may not finalize the "significant transaction" in question.

"Significant transactions" and shareholder's right to exit the company are set forth in general under Articles 23 and 24 of the Capital Markets Law No. 6362, and further details regarding the same are set forth under the Communiqué on Common Principles Regarding Significant Transactions and Shareholder's Right to Exit the Company (II-23.1) ("Communiqué").

Companies, whose shares are offered to public (or qualify as such) are subject to the foregoing regulations.

1. Significant Transactions

As per Article 5(1) of the Communiqué, following transactions are deemed as "significant transactions" provided that they also meet the significance criteria set forth in Article 6 of the Communiqué:

1. to be a party to merger or demerger transactions, issuance of decisions to change the type of the company or to terminate the company;

2. to transfer, rent or establish a right *in rem* on whole or an important part of the assets of the company;

3. to change the field of activity of the company totally, or to a significant extent;

4. to create privileges attached to shares, or change the content or subject of existing privileges;

5. to decide to be delisted;

6. to acquire or lease from its related parties assets that have significance; or

7. in the case of capital increases planned through issuance of rights, if sum of the funds to be derived from capital increase are to exceed the existing capital of the company, and if such funds are to be used in partial or full repayment of debts (a) owed to related parties as defined in the relevant regulations of the Board, and (b) arising from transfer of non-cash assets to the company.

The foregoing transactions are not numerus clauses. The Board has the right to qualify a transaction of a company as a significant transaction if such transaction falls within the scope of Article 5(2) of the Communiqué.

The board of directors is obliged to adopt a resolution regarding the foregoing transaction including justifications as to the significant transaction in question and then this resolution should be disclosed to public, by indicating the votes of independent board members, together with the exercise price applicable for the right to exit, within the framework of the regulations of the Board pertaining to public disclosure of material events. For companies that are also subject to the Capital Markets Law although their shares are not publicly traded, it is not mandatory to disclose at this stage, the exercise price applicable for the right to exit.

Votes of the independent board members in the company, with respect to significant transactions have great importance since they are also responsible to redress the balance between different stakeholders, and to protect their rights equally and independently. Thus, before voting, they should use their right to demand information regarding the significant transaction in hand and ask questions if anything seems to be incoherent.

2. General Assemblies Concerning Significant Transactions

Significant transactions should be submitted to the approval of the general assembly following the resolution of the board of directors in this respect, since these transactions directly affect shareholding rights of the shareholders. The following shall be included in the agenda of the general assembly meeting at which approval of the significant transactions will be voted: (i) existence of the right to exit the company for shareholders who attend the general assembly meeting and record their dissenting vote to the minutes, (ii) exercise price applicable for the right to exit, and (iii) procedure of the exercise of such right.

The general assembly's decision relating to significant transactions can be obtained by affirmative votes of at least two-thirds of the shares represented in the general assembly meeting, regardless of the meeting quorum, unless a heavier quorum is stipulated in the articles of association. However, if at least half of the shares representing the share capital are present at the meeting, decision quorum shall constitute with the affirmative votes of majority of voting shares present in the meeting, unless a heavier quorum is stipulated in the articles of association.

Provisions in articles of associations reducing the quorums set forth above are invalid.

3. Right to Exit

Since significant transactions generally cause essential changes to the structure of the company or lay a burden (financial or otherwise) on the company, regulators grant the shareholders with the right to exit the company, if they are not happy with significant transactions.

Main purpose of such right is to protect rights and investments of the minority shareholders and to introduce a mechanism for minority shareholders to protect themselves against mismanagement of the company.

Shareholders or their proxies who attend the general assembly meeting with the agenda of discussions on significant transactions, and record their dissenting votes to the minutes shall have the right to exit the company by selling their shares to the company.

Where a shareholder or its proxy is unjustly prevented from attending a general assembly meeting relating to discussions on significant transactions, or a due invitation is not made for the general assembly, or the meeting agenda is not duly announced, the right to exit the company is applicable without seeking the conditions of a dissenting vote at the general assembly and lodging a dissenting opinion in the meeting minutes.

Where a share is restricted by a right of *usufruct*, and its voting rights are used by holders of the *usufruct* right, such right holders cannot exercise the right to exit the company.

In this case, only the shareholder or its proxy has the right to attend the general assembly meeting and use a negative vote for the relevant transaction and lodge a dissenting opinion in the minutes, in order to use its right to exit the company.

The exercise of a shareholder's right to exit the company shall commence within 6 business days (at most) starting from the date of the general assembly meeting. The period for the exercise of such right cannot be less than 10 business days and no more than 20 business days.

Right to exit the company shall be used through an intermediary institution. The Board, upon request, may grant an exemption to such rule for companies whose shares are not traded in the stock exchange. Value of the shares (of the shareholder exiting the company) shall be paid to the shareholder, applying to the intermediary institution for exercise of their right to exit, in no later than the business day following the date of sales.

Shareholders wishing to use their right to exit are obliged to use this right for all of the shares they hold, regardless of different classes of shares, as the case may be.

Value of the shares subject to the right to exit shall be paid fully in cash.

4. Cases not Triggering the Right to Exit

For the sake of clarity, regulators set forth certain exemptions to significant transactions which trigger the shareholder's right to exit, in order to prevent any question marks which may arise in practice.

Accordingly, the following significant transactions would not trigger shareholders' right to exit the company within the scope of provisions of the Communiqué:

a) Transactions required to be executed pursuant to other relevant legislation which are applicable on the company;

b) Transactions executed by companies whose management control belongs to a governmental authority;

c) Removal of all of the privileges of the shareholders without consideration, or limitation on privileges in terms and scope;

d) Change of the status of the investment companies, cessation of the status of such companies and change in privileges in this regard;

e) Transactions which oblige takeover bids as a result of a significant transaction, or transactions approved by the Board for voluntary takeover bids;

f) Demerger transactions that establish a new partnership in which the shareholding structure of the demerged company is preserved; merger and demerger transactions in simplified form;

g) In case the transaction is made by judicial authorities or for the purposes of collection of public receivables in accordance with a judgment, the immediate buy back of the assets subject to transaction through financial leasing; and asset transfer to issue a lease certificate, security based assets or a mortgage or warranted security;

h) Lease of assets in the portfolio of real estate investments companies;

i) Establishing rights *in rem* over the assets in the portfolio of real estate investment companies;

j) Establishing rights *in rem* over the assets of the companies on behalf of themselves, or in favour of the companies consolidated in the financial statements;

k) Provided that it is deemed acceptable by the Board, transactions where, as determined by a special-purpose independent audit report, transfer of ownership of no-economic-value properties that are included in assets of a company which has lost at least half of its share capital according to its financial

statements issued in accordance with the pertinent regulations of the Board will terminate the said loss of share capital; and

l) Merger and liquidation transactions to which a special-purpose acquisition company is a party.

In cases that do not trigger the right to exit, except for the events requiring a general assembly meeting pursuant to other relevant regulations, for approval of the significant transaction, it is sufficient to obtain a decision of board of directors, and a separate general assembly meeting is not required.

Banking and Finance Law

Interface between General Terms and Conditions and Credit Loan Agreements

One of the novelties of the Turkish Code of Obligations ("Code"), which went into force in 2012, is that it codified provisions applicable to general terms and conditions, without making any distinctions as to whether one of the contracting parties is a consumer.[2] The first paragraph of Article 20 of the Code defines general terms and conditions as provisions of an agreement which are unilaterally prepared by one party to be used in many similar agreements in future. What is aimed by the codification of general terms and conditions is to grant protection to the party which did not have any role or a say during the preparation of a document whose execution is imposed by the counterparty.[3] The second paragraph of the same article further stipulates that the content of the agreements, which are prepared for the same purpose, do not necessarily have to be identical to be deemed general terms and conditions. As long as a provision of an agreement coincides with the definition provided under the first paragraph of Article 20, the differences within the texts are deemed insignificant. This is to prevent preparation of typical agreements, which only slightly differ from each other, to circumvent the law.[4] Additionally, the third paragraph of Article 20 stipulates that clauses indicating such provisions have been discussed and then accepted by the parties, would not solely be sufficient to prevent the execution of Article 20 and such provisions would fall within scope of the relevant article nevertheless.

The consequence of one provision being deemed a general term and condition is stipulated under Article 21 of the Code. As per the relevant article, it is only possible to deem such provision, which is against benefits of the counterparty, indeed a part of an agreement, only if (i) the issuer party proves that it informed the counterparty explicitly regarding existence of such provision, (ii) that it indeed provided the counterparty with the opportunity to learn the content of such provision and (iii) that the counterparty has indeed accepted the existence thereof. In case the issuer party fails to prove the foregoing, the relevant provisions will be deemed not to be included within the agreement text. As for other provisions within the agreement, they will remain to be effective.

As stated above, the importance of the codification brought by the Code is that it does not make any distinctions as to whether one of the contracting parties is a consumer.[5] In fact credit agreements are explicitly referred to within the official reasoning of the Code.[6] Accordingly, it shall provide protection also with respect to commercial agreements, to which at least one of the parties is a merchant.

---

[2] The previous law on the protection of consumers, the law numbered 4077, was amended in the year 2003 to regulate general terms and conditions found within agreements, to which one of the parties was a consumer.
[3] Borçlar Hukuku Genel Hükümler (Law of Obligations General Provisions), Volume I, M. Kemal Oğuzman, M. Turgut Öz, p.170.

[4] 6098 Sayılı Türk Borçlar Kanunu Şerhi (Commentary of Turkish Code of Obligations numbered 6098), Volume I, Turgut Uygur, p. 303.
[5] The previous law on the protection of consumers, the law numbered 4077, was amended in the year 2003 to regulate general terms and conditions found within agreements to which one of the parties was a consumer.
[6] Official Reasoning of Article 21 of the Code.

Professor Oğuzman explicitly states in his book that “a merchant (be it a real or a legal person) entering into an agreement with a bank for obtaining credit may also resort to Articles 20 – 25 [articles regarding general terms and conditions] of the Code”.[7] Another author also conveys that the legal writing accepts that the credit agreements signed between two parties, which are both merchants, shall be subject to an assessment under general terms and conditions provisions of the Code.[8] What this means is that the credit agreements signed between banks and merchant counterparties shall also be subject to the test posed by the Code and certain provisions therein could be deemed invalid when the relevant provisions fail to pass the relevant test. Accordingly, counterparties would be able to claim that certain relevant provisions were not formed through mutual negotiation and thus are void.

All said, in cases where the counterparty is also a merchant, such claim could be deemed to be in breach of Article 18 of the Turkish Commercial Code No. 6102, which stipulates that each merchant should act as a prudent businessman with respect to all her/his activities regarding her/his business. A merchant claiming that it signed an agreement without examining and negotiating it and without being provided the opportunity to learn the content thereof would not coincide with the principle of merchants being prudent.

Such claim of the counterparty, that it signed an agreement without having the opportunity to read/negotiate it thoroughly, is also against the natural flow of commercial life, since merchants are obliged to guarantee themselves against any act which puts them under obligation(s). Accordingly, the foregoing could be utilized as a defense mechanism, if a merchant third party were to claim the voidness of certain general terms and conditions.

What happens then to provisions within credit agreements that are widely in use, such as, for example, bank’s unilateral right to increase interest rates? The High Court of Appeals, during the era of the previous Code of Obligations, did acknowledge banks’ unilateral right to determine interest rates,[9] with the conditions that such determination is made in line with the principle of good faith,[10] is not applicable retroactively[11] and that the counterparty is notified of such change.[12] That said, Article 24 of the Code explicitly stipulates that the articles stipulated within an agreement by the issuer, granting itself a unilateral right which would be against counterparty’s rights, shall be deemed “non-written”. As the Code recently went into force, *i.e.* June 2012, the precedents of the Court of Appeals in light of the aforementioned article, are yet to shed light on what the standing of such provisions within the agreements will be. That said, since Article 24 refers to “unilateral” amendments, bilateral amendments shall be deemed to fall out of scope of the relevant article.

---

[7] Borçlar Hukuku Genel Hükümler (Law of Obligations General Provisions), Volume I, M. Kemal Oğuzman, M. Turgut Öz, p.170.

[8] Kredi Tahsisi ve Kredi Sözleşmeleri (Granting of Credit and Credit Agreements), A. Mehmet Özdeniz, Jale Kuleli, p. 29.

[9] Decision of the Court of Appeals for the 19th Civil Circuit, dated Feb. 4th, 1997, numbered E. 1996/3416 and K. 1997/831; decision of the Court of Appeals for the 19th Civil Circuit, dated March 26, 1996, numbered E. 1996/6 and K. 1996/2976; decision of the Court of Appeals for the 19th Civil Circuit, dated November 26, 1994, numbered E. 1994/6472 and K. 1994/11467.

[10] Decision of the Court of Appeals for the 19th Civil Circuit, dated Feb. 4th, 1997, numbered E. 1996/3416 and K. 1997/831; decision of the Court of Appeals for the 19th Civil Circuit, dated March 26, 1996, numbered E. 1996/6 and K. 1996/2976; decision of the Court of Appeals for the 19th Civil Circuit, dated November 26, 1994, numbered E. 1994/6472 and K. 1994/11467.

[11] Decision of the Court of Appeals for the 19th Civil Circuit, dated November 26, 1994, numbered E. 1994/6472 and K. 1994/11467.

[12] Decision of the Court of Appeals for the 19th Civil Circuit, dated March 26, 1996, numbered E. 1996/6 and K. 1996/2976; decision of the Court of Appeals for the 19th Civil Circuit, dated November 26, 1994, numbered E. 1994/6472 and K. 1994/11467.

The Court of Appeals mentioned in some of its decisions that the provisions, which entitled a bank to request early repayment fee, conflicting with Article 20 of the Code, should be deemed as "non-written".[13] On the other hand, the Court of Appeals ordered that a bank should be entitled to request a reasonable fee from its borrowers.[14] As there are not yet many established precedents regarding due practice under Articles 20 and 25 of the Code, it is still a matter of discussion among the practitioners. In the meantime, what should carry out importance is that such matters are tried to be stipulated within the credit agreement so as to not allow counterparties' possible claims that the matters were not stipulated upon both parties' negotiation and thus should be deemed invalid. Though a successful claim as to the failure of the abovementioned test (thus as to invalidity of certain relevant provisions) is more difficult when realized by a merchant, due to her/his supposed prudence, it would be recommendable to preserve correspondence, which takes place between relevant parties, indicating that the agreement text and further information as to possible negative effects of enforcement of the text was indeed conveyed to the relevant counterparty for its examination and parties' negotiation.

Competition Law / Antitrust Law

The Turkish Competition Board has Published the Reasoned Decision on the Preliminary Investigation against MEDAŞ (02.03.2016, 16-07/134-60)

The Turkish Competition Board ("Board") published the reasoned decision on the preliminary investigation against Meram Elektrik Dağıtım A.Ş. ("MEDAŞ"), the exclusive electricity distributor within Konya, Karaman, Aksaray, Nevşehir and Kırşehir, based on Göksu Enerji Elektrik Üretim ve Ticaret A.Ş.'s ("Göksu Enerji"), Saturn Power Enerji Sanayi ve Ticaret A.Ş.'s ("Saturn") and FRT-GES Enerji San. ve Tic. A.Ş., ŞFK-GES Enerji San. ve Tic. A.Ş., PAGES Enerji San. ve Tic. A.Ş., SAGES Enerji San. ve Tic. A.Ş. and SNM-GES Enerji San. ve Tic. A.Ş.'s (together "GES Companies") complaints that MEDAŞ has violated Article 6 of Law No. 4054 on the Protection of Competition ("Law No. 4054") by engaging in discriminatory behavior while evaluating applications for unlicensed electricity production by rejecting access to network requests of the complainants in favor of the producers of its own economic entity.

In its reasoned decision, the Board firstly stated that connection to the distribution network (grid) is required in order to sell the surplus energy in scope of unlicensed electricity production. In this respect, the entry to the market for unlicensed production activities depends on the evaluation conducted by distributor companies and their approval. Therefore, while defining the relevant product market as "the market for electricity distribution services" the Board stated that the grid connection services should be regarded as a part of the distribution activities. Additionally, the Board also separately defined the relevant product market as "electricity production market" as MEDAŞ's activities subject to the allegations also produce effects on electricity production activities. Furthermore, the Board decided that the geographic scope of the abovementioned markets are limited to the cities Konya, Aksaray, Niğde, Kırşehir, Nevşehir and Karaman, where MEDAŞ provides its electricity distribution services.

With regards to the review conducted under Article 6 of Law No. 4054, the Board found that MEDAŞ is in a dominant position within the scope of the relevant geographic market. Electricity distributors in Turkey are in a dominant position in each distribution zone due to natural monopoly characteristic of the

---

[13] Decision of the Court of Appeals for the 13th Civil Circuit, dated April 29, 2014, numbered E. 2014/13315 and K. 2014/13503.

[14] Decision of the Court of Appeals for the 11th Civil Circuit, dated December 8, 2014, numbered E. 2014/17411 and K. 2014/19233.

distribution networks on the local level. Furthermore, MEDAŞ is the only authorized undertaking that receives and evaluates the applications for unlicensed production, and provides the physical grid connection of the unlicensed production facilities, within the geographical market. Therefore, the Board decided that, the allegations related to MEDAŞ's discriminatory behavior regarding allocation of limited substation capacities for the unlicensed electricity production applications should be reviewed under Article 6 of Law No. 4054, in order to determine whether MEDAŞ's conduct constitutes an abuse of dominance. The Board stated that cases where the electricity distributors decline the applicants' requests for grid connection due to objective and valid grounds and would not constitute an abuse of dominance; whereas it might constitute a discriminatory behavior in scope of abuse of dominance if MEDAŞ has allocated grid capacity to the undertakings/persons that are within its own economic unity, while declining other applications due to non-technical reasons.

The Board reviewed every access request of the complainants separately and evaluated whether the refusal decisions to access to network have valid and objective grounds. The Board found that access requests made by the complainants have been declined based on objective reasons such as distance, capacity. Furthermore, the Board could not find any evidence showing that MEDAŞ has engaged in discriminatory behavior in favor of the companies within its own economic entity when assessing the access requests. In light of the above, the Board refrained from initiating an in-depth investigation with a majority decision.

The Board's Decision is Annulled in Diye Danışmanlık

The decision of the Board in case Diye Danışmanlık (12.12.2014, 14-51/900-410) where the Board (i) did not find any anticompetitive practice that would trigger a full-fledged investigation (ii) while it considered it necessary to render an Article 9(3) decision ordering Yurddaş and Partners ("YP") to cease its Media Barometer system; has been cancelled by two different judgments of two different chambers of the Turkish Administrative Courts. The case is interesting as it gave rise to the annulment of the Board's decision through two different judgments based on two different legal reasoning. The relevant judgments have been rendered in two separate annulment proceedings initiated by the investigated company (YP) and the complaining party (Association of TV Broadcasters).

For background information, the Association of TV Broadcasters filed a complaint with the Turkish Competition Authority on October 5, 2014 alleging that (i) YP had abused its dominant position in the market for media auditing services through its Media Barometer system, by way of facilitating the establishment of a cartel in the market for television channels' advertisement space and (ii) the undertakings receiving media auditing services from YP are engaging in a "buying cartel" concerning the prices for advertisement spaces.

In response to the complaint, the Board analyzed whether there was a buying cartel between the advertisers using YP's Media Barometer system. As a result of its analysis, the Board found that there was no need to take action with respect to this allegation as some of the pieces of evidence were related to 1998 and 2005 (the statute of limitation thus being expired) and there was no evidence supporting the relevant allegations for the boycott plan in 2011.

As for the allegation on YP's abuse of dominant position via the Media Barometer system, the Board found no evidence proving that the exchange of information through the Media Barometer price pool system constitutes a violation in and of itself. Even though there is no document proving a price fixing agreement among the Media Barometer users, the Board however considered that such a system could have certain effects on the

advertisement unit time prices and payment terms. The Board concluded that (i) there was no document proving the existence of an anticompetitive agreement among the Media Barometer users and decided not to initiate a full-fledged investigation, (ii) however considering the competitive concerns that such a system could raise in the future, the Board found it necessary to submit an Article 9(3) letter, indicating that the relevant Media Barometer services should cease.

The Board's decision has been challenged twice: (i) before the 3rd Administrative Court of Ankara by YP and (ii) before the 16th Administrative Court of Ankara by the Association of TV Broadcasters (the complaining party before the Board).

The judgment of the 3rd Administrative Court of Ankara

The 3rd Administrative Court of Ankara first rendered a suspension of execution decision regarding the Board's 2014 decision in order to avoid the realization of any irreparable damage for YP (E.2015/101, 13.07.2015) and then few months later annulled the Board's decision (E.2015/101, 07.10.2015). The 3rd Administrative Court considered that the Board based its Article 9(3) decision on a speculative assessment as (i) the Board failed to consider the fact that the users of the Media Barometer were unable to access individual data on their competitors through such a system and (ii) it did not substantiate how such an information exchange could damage the competition in the market in the future. The 3rd Administrative Court observed that the Media Barometer system is only a pool which gathers information provided by the advertisers which allows the TV channels to determine their price policy individually by using the information contained in the relevant pool. As the Board failed to substantiate concretely how such a system could affect the competition in the market, the Court concluded that Article 4 of Law No. 4054 is not violated and the Board's decision should thus be annulled.

The judgment of the 16th Administrative Court of Ankara

The 16th Administrative Court rendered its own judgment on the same dispute in response to the annulment lawsuit initiated by the Association of TV Broadcasters seven months after the judgment of the 3rd Administrative Court (12.05.2016, 2016 /1534).

16th Administrative Court also decided that the Board's decision should be annulled on the ground that it is based on a contradictory reasoning. According to the 16th Administrative Court, if the Board were concerned about future anticompetitive effects of the Media Barometer system which justified the necessity to order YP to cease its relevant practices, the Board should have decided to initiate a full-fledged investigation in order to scrutinize if the relevant system is actually infringing Article 4 of Law No. 4054. However, according to the 16th Administrative Court, by deciding that there is no need to initiate a full-fledged investigation and that it was necessary to order an Article 9(3) decision on the undertaking, the Board rendered a contradictory decision which does not comply with the law, and which therefore should be annulled.

It follows from the foregoing that there are currently two different annulment judgments with respect to the Board's 2014 decision with two different reasoning. The appeal process against the judgments of the 3rd Administrative Court and 16th Administrative Court is still pending before the Council of State. Therefore, one could expect that the Turkish Competition Authority may bring the matter before the Council of State and render its final decision against YP after the finalisation of the appeal process.

The Board Clears Philips from Allegations of Abuse of Dominance

After an investigation process of thirteen months, the Board announced on October 14, 2016 the outcome of a high-profile investigation against Türk Philips Tic. A.Ş. ("Philips Turkey") into allegations of abuse of dominance.

The Board weighed the pieces of evidence, the written defenses and the investigation file to find that Philips Turkey did not violate Article 6 of Law No. 4054 and should not be subject to an administrative fine under Article 16 of Law No. 4054.

The nexus of the investigation was on the maintenance and repair of Philips-branded medical devices. The accusations submitted by a complainant emanated from alleged market practices of Philips Turkey which the complainant claimed ranged from price discrimination and applying dissimilar conditions between similarly-situated customers, excessive pricing on products sold to some customers and market foreclosure.

The defendant, Philips Turkey, demonstrated the lack of substantial evidence and utilized economic arguments to fortify its written defenses. While the reasoned decision is yet to be published, the Board's short decision stipulates that market research conducted by the investigation team in light of the defenses raised by Philips Turkey swayed the opinion of the Board to issue a no-go decision. The Board resolved that Philips Turkey did not violate Article 6 of Law No. 4054.

The decision is a candidate of forming a cornerstone in the abuse of dominance cases in the Turkish competition law jurisprudence as the reviewing process becomes increasingly oriented around economics arguments. The reasoned decision, which is expected to be published in the following months, is likely to provide insight on the abuse of dominance cases and the direction the Turkish competition enforcement will be heading to in the coming years.

The Competition Authority Publishes Cement Sector Inquiry Report

The Competition Authority ("Authority") has finally published its long awaited sector inquiry report into cement sector on November 2, 2016. The Board had launched the inquiry on May 8, 2014, citing the increasing number of complaints stemming from the industry. In its launch announcement, the Board had highlighted the increasing rate of complaints. The Authority, in its capacity of competition advocacy, collected input from the public and held a stakeholders conference on November 7, 2014 to canvass the challenges before the competition in the cement sector.

The Authority published its 177 page long report that contains certain extrapolations on grey Portland cement after two and a half years of consultations, collection of data and analysis. Notably, the report delves into detail on geographical markets, barriers to entry into the market, breakdowns on city /undertaking/product/client, long and short term fluctuations on cost and demand, profit maximization opportunities and efficiency levels. The report tries to utilize economic simulations to support and demonstrate its conclusions.

In sum, the report concludes that (i) there are some market barriers to entry due to logistics, economics and legal constrains, (ii) prices are directly affected from the conjuncture and the general outlook of the economy, (iii) the level of competition varies greatly between different cities, (iv) the cement prices are not directly affected from demand, seasonal effects and excess supply, and (v) the market does not have a high level of concentration as the market shares are not consolidated.

All in all, the sector inquiry report attempts to take a snapshot of the status of the sector from a number of perspectives including legal and economics.

Labor Law

Termination of Employment Agreements due to Insufficient Performance

Termination of employment must be considered as a last resort under any circumstance, employers are obliged to make a sincere effort not to terminate employment agreements. This rule is called "*ultima ratio*" principle and governs the entirety of Turkish labor law.

Pursuant to Article 18 of the Labor Law, insufficient performance is among valid reasons for termination. Although what constitutes insufficient performance is not defined within the Labor Law, it can be understood from Court of Appeals' decisions.[15]

As per the High Court of Appeals' precedents, there is insufficient performance where, for instance, an employee's performance is lower than the performance of the employees who undertake the same or similar works, or where an employee's concentration is lower than expected, or the employee fails to improve his/her abilities or knowledge, suffers from a lack of adaptation or a specific kind of sickness of the employee's keeps him/her from working constantly and efficiently.

Insufficient performance has to be determined objectively, in other words, the employer has to exclude its prejudice and personal preferences when determining and deciding on the insufficient performance of an employee. The objectivity principle here can be described as implementation of the same rules for each employee undertaking the same or similar works. When an employee's performance is first determined to be insufficient, in consideration of the above mentioned principle, the foregoing steps should be taken:

i. The employer shall issue a warning letter, apprising the employee of his/her insufficient performance, elaborating the expected performance standards and stating that his/her improvement in his/her performance will be closely watched over.

ii. The employer has to make sure that the employee undergoes a certain performance evaluation system by taking into consideration the employee's opinion as well.

iii. In case the employee fails to achieve the performance targets detailed in performance evaluation system, the employer should obtain the employee's written defense as to his/her failure.

iv. If the employer concludes that the employee's defense does not justify his/her insufficient performance, the employer shall issue another warning letter regarding his/her failure to reach the standards set out by the employer. Following the service of this warning letter, the employee should be observed closely for a reasonable amount of time to see whether there is any improvement in performance. Here "reasonable amount of time" shall be determined on a case-by-case basis yet the High Court of Appeals' approach in this regard often requires 6 months' observation period before taking an action.

v. If the employee does not show any progress in his/her performance despite two separate warnings, the employer can now consider moving the employee to another position that may be appropriate for the employee's seniority and qualifications, within the same or another workplace of the employer, both local and abroad. According to Article 22 of the Labor Law, since such offer for changing the employee's position is an essential change in working conditions, the employer must notify the employee in writing with respect to the relevant change together with the reasons and the purpose of such change. So in order for such position change to be executed, the employee should consent to this change in writing within 6 business

---

[15] 7th Circuit of the Court of Appeals' decision dated 20.04.2016 and numbered 2015/41444 M, 2016/8802 D., 7th Circuit of the Court of Appeals' decision dated 30.03.2016 and numbered 2015/6447 M., 2016/7557 D., 22nd Circuit of the Court of Appeals' decision dated 16.03.2016 and numbered 2016/4391 M., 2016/8053 M.

days as of the date on which the offer for the position change is notified to the employee.

vi. Provided that the employee does not accept the position change offer within 6 days or there is not even a position available to the employee in the first place, the employer may be entitled to terminate the employment agreement on valid reason based on the employee's insufficient performance.

However, above all, the aforementioned criterion shall be constructed on the most essential targets that the employee is responsible to reach, in other words his/her expected performance criteria shall be determined beforehand under any circumstance. This is because according to the High Court of Appeals, if there is no starting point, there is nothing to compare either.

Accordingly, if the employer does not follow the foregoing steps, a reemployment lawsuit to be initiated against the employer within 1 month as of the termination date would result in reinstitution of the employee.

Property Law

Overview of the New Law Regulating Movable Property Pledges in Commercial Actions

Movable property pledges are regulated under the Turkish Civil Law No. 4721 ("TCL"). The general rule is movable property pledges can only be established by delivery of the property. However, Article 940/2 of the TCL permits establishing pledges without delivering the movable property if the pledge is registered before competent registry.

Merchants, including small and medium sized enterprises ("SME") have been obtaining sources in order to fund their commercial activities by pledging their commercial enterprises pursuant to the Law on Commercial Enterprise Pledges No. 1447 ("Law No. 1447"). Nevertheless, the Law on Movable Property Pledges in Commercial Actions No. 6750 ("MPP Law") is published in the Official Gazette on October 28, 2016 and will be in force as of January 1, 2017. The MPP Law will repeal the Law No. 1447 pursuant to Article 17 of the MPP Law.

a) Reasoning

The SMEs have difficulties to provide funding for their commercial enterprises and this situation causes severe disadvantages for the SME whilst competing with dominant companies. To that end, the MPP Law aims to obviate these severe disadvantages, therefore the SME will contribute to the development of the country. According to the first article of the MPP Law, the foregoing target will be achieved by popularizing the use of movable property pledges, extending the scope of movable properties that are subject to this law, providing publicity of the pledges and presenting alternative ways for foreclosing of the pledges.

b) Scope

The MPP Law's scope is stipulated under paragraph 2 of Article 1. According to the said article, the Law regulates the establishment of the movable property pledges, effect of the pledge to third parties, Movable Property Pledges Registry, determination of superiorities of the pledgees, obligations and rights of the parties and third parties, exercising of the pledges and determination of the procedure related to pledges. Thus, the law covers a large scope of movable property pledges but under any circumstance Turkish Civil Law, being the general law, will be applicable where there is not a regulating provision in the MPP Law.

Article 5 details and limits the scope by listing specifically the movable properties including receivables, intellectual property rights, any kinds of revenues, rental incomes, tenancy rights, any kinds of movable store equipment, commercial name and/or company name. And also legislator enabled the parties to establish the pledge over commercial enterprise either with its commercial name and company name

or separately, which is a different regulation from previous ones. Also, the MPP Law allows establishing a pledge over contingent receivables of the commercial enterprise.

c) Establishment of the Pledge
A pledge over movable properties is merely established by registering the pledge before Movable Property Pledges Registry. The pledge agreement can be issued in writing or electronically provided that the agreement is signed with an electronic signature. In order for the pledge agreement to register before Movable Property Pledges Registry, the signatures of the parties must be notarized or the agreement must be signed before the Registry.

d) Default
In case of the default of the pledger, pledgee will have the following rights:

(i) to request the transfer of the property right of the movable property, (ii) to assign its receivable to an asset management company, (iii) to use the rental or license right of the property and (iv) to file execution proceeding for foreclosure of the pledge.

e) Administrative Actions
Pledger or assignee of the pledged property may be imposed to administrative fine up to half of the debt that is secured by the pledge on complaint of the pledgees whose entire or part of the receivable could not be collected, if:

(i) they use the pledged property in a way that conflicts with this law,
(ii) the pledged property is not transferred to the pledgee in case of non-payment of the debt,
(iii) the pledged property is removed or damaged on purpose to violate pledgee's rights,
(iv) the property right of the pledge property is not transferred to the pledgee and this transfer is not registered before the Registry,
(v) they do acts to mislead the Registry.

Litigation

The High Court of Appeals Rules that Judges cannot Resort to Experts in Assessment of Likelihood of Confusion in Trademarks

The High Court of Appeals, Assembly of Civil Chambers has recently ruled on the issue of whether appointment of an expert for assessment of likelihood of confusion in trademarks is admissible under Turkish Procedural Law (E. 2014/11-696, K. 2016/778, 8.6.2016).

The dispute was regarding the annulment of a Turkish Patent Institute's decision. The plaintiff requested de-registration of the "coco-ball" trademark on the grounds that there is a likelihood of confusion with its registered trademark "cocobar" in terms of Article 7, 8 and 9 of Decree on Protection of Trademarks No. 556 ("Decree Law"). The local court rejected the plaintiff's claim upon an expert report, saying that there is no likelihood of confusion. Following the plaintiff's appeal, the High Court of Appeals reversed the local court's decision. After the reversal decision, the local court proceeded with the case in line with the reversal reasons, but rejected the case once again despite the "second" expert report - obtained in the post-reversal proceedings - saying the opposite of the first expert report, that there is indeed a likelihood of confusion between the trademarks in question. The plaintiff appealed the decision for the second time and the High Court of Appeals reversed the local court's decision again, on the ground that the court should have obtained a "third" expert report to settle the conflict between the first and second reports. This time the local court did not comply with the High Court of Appeals' decision and insisted on its decision. Upon this, the case was brought before the Assembly of Civil Chambers.

The Assembly of Civil Chambers first established that assessment of similarity of trademarks and likelihood of confusion in terms of Article 8 (1-b) is a matter of law.

Then the question rises whether this assessment, which is in its essence a law matter, has any aspect that is not related to law itself and may actually require specific or technical knowledge of an expert. The Assembly of Civil Chambers dwelled on this point since the procedure dictates that law-related issues, without exception, must be settled by the judge, not by experts appointed by the judge, and this rule is actually the very foundation of the legal system, based on Article 138 of the Constitution. So the Assembly of Civil Chambers concluded that legal issues cannot be left to court-appointed expert's knowledge and discretion, as this would ultimately mean assignment of judges' power to third parties, *i.e.* experts, which cannot be adopted by law in any way.

Based on this reasoning, the Assembly of Civil Chambers ruled that the issue of likelihood of confusion in terms of Article 8 (1-b) of Decree Law is a matter of law, therefore cannot be left to assessment of an expert. This ruling of the Assembly of Civil Chambers could fundamentally change how the courts proceed with cases where likelihood of confusion, or similar issues, will be examined, since the usual practice of the courts is to resort to experts for such an assessment. Now that there is this ruling, the courts could change the way they handle cases and may not involve experts when it comes to matters that are directly related to law.

Telecommunications Law

Amendments to the Authorization Regulation in Electronic Communication Sector

The Regulation on Electronic Communications Infrastructure and Information System ("Regulation") is published on the Official Gazette No. 29769 of July 13, 2016 and it came into force on October 13, 2016.

The Regulation introduces a data recording system in which the companies would enter their electronic communication infrastructure information, which is called electronic communication infrastructure information system. The Regulation sets data entry requirements for companies which operate services within the scope of electronic communication as well as requirements for auditing data protection related matters. According to the Regulation, companies not only have to make entries of their information regarding electronic communication infrastructure to the aforementioned system, but they also have to ensure that the information they entered are accurate and up to date.

Under Turkish telecommunications legislation, an operator is defined as a legal entity, which has the right to provide electronic communications services and/or to provide electronic communications network and to operate the infrastructure within the framework of authorization granted by the Information and Communication Technologies Authority ("ICTA").

According to Article 5 of the Regulation, all companies have to comply with the reference document regarding electronic communication infrastructure facilities which is published by ICTA. Moreover, all operators have to enter their information regarding electronic communication infrastructure to the system. Operators may be required to provide a remote access to their information systems to ICTA.

Article 6 of the Regulation sets the provisions related inspection mechanism. According to the relevant provision ICTA has the authority to conduct either an *ex officio* inspection or an inspection based on a third party complaint. ICTA may conduct the inspection to check whether the data within the information systems are accurate and it may also check whether the operators comply with the reference document regarding electronic communication infrastructure facilities, or not.

In case of violation of any provision of the Regulation, ICTA has the authority to impose administrative fines. The administrative fines would be based on the Regulation on the Information and Communication Technologies Authority Administrative Fines which was published on the Official Gazette No. 28914 of February 15, 2014.

Data Privacy Law

Employee Monitoring under the Brand New Data Protection Law

An employer may collect and process his/her employees' personal data for a variety of reasons starting from the very beginning of the employment relationship or even before. This mainly begins with the CV received by the employer, and continues until the end of the employment relationship or even further, in cases where the law allows the employer to do so. Personal data related to payroll and taxes are among the information employers usually collect. These data are vital for performance of the employment relationship as it is also employer's duty to act in accordance with his/her legal obligations (social security, payment of taxes) and in most cases, they are expressly regulated and imposed by the law.

However, there may be cases where the law does not oblige the employer to collect and process, but the collection or processing might be crucial for the employer's risk assessment and mitigation measures. Such collection and processing raises concerns related to privacy of employees' personal data. Employee monitoring is one of these cases where employers process their employees' personal data where there is a thin line between excessive invasion of the employee's privacy and the employer's legitimate interests in monitoring the employee. Turkey did not have a law providing principles and procedures pertaining to protection and privacy of personal data until April 7, 2016. Therefore the gap in the legislation was filled with court precedents interpreting general provisions of the Turkish law case by case.

On March 24, 2016, before a data protection law was enacted in Turkey, Turkish Constitutional Court rendered a decision on a complaint filed by employees (co-workers) who were laid off from their jobs due to their personal correspondence revealing their love affair. Their relationship was noticed by one of these employees' wife who reported this to the business executives of the company. Then the company conducted an internal investigation and fired both employees based on the e-mail messages exchanged between their corporate e-mail addresses, during the working hours. Employees claimed that this was a violation of their privacy of private life, employer denied these claims, and the dispute was eventually brought before the Constitutional Court. Turkish Constitutional Court rendered that monitoring of corporate e-mail accounts may not constitute violation of privacy of private life and that the employer's interference with the employees' privacy is proportionate, considering that the company rules expressly prohibited personal use of corporate e-mail accounts and there was no reason for the employees to have an expectation of protection with respect to their personal use of corporate e-mail accounts.

Then on April 7, 2016, Turkey enacted the Law No. 6698 on Protection of Personal Data (Law No. 6698), which sets out principles and procedures pertaining to personal data. The Law No. 6698 does not include any particular provisions pertaining to employment relations. However the Law No. 6698, which is quite similar to Data Protection Directive 95/46/EC, provides legal grounds for processing personal data without the data subject's explicit consent (Article 5 of the Law No. 6698). According to this provision a data controller (*e.g.* an employer) may process personal data without obtaining prior explicit consent of the data subject (*e.g.* an employee) if the processing is necessary for its legitimate interests. The Law No. 6698 does not provide measures of interpretation of its provisions, the secondary legislation has not been issued and there is no precedents pertaining to implementation of the Law No.

6698 since even the data protection authority has not been established yet. Therefore, there is an uncertainty as to application at this stage. Nevertheless, since the Law No. 6698 is based on the Data Protection Directive 95/46/EC, the European practice might guide us regarding interpretation of the provisions therein.

In the European Union, employers have the right to monitor employees' computers, such as desktops, laptops, servers and their Internet activities. Any monitoring must be proportionate considering the risks that the employers face with and as well as the legitimate privacy and other interests of workers. Any personal data processed during monitoring must be adequate, relevant and not excessive for the purpose for which the monitoring is justified.

European Court of Human Rights ("ECHR") evaluated that the act of verifying an employee's performance at work is a legitimate purpose of the employer to monitor the employee's corporate e-mail account (Halford v. United Kingdom). For example, writing private e-mails during working hours might reveal a misuse or hint that there is lack of attention which should have been paid to work related activities instead.

Nevertheless, the interests of the employee must be considered as well. In terms of checking employee's business e-mail account, the European case law provided certain conditions to establish a balance for competing interests at stake. According to ECHR, at the beginning, traffic and content data must be separated, as the court assumed that they represent a different level of privacy relevance, which has to be taken into consideration and analyzed (Copland v. United Kingdom). Second, it is important to check whether employer is prohibiting or allowing the private use of the corporate e-mail accounts. In the latter, the employee may have an expectation of higher level of privacy (Bãrbulescu v. Romania).

If an employer chooses to forbid the private use of the corporate e-mail account, he/she may think and act in accordance with the belief that the employee's corporate e-mail account does not contain personal e-mail messages. For instance, in an employment dispute Frankfurt Labor Court held that, using corporate e-mail account for private purposes constitutes violation of employment contract.

When it comes to the surveillance of e-mail content, employers must be cautious as it is a more serious intervention in the employee's general right of privacy. Content of a private e-mail message may contain intimate or confidential information about the employee. For example, employee may want to keep a reminder e-mail for the meeting of the employee's "anonymous group for alcoholics" private. Consequently, checking the content of employee's e-mail messages might be considered unlawful in some cases.

On the other hand, although reading content of e-mail messages is a more intrusive way of monitoring, this does not mean that an employer cannot randomly check compliance of his work instructions. ECHR acknowledges that monitoring the employee's e-mail messages, even their content, might be in accordance with law. That being said, if the employer runs across private e-mail messages during regular monitoring, which can be understood by the private nature of the subject line or the recipient for example, employer should stop reading that particular e-mail message immediately. If the employer continues reviewing the content, then this might exceed the limits of the employer's right to monitor its employees.

What to Understand from the Definition of Personal Data

Personal data is defined under the Law on Protection of Personal Data No. 6698 ("Turkish DP Law") which is enacted on April 7, 2016 based on the EU Directive 95/46/EC. According to Article 3 of the Turkish DP Law, personal data means any information

relating to an identified or identifiable real person.

Directive 95/46/EC of the European Parliament and of the Council, dated October 24, 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data ("EU Directive") on which Turkish DP Law is based on, also includes the same definition of personal data and it also defines the concept of identifiable person. According to Article 2 of the EU Directive, identifiable person is a person who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.

Even though the EU Directive defines identifiable person along with the definition of personal data, this definition is very broad and it reflects the intention of the European lawmaker for a wide notion of personal data.

According to Recital 26 of the EU Directive, to determine whether a person is identifiable, all the means to be used reasonably either by the controller or by any other person to identify the said person should be taken into account. It is also stated under the same recital that the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable.

Working Party on the Protection of Individuals with regard to the Processing of Personal Data ("Working Party") which is established under Article 29 of the EU Directive and which has advisory status, adopted an opinion regarding the analysis of the definition of personal data ("Opinion 4/2007"). In its opinion, Working Party divided the definition of personal data to four elements.

1st Element – Any Information: According to the Opinion 4/2007, the concept of personal data includes any sort of statements about a person. It covers "objective" information, such as the presence of a certain substance in someone's blood. It also includes "subjective" information, opinions or assessments. The term personal data includes information regarding the person's private and family life, but also information regarding whatever types of activity is undertaken by the individual (*e.g.* working relations or the economic or social behavior of the person).

It is not necessary for the information to be considered as personal data that it is contained in a structured database or file. Also information contained in an electronic document may be considered as personal data (*e.g.* in telephone banking, where the customer's voice giving instructions to the bank are recorded on tape, those recorded instructions should be considered as personal data or images of individuals captured by a video surveillance system can be personal data to the extent that the individuals are recognizable).

The Opinion 4/2007 also mentions biometric data such as fingerprints, retinal patterns, facial structure, voices, handwritten signature, particular way to walk or to speak, *etc*. as personal data.

2nd Element – Related to: In many situations the relationship between the data and the person can be easily established (*e.g.* the data registered in someone's individual file in the personnel office are clearly "related to" the person's situation as an employee).

In some situations, the information conveyed by the data concerns objects in the first instance, but not the individuals (*e.g.* the value of a house is information about an object). Data protection rules will not apply when this information will be used solely to illustrate the level of real estate prices in a certain district. However, under certain circumstances such information should also be considered as personal data. Indeed, the house is the asset of an owner, which will be used to determine the extent of this person's obligation to pay some taxes. In this context, it will be

indisputable that such information should be considered as personal data.

According to the Working Party, data relates to an individual if it refers to the identity, characteristics or behavior of an individual or if such information is used to determine or influence the way in which that person is treated or evaluated. It is stated under the Opinion 4/2007 that in order to consider that the data “relate” to an individual, a "*content*" element or a "*purpose*" element or a "*result*" element should be present.

3rd Element – Identified or Identifiable: Identification is normally achieved through particular pieces of information which are called “identifiers” and which hold a particularly privileged and close relationship with the particular individual (*e.g*. height, hair color, etc.) or a quality of the person which cannot be immediately perceived (*e.g*. a profession, a function).

The European Court of Justice, in one of its decisions, stated that "referring, on an internet page, to various persons and identifying them by name or by other means, for instance by giving their telephone number or information regarding their working conditions and hobbies, constitutes the processing of personal data."

According to the Working Party, publishing a woman’s X-Ray plates along with her first name (which is an unusual one) makes those X-Ray plates personal data. The Working Party has considered IP addresses as data relating to an identifiable person as well.

For information to be treated as ‘personal data’ within the meaning of Article 2 of the EU Directive, it is not required that all the information enabling the identification of the data subject must be in the hands of one person. Accordingly, the European Court of Justice in one of its decisions considered Internet Protocol address as personal data.

4th Element – Natural Person: According to the Working Party, the protection of data applies to natural persons. The right to the protection of personal data is universal and it is not restricted to nationals or residents in a certain country.

Information relating to deceased people should not to be considered as personal data according to the rules of the Directive, as the deceased people are no longer natural persons according to civil law. However, the data of the deceased may still indirectly receive some protection in certain cases (*e.g*. the information that a dead person suffered from hemophilia indicates that his/her son also suffers from the same disease, as it is linked to a gene contained in the X-chromosome).

The aforementioned four elements are included in the definition of personal data both under Turkish DP Law and the EU Directive.

Since the secondary regulation on Turkish DP Law is not enacted yet, what to understand from the definition of personal data is not clear. However, since Turkish DP Law is based on the EU Directive, the opinion of Working Party might be taken into consideration while evaluating an information whether it can be considered as personal data or not.

Regulation on Processing and Protecting the Privacy of Personal Health Data

The Regulation on Processing and Protecting the Privacy of Personal Health Data (“Health Data Regulation”) has recently been published on the Official Gazette, on October 20, 2016 and came into force on the same date.

This regulation is not only applicable to the health institutions and the data subjects whose personal data is processed, but also covers real persons and legal entities who process health data within the scope of a legislation. Therefore, all companies processing health data for reasons such as employment

procedures, periodic inspection or due to obligations arising from social security legislation will be subject to the provisions of the Health Data Regulation.

The purpose of the Health Data Regulation is to set out the procedures and principles to protect personal health data and to ensure its privacy, to regulate the provisions regarding the system which will be established to collect, process, transfer the personal health data and to access to such data and regarding the security and supervision of the systems in which the personal health data are recorded, and regarding notifications to the Ministry of Health ("Ministry") on the employee movements during the provision of health services.

Most of these definitions are in line with the Turkish DP Law, and certain additional definitions are introduced, which are specifically defined for the Health Data Regulation, such as, the Ministry, the information security administrator, the general management, personal health record system, committee, central health data system, undersecretary, health service provider, and intervention team of cyber incidents. Under the Health Data Regulation, personal health data means any kind of health information relating to an identified or identifiable real person.

Health Data Regulation sets out principles for the protection, processing, transferring and erasure of personal health data. As per Article 6 of the Health Data Regulation, the data processor is obliged to protect the privacy of personal health data and obey the rules and standards of data protection and processing which will be determined by the Ministry. In case of a data breach, health service providers should notify the Ministry in the form prescribed under the same provision. Health service providers should take all the necessary measures which will be determined by the Ministry in order to protect the privacy of the personal health data. If there is a suspicion of a possible data breach a notification should be made to the Ministry and a pre-drafted form should be used to make this notification. The notification may also be submitted to the Ministry by electronic means. After an investigation regarding the personal health data breach, following the investigation carried out on the relevant breach, data subjects will be informed by the Commission of Personal Health Data which is established under the Ministry.

Personal health data can be processed without the data subject's explicit consent; (i) to protect public health, (ii) to perform preventive medicine, medical diagnosis, treatment and nursing services and (iii) to manage and plan health services and financing; by the persons who are under confidentiality obligation (*e.g.* doctors) and by the authorized institutions and organizations.

Transfer of personal health data is regulated under Article 8 of the Health Data Regulation. The personal health data may be transferred; for preserving public health, performing preventive medicine, medical diagnosis, treatment and nursing services; managing and planning health services and financing by way of taking precautions which will be determined by the Data Protection Board, to the relevant institutions and organizations, if it is clearly regulated by laws. Additionally, data transfer in between the institutions and organizations which are requesting the data within the scope of their duties and responsibilities that are regulated by law and the Ministry along with the institutions and organizations under the Ministry would be regulated by a protocol prescribing the relevant measures for transfer of personal health data and other requirements. Moreover the requests for (i) transfer of personal health data abroad and (ii) any other transfer apart from the ones stated above will be governed by the Turkish DP Law and the Health Data Commission established under the Ministry shall evaluate these transfer requests. Therefore, it appears at this early stage that both the Board and the Health Data Commission will be in charge for personal health data.

Provisions for erasure of personal health data are also in line with the Turkish DP Law. In the event that the reasons for which the personal health data are processed are no longer valid, personal health data should be erased or anonymized by the data controller *ex officio* or upon the demand of the data subject, regardless of whether the personal data has been processed in accordance with the relevant legislation. In cases where there is an erasure request for a personal health data and if processing the data may be necessary for the establishment, exercise or defense of a legal claim, or if it is possible to use the data by law enforcement authorities, personal health data will be archived under a registry which will be established by the Ministry.

Finally, the Health Data Regulation fills the legal gap of how to protect personal health data, by regulating the abovementioned provision, along with other rules such as rights of the data subjects. Even though it refers to the Turkish DP Law in many of its provisions, the Health Data Regulation introduces a new regime on personal health data, in a more strict way.

Retail Trade Law

An Overview of the Long-Awaited Regulation on Retail Trade

After a long legislation period, the Regulation on Principles and Rules Applicable to Retail Business ("Regulation"), regulated as a secondary legislation to the Law on Regulation of Retail Trade, has been published on the Official Gazette on August 6, 2016 and entered into force as of its publication.

In general, mostly in parallel with the provisions under the Law, the Regulation includes detailed principles as to the contribution payments made by the suppliers or manufacturers, campaign sales as well as continuous discount sales.

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

(i) Contribution Payments

Article 4 of the Regulation, as in the Law, specifies conditions for provision of contribution payments made to chain stores, department stores, retail business and specifically authorized business (together as "Retailers") by suppliers and manufacturers.

As per Article 4, in order for the Retailers to be able to demand contribution payments from manufacturers or suppliers; (i) the contribution payment shall "directly affect" the product demand, (ii) type and rate of the payment and the contribution as well as period and/or volume of the service they will provide shall be specified in the agreement signed between parties and (iii) the service they will provide shall be limited with the period/volume specified in the agreement.

Although at first glance the foregoing rule brought also by the Law seems clearly put forward, in practice determination of a "direct effect" on product demand is what confuses market players the most. The Regulation, in this respect, exemplifies payments directly affecting the product demand as; contribution payments for promotional and placement activities, advertisements, magazines, announcements, shelf allocation, point of sale marketing expenses.

(ii) Campaign Sales

Article 7 of the Regulation lists activities to be considered as campaign sales. In this respect, activities such as provision of (i) discounted goods or services, (ii) increased amount of goods or services for the same price and (iii) free of charge or discounted additional goods or services for promoting goods, brands or businesses, encouraging and increasing product sale or strengthening the business's/brand's image are considered as campaign sales.

The same article also brings a limitation regarding campaign sales during business openings, closures, turnovers as well as change

in business address, activity area and liquidation. As per Article 7, duration of campaign sales cannot exceed a period of 3 months during business openings, closures, turnovers as well as address and activity area changes. Also during liquidation process to be conducted in accordance with the Turkish Commercial Code, this period will be limited to 6 months.

(iii) Continuous Discount Sales

Products which can be subject to continuous discount sales are listed under Article 10 of the Regulation. To that end, according to Article 9, retail businesses are obliged to use signs showing the continuous discount sales, if 70% of their product portfolio consists of the products which can be subject to continuous discounted sales.

Also, these signs should be positioned in retail businesses' front areas and entrance/front sections of discount sections in an apparent and readable way.

(iv) Shelf Allocation for Regional Products

The Regulation imposes shelf allocation obligation for regional products on Retailers which, as a field of operation, sell fast moving consumer goods (*i.e.* nourishment, beverage, cleaning and personal care products).

With this provision, Retailers will have to reserve at least 1% of their selling space for regional products (*i.e.* fast moving consumer goods registered with geographical indication or if not, determined by related province's provincial directorate, provided that such goods are manufactured in the same province where the Retailer is located.)

This being said, with Provisional Article 1, Retailers are granted with a period of one year as of the enforcement date of the Regulation (*i.e.* August 6, 2016) for preparing their selling spaces to be in compliance with Article 11.

(v) Audit and Sanctions

According to Article 16 of the Regulation, Ministry of Customs and Trade ("Ministry") as well as provincial directorates authorized by the Ministry are allowed to audit Retailers' compliance with the Regulation.

Article 16, by way of referring to Article 18 of the Law, also sets forth a monetary sanction against Retailers which fail to comply with the rules under the Regulation.

Real Estate Law

Overview of the New Communiqué Regulating Coastal Investments

The General Communiqué on National Estate No. 373, governing principles regarding easement right and/or right of usage to be granted to financers in order for them to construct marinas, landing stages, piers and berths on state-owned or treasury lands, has been published on the Official Gazette dated October 8, 2016 and entered into force as of its publication.

The Communiqué, brings an in-depth roundup for coastal investments extending from the principles as to the tender process for granting the easement right, to the liabilities of the financers. To that end, there is no doubt that the Communiqué will draw the attention of investors contemplating investing in coastal structures.

Significant topics addressed under the Communiqué are as follows:

(i) Applications to be made by the Investors

As per Article 4 of the Regulation, financers who are willing to invest in treasury lands should at first apply to the Ministry of Transport, Maritime Affairs and Communication ("MoTMAC") with their preliminary project and prefeasibility report. After obtaining the approval from the MoTMAC, they should submit the zoning

plan proposal to the Provincial Directorate of Environment and Urbanization.

Required content of the prefeasibility report is listed under Article 5 of the Regulation, which includes the ground of the project (*e.g.* the developments in Turkish and global financial landscape, current yacht traffic in the area etc.) and the financing of the project

(ii) Tender process

Tender process for granting the easement right and/or right of usage will be conducted in accordance with the general principles on negotiated tendering under the Public Procurement Law.

That said, the Regulation sets forth an exception for financers who are owners, lessees or right holders of neighbor lands located behind the state-owned and/or treasury land to be subjected to the investment. As per Article 6, the foregoing investors, provided that they possess the net equity amount equivalent to at least 20% of the investment amount, can be directly granted with the easement right or the right of usage without the issue of a procurement notice.

(iii) Preliminary permission

According to Article 7, following the tender process and before acquisition of the easement right/the right of usage, if deemed necessary for completion of the bureaucratic stage, the Ministry of Finance ("Ministry") can grant the financer a preliminary permission for one year. Duration of the preliminary permission can be extended by the Ministry to a maximum of four years (provided that the financer makes the required payment for the extension), if the financer proves that the bureaucratic stage cannot be completed due to advenient reasons.

The Ministry can refrain from extending the preliminary permission period if it decides to utilize the land for other purposes, in which case the remaining period of a current preliminary permission will be cancelled by refunding the deposited payment *pro rata* and the investor would not be able to set forth any claims for the absence of an additional extension. Similarly, in case it is apparent that the bureaucratic stage cannot be completed in due time, without the fault of the investor, the agreement will be terminated upon the notification of the investor and if deposited in advance, the amount for the extension period and the security payment will be returned to the financer.

If the financer renounces from its commitments before the end of the agreement, the agreement for preliminary extension will be terminated by the administration, its security payment will be registered as treasury revenue and the amount deposited for the extension period will not be returned.

(iv) Easement right and the right of usage

Provided that the financer completes the bureaucratic stage in due time, an easement right or the right of usage will be established in favor of the financer. The period of the easement right or the right of usage, in any case, cannot exceed thirty years but can be suspended by the Ministry in accordance with the provisions under Article 8 of the Regulation (in circumstances such as force majeure, legal or physical impossibility hindering the exercise of the right).

Article 8 of the Regulation obliges the financer to start the construction in six months as of the delivery of the property to the investor who now has easement right and/or right of usage and to complete it in two years. The two-year term can be extended to maximum five years.

The Regulation also gives the financer the right to assign its easement right/right of usage on Ministry's own initiative and approval.

Anti-Dumping Law

New Developments in Steel Industry: Turkey's WTO Complaint against Morocco's Anti-Dumping Measures

In October 2016, Turkey has filed a WTO complaint against Morocco over anti-dumping measures on hot-rolled steel.[16] In its request for consultations, Turkey alleges that anti-dumping duties imposed by Morocco in September 2014 on imports of Turkish hot-rolled steel are inconsistent with a number of procedural and substantive provisions of the WTO's Anti-Dumping Agreement, the Agreement on Import Licensing Procedures as well as the General Agreement on Tariffs and Trade 1994.

Back in September 2014, Morocco has imposed an 11% tax duty against Turkish hot-rolled steel exporters.

Turkey, in return, knocked on WTO's door with a consultation request.

Turkey's Allegations against Morocco's Decision

A Request for Consultations[17] ("Request") was circulated by the delegation of Turkey to the delegation of Morocco and to the Chairperson of the Dispute Resolution Body under the WTO wherein the following allegations have been put forward:

- The Moroccan authorities have failed to comply with the rule of 18-month deadline for concluding the investigation according to Article 5.10 of the Anti-Dumping Agreement,

- The Moroccan authorities "(…) *have failed to provide the Turkish exporters with an opportunity to explain the alleged discrepancies, failed to take into account evidence in the record regarding these discrepancies, and applied facts available to determine the dumping margins of the Turkish exporters without using "special circumspection""*.

- The Moroccan authorities did not disclose essential facts with respect to its decision to use facts available.

- By way of using registration/licensing requirements, they have refrained from issuing import licenses following the imposition of provisional anti-dumping measures in a way to cause "specific action against dumping".

- The Moroccan authorities have failed to provide a reasoned and adequate explanation regarding their findings of injury and causation.

Lastly, Turkey had preserved its right to raise further legal claims during the course of the consultations.

Objective of Consultations

The bilateral consultations are the first main stage of the dispute settlement system of the WTO. They are a pre-requisite for panel proceeding, giving the parties the opportunity to discuss the matter to find a satisfactory solution without the establishment of a panel. If the consultations fail to resolve the dispute within 60 days, the complainant may request adjudication by a panel.

Current Status of the Consultations

At this stage, as announced in WTO's webpage,[18] no dispute panel has been established yet and no withdrawal or mutual agreement has been notified.

With no current developments at hand, the dispute with Morocco continues to evolve and develop.

[16] See https://www.wto.org/english/news_e/news16_e/ds513rfc_05oct16_e.htm

[17] See https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%20@Symbol=%20(wt/ds513/1%20))&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true

[18] See https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds513_e.htm

An Example from the Past

Previously, in 2000, Turkey also requested consultations with Egypt concerning an anti-dumping investigation with respect to imports of steel rebar from Turkey. After the consultations have failed to produce a satisfactory solution, Turkey requested adjudication by a panel.

The Panel concluded that Egypt acted inconsistently with its obligations under Articles 3.4 and 6.8 of the Anti-Dumping Agreement. Therefore, the Panel recommended Egypt to bring its definitive anti-dumping measures on imports of steel rebar from Turkey into conformity with the relevant provisions of the Anti-Dumping Agreement. Egypt implemented the recommendations and declared its full compliance.

White Collar Irregularities

2016 FCPA Enforcement Actions and Highlights

Overall, this was a more active year for FCPA enforcement actions when compared to 2015. This year, Department of Justice ("DOJ") took a total of 10 enforcement actions and Securities and Exchange Commission ("SEC") took a total of 25 enforcement actions. Like last year, SEC is more active than DOJ, in terms of numbers of the enforcement actions. Of the 10 enforcement actions taken by DOJ, only 1 of them was related to a real person. Of the 25 SEC enforcement actions 4 of them were related real persons.

In terms of sectoral concentration of FCPA enforcement actions, one can see that mostly the technology sector were targeted followed by the pharmaceutical sector. In terms of where the foreign bribery took place, China seems dominant. In fact, all of the 4 pharmaceutical companies were charged with foreign bribery in China.

This year, we were expecting to see the effects of Yates Memo, which underlined the significance of individual accountability for deterring corporate wrongdoing and provided a guideline on how to enforce such accountability. That said the total number of FCPA enforcement actions against individuals so far is 5, as opposed to 30 enforcement actions against corporations.

This year, one of the more interesting cases is with regard to provision of paid internships, provision of loans to universities and provision of loans for house buying to relatives of Chinese officials (the Qualcomm case). The case echoes the BNY Mellon case of last year, where provision of valuable internships to relatives of public officials was deemed bribery. Also this year for the first time, a hedge fund was found to have violated the FCPA.

DOJ Enforcement Actions

In February 2016, VimpelCom, a Dutch communications company agreed to pay a combined fine of more than $795 million to US and Dutch authorities to settle the charges that it made corrupt payments to Uzbek officials. The DOJ classified this case as "one of the largest global foreign bribery resolutions ever". VimpelCom's Uzbek subsidiary pleaded guilty, while Vimpelcom entered into a deferred prosecution agreement ("DPA") with the DOJ. According to admissions, companies paid at least $114 million in bribes to an Uzbek official, a close relative of a high-ranking Uzbek governmental official who had influence over the telecom industry. The companies attempted to hide illicit payments as payments to shell companies, payments for equity transactions, consulting agreements and reseller transactions. Vimpelcom is to pay $167 million to SEC with regard to the case.

In February 2016, two Chinese subsidiaries of PTC Inc. entered into a non-prosecution agreement ("NPA") with DOJ and agreed to pay $14.54 million in penalties. The companies admitted that they paid for recreational travel expenses of Chinese public

officials and in return obtained $13 million in contract. Although the seeming purpose of these trips was training, the travel plan also included New York, Los Angeles, Las Vegas and Hawaii. Admittedly, the travel expenses were hidden in sales made to the relevant Chinese state-owned entities. In a SEC action relating to the case, PTC agreed to pay $11.858 million in disgorgement and $1.764 in prejudgment interest to settle charges.

In March 2016, Abraham Jose Shiera Bastidas pleaded guilty bribing Venezuelan public officials, in order to obtain lucrative energy contracts from a Venezuelan government owned and controlled energy company. Bastidas also made corrupt payments in order to expedite payments to his companies.

In March 2016, the Latin American subsidiary of a US based health-care company, Olympus Latin America, entered into a DPA with the DOJ and agreed to pay $22.8 million to resolve FCPA charges. According to court documents in order to increase its sales in Central and South America, the subsidiary implemented a plan to provide cash, money transfers, personal grants, personal travel and free or heavily discounted equipment to public officials. Officials would be provided with these in trainings centers whose seeming aim was to educate doctors. The bribes amounted to the approximate amount of $3 million and gains were more than $7.5 million.

In June 2016, Analogic Corporation entered into a $3.4 million NPA with the DOJ in order to settle charges that its Denmark subsidiary BK Medical ApS made illegal payments to Russian public officials. As per the scheme, BK Medical ApS would pay inflated prices to its distributor and upon getting the payments from its distributor, would then transfer the excessive amounts to third parties with whom the subsidiary did not have a legitimate business relationship. The Denmark subsidiary also admitted that it did not engage in third party due diligence with these third parties. In a SEC action relating to the case, Analogic agreed to pay $7.67 million in disgorgement and $3.8 million prejudgment interest.

In July 2016, Latam Airlines, a Chilean airline company entered into a DPA with the DOJ and agreed to pay $12.75 million to settle charges. According to the admissions, the company entered into a false consulting contract $1.15 million in value, in order for the "consultant" to funnel the money to Argentine union officials. This way, the union officials agreed to a lower wage deal. Company is to pay the SEC $6.74 million in disgorgement and $2.7 million in prejudgment interest. According to the SEC investigation when the consultant contacted the company, the consultant made clear that payments would go to third parties and CEO was aware that the consultant would not perform the actions stipulated in the contract.

In September 2016, Och-Ziff, a New York based hedge fund management entered into a DPA with the DOJ, agreeing to pay more than $213 million in order to settle the charges. OZ Africa, a wholly owned subsidiary of Och-Ziff pleaded guilty. According to companies' admissions, Ocz-Ziff employees knowingly continued their business relationship with a third party consultant who they knew gained access to lucrative investment opportunities through bribes to public officials. The company was aware that part of the money paid to the consultant would be used as bribes. In another scheme, the Och-Ziff admitted to knowingly hiring a consultant who would pay bribes to government officials in order to secure investments. Och-Ziff hired the consultant without any due diligence. Och-Ziff agreed to pay $200 million to SEC, in order to settle charges regarding the relevant case. Och-Ziff is the first hedge fund held accountable for FCPA violations.

In September 2016, OZ Africa Management GP is the first hedge fund that held liable for violating Foreign Corrupt Practices Act ("FCPA"). The company entered into a DPA with DOJ and agreed to pay $213,055,689.

The charges arose from a widespread scheme involving bribery of officials in Democratic Republic of Congo and Libya.

In October 2016, Embraer, a Brazilian aircraft manufacturer, entered into a DPA with the DOJ, agreeing to pay $107 million as penalty. The company admitted that it paid government officials in Mozambique, Dominican Republic and in Saudi Arabia, bribes in order to obtain contracts. The bribes were concealed through false agency agreements. The company also agreed to pay $83.8 million in disgorgement and $14.4 million in prejudgment interest to SEC.

SEC Enforcement Actions

In February 2016, SAP SE settled charges with SEC that it had paid Panamanian government officials bribes in order to gain sales contracts. According to the SEC investigation, an SAP employee falsified internal approval forms, falsifying documents as discounts. Panamanian partner created a slush fund with the excessive discounts and paid bribes to officials. SAP SE agreed to pay $3.7 million, in order to settle charges.

In February 2016, SciClone, an American pharmaceutical company, agreed to pay $12 million to settle charges that it bribed Chinese health officials. According to the SEC investigation, SciClone employees provided money, gifts and other things of value to health officials.

In February 2016, SEC entered into its first DPA with an individual in an FCPA related case. SEC held that YU Kai Yuan, a former employee of PTC's Chinese subsidiaries qualified for a NPA due to his significant cooperation during the investigation into PTC Chinese subsidiaries.

In February 2016, Ignacio Cueto Plaza, president and COO of LAN airlines agreed to pay $75,000 to settle charges that he has authorized payments to an Argentinian consultant who he knew would transfer the payments to Argentinian union officials in order for them to agree to lower wages.

In March 2016, Qualcomm, an American telecommunications company, settled charges with SEC that it paid bribes to Chines officials in order to gain business advantage, and agreed to pay a $7.5 million penalty. According to the SEC investigation, Qualcomm provided employment and paid internships to Chinese officials' relatives, in order to influence their business decisions. Such employment and internship applications were referred to as "must place" or "special" hires within the company. In one case, the company provided a grant to a university, in order to render the son of Chinese official a position in a Ph.D. program and renew his student visa. Further, a company executive provided the son of a Chinese official with $75,000 loan for a house payment. Qualcomm also provided other things of value to Chinese officials such as airplane tickets to their children or luxury goods for their spouses.

In March 2016, Nordion, a Canadian healthcare company and its employee Mikhail Gourevitch settled charges that they bribed Russian officials for business advantages. Mr. Gourevitch agreed to pay $100,000 in disgorgement, $12,000 in prejudgment interest and a $66,000 penalty. Nordion agreed to pay a $375,000 penalty as well. According to the SEC investigation, Mr. Gourevitch paid improper funds obtained from Nordion to a third party agent and falsified documentation regarding the payments.

In April 2016, Las Vegas Sands, an American casino and resort operating company, agreed to pay a $9 million fine to settle SEC charges that it bribed Chinese officials. According to the SEC investigation, company made improper payments to a consultant in order to gain business advantages in China. The company concealed the payments through falsifying books and records, and in one case

declaring payment for an artwork which was never purchased. The company employees referred to the consultant as “the beard”.

In June 2016, Nortek Inc., an American building products manufacturer, entered into an NPA with SEC in order to settle charges that it bribed Chinese officials. The company agreed to pay $291,403 in disgorgement and $30,655 in interest. According to the NPA, the company made cash payments, provided gift cards and entertainment expenses to the Chinese officials in order to obtain favored treatment and reduced customs taxes.

In August 2016, Key Energy, an American energy company agreed to pay a $5 million disgorgement in order to settle charges that its Mexican subsidiary bribed Mexican officials. According to the SEC investigation, the Mexican subsidiary made payments to a consulting company who funneled payments to the Mexican public official. The Mexican official in return provided insider information on how to successfully negotiate contracts with Mexica’s state-owned oil company Pemex. The Mexican subsidiary did not conduct due diligence or entered into a written contract with the consulting firm.

In August 2016, Astrazeneca, a UK pharmaceutical company, agreed to pay more than $5 million to settle charges that the company’s subsidiaries made illicit payments in China and Russia. According to the SEC investigations the subsidiaries provided officials with cash, gifts and other types of payments in order for the company products to be prescribed and obtain fine reductions for proposed financial sanctions.

In September 2016, a former employee of the Harris Corporation, an American communications and information technology company, agreed to settle charges that he bribed Chinese government officials. Jun Ping Zhang agreed to pay a $46,000 civil penalty. The SEC investigation found that Ping falsified expense receipts in order to obtain cash for the gifts provided to Chinese officials. Harris Corporation was not charged by the SEC, as Harris Corporation discovered the misconduct, its prompt self-reporting, remediation efforts and cooperation with the SEC.

In September 2016, GlaxoSmithKline (“GSK”), a UK pharmaceutical company, agreed to pay $20 million for the transfer of money, gifts, and other things of value to health care professionals in China in order to increase its sales.

In September 2016, NuSkin Enterprises, an American multilevel marketing company agreed to pay $765,688 to settle charges that it bribed Chinese officials. According to the SEC investigation company’s Chinese subsidiary made a donation to a charity identified by a party official from Chinese Communist party to impact an on-going provincial agency investigation against the company. In July, Johnsons Controls, an American provider of HVAC systems, agreed to pay $14 million to SEC in order to settle charges that it bribed Chinese officials. According to SEC investigation, the company’s Chinese subsidiary, which was the subject of a previous FCPA enforcement action, made payments of almost $4.9 million to employees of Chinese government owned shipyards, and others, to obtain and retain business and personally enrich themselves. The subsidiary used vendors for these actions because vendor transactions (instead of agents) were tagged as “low-risk” by the company. Even where the managers of the company oversaw these transactions, they were not able to uncover the illicit deals as the transactions were highly customized.[19]

[19] Information regarding the cases mentioned in the article has been obtained from the official SEC (https://www.sec.gov/spotlight/fcpa/fcpa-cases.shtml) and DOJ (https://www.justice.gov/criminal-fraud/case/related-enforcement-actions/2016) websites.

ELİG
GÜRKAYNAK
Attorneys at Law

ELIG, Attorneys-at-Law is an eminent, independent Turkish law firm based in Istanbul. The firm was founded in 2005.

ELIG 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 70 lawyers. We take pride in being able to assist our clients in all fields of law. Our areas of expertise particularly include competition law, corporate law, M&A, contracts law, white collar irregularities and compliance, data protection and cybersecurity law, litigation and dispute resolution, Internet law, technology, media and telecommunications law, intellectual property law, administrative law, real estate law, anti-dumping law, pharma and healthcare regulatory, employment law, and banking and finance law.

As an independent Turkish law firm, ELIG collaborates with many international law firms on various projects.

For further information, please visit www.elig.com

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